COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

VOLUME I

(Pages 1–451)

1986

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE

ADJUDICATIONS

1986

Chairman.....MAXINE WOELFLING

Member .....EDWARD GERJUOY

Member.....ANTHONY J. MAZULLO Jr.,
until 1/31/86

WILLIAM A. ROTH,
from 6/24/86-present

Secretary.....M. DIANE SMITH

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1986 EHB 1

FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1986.

The Environmental Hearing Board was created by the Act of December 3, 1970, P.L. 834, which amended the Administrative Code of 1929, Act of April 7, 1929, P.L. 177, as amended. The Act of December 3, 1970, commonly known as "Act 275", was the Act that created the Department of Environmental Resources. Section 21 of that Act, §1921-A of the Administrative Code, provides as follows:

> "§1921-A Environmental Hearing Board
>
> (a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law," or any order, permit, license or decision of the Department of Environmental Resources.
>
> (b) The Environmental Hearing Board shall continue to exercise any power to hold hearings and issue adjudications heretofore vested in the several persons, departments, boards and commissions set forth in section 1901-A of this act.
>
> (c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified.
>
> (d) An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have the power to grant a supersedeas.

(e) Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality Board and such rules and regulations shall include time limits for taking of appeals, procedures for the taking of appeals, location at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental Quality Board.

(f) The board may employ, with the concurrence of the Secretary of Environmental Resources, hearing examiners and such other personnel as are necessary in the exercise of its functions.

(g) The Board shall have the power to subpoena witnesses, records and papers and upon certification to it of failure to obey any such subpoena, the Commonwealth Court is empowered after hearing to enter, when proper, an adjudication of contempt and such order as the circumstances require."

In addition, the Board hears civil penalties cases pursuant to the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4009.1; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(a); the Dam Safety and Encroachment Acts, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.21; and the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, 58 P.S. §601.506. Also, the Board reviews the Department's assessment of civil penalties under the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §1406.17(f); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(b); the Coal Refuse Disposal Act, Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.61; the Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, 35 P.S. §721.13(g); the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, §6018.605; and the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.22.

Although the Board is made, by §62 of the Administrative Code, 71 P.S.§ 62 an administrative board within the Department of Environmental Resources, it is functionally and legally separate and independent. Its Chairman and two members are appointed directly by the Governor, with the consent of the Senate[1] and their salaries are set by statute.[2] Its Secretary is appointed by the Board with the approval of the Governor.

The department is always a party before the Board. Other parties include recipients of DER orders, penalties assessments, permit denials and modifications and other DER actions. Third party appeals from permit issuances are also common in which cases the permittees are also parties. In third party appeals from permit issuances, the department often does not actively participate in the appeal, but lets the permittee defend the permit issuance.

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1 Section 472 of the Administrative Code, 71 P.S. §180-2.

2 Section 709 of the Administrative Code, 71 P.S. §249(m).

1986

TABLE OF CASES

ADJUDICATIONS

OPINIONS AND ORDERS

OPINIONS AND ORDERS (CONT'D)

OPINIONS AND ORDERS (CONT'D)

OPINIONS AND ORDERS (CONT'D)

OPINIONS AND ORDERS (CONT'D)

OPINIONS AND ORDERS (CONT'D)

INDEX

1986 ADJUDICATIONS

1986 OPINIONS AND ORDERS

EHB—12. Rev. 10/83

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

Maxine Woelfling, Chairman
ANTHONY J. MAZULLO, JR., MEMBER
EDWARD GERJUOY, MEMBER

M DIANE SMITH
SECRETARY TO THE BOARD

AMERIKOHL MINING, INC.	:	
	:	
v.	:	EHB Docket No. 85-290-W
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	(Issued: January 7, 1986)

OPINION AND ORDER
SUR MOTION TO DISMISS

Synopsis

The appeal from a proposed consent assessment of a civil penalty is dismissed for lack of jurisdiction. A proposed consent assessment does not constitute an appealable action because it, in and of itself, does not affect Amerikohl's rights, obligations, or duties.

OPINION

Appellant Amerikohl Mining, Inc. ("Amerikohl") is seeking review of an undated Department of Environmental Resources' document entitled "Consent Assessment of Civil Penalty," which purportedly assessed a civil penalty in the amount of $5000 against Amerikohl. The consent assessment was not executed by the Department or Amerikohl. The Department filed a motion to dismiss the appeal on grounds that the Board lacks jurisdiction to hear the appeal because it was not timely filed and because the consent assessment was not an appealable action. Despite being given an opportunity to respond, Amerikohl did not file a reply to the Department's motion.

The Department contends this appeal is analogous to Cooney Brothers Coal Company v. DER, 1984 EHB 930, a case in which the Board dismissed an appeal of a civil penalties worksheet. The Board held that the worksheet was similar to a notice of violation in that it merely notified the appellant that the Department was contemplating a formal assessment. While the preparation of a consent assessment is perhaps further removed in the civil penalties assessment process than the preparation of an assessment worksheet, it is nonetheless no more of a Department action. The worksheet in Cooney was indicative that the Department was contemplating the initiation of an assessment pursuant to 25 Pa. Code §§86.201-203. The proposed consent assessment is an indication that the Department would be willing to settle the matter in lieu of initiating a formal assessment under the regulations. The worksheet was not appealable because it did not impose the penalty. The proposed consent assessment also does not impose any penalty, and, like the worksheet in Cooney is not an appealable action.

The Board would note another reason for not taking jurisdiction over this appeal. The proposed consent assessment is an offer of settlement. If the Board were to take jurisdiction over appeals of such offers, it would frustrate the very reason for settlement, the avoidance of litigation.

The Department has also moved to dismiss this appeal as being untimely on the grounds that Amerikohl was also seeking review of the February 11, 1985, compliance order that gave rise to the proposed consent assessment and did not file its appeal until after the thirty (30) period had elapsed. The Board does not have the benefit of Amerikohl's reply, but, based on a fair reading of the Notice of Appeal and Amerikohl's prehearing memorandum and the fact that Amerikohl submitted an appeal bond pursuant to 25 Pa. Code

§86.202(a), the Board believes that Amerikohl is appealing the proposed consent assessment. Consequently, it is not necessary for the Board to dispose of this issue.

ORDER

AND NOW, this 7th day of January, 1986, the appeal of Amerikohl Mining, Inc. is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., MEMBER

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: January 7, 1986

cc: Bureau of Litigation
Harrisburg, PA

For the Commonwealth, DER:
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Western Region

For Appellant:
James P. Coulter, Esq.
DILLON, McCANDLESS & KING
Butler, PA

bl

JAMES FLANNERY	:	
	:	
v	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	EHB Docket No. 85-286-G
	:	
and	:	Issued January 13, 1986
	:	
DURANT EXCAVATING COMPANY,	:	
Permittee	:	

OPINION AND ORDER

Synopsis

Appellant is ordered to fully and completely answer interrogatories served upon appellant by the permittee in this appeal. Appellant's failure to identify its witnesses, expert and otherwise, is not grounds for the imposition of sanctions at this point in time, since the hearing on the merits of this matter will not be conducted for approximately fourteen months. However, deadlines are imposed upon appellant for supplementing his response to the permittee's interrogatories concerning the identity of appellant's witnesses. Appellant's responses to the permittee's interrogatories which inquired as to the factual basis for statements in appellant's Notice of Appeal are entirely unsatisfactory. Appellant is ordered to provide responses which comply with the Pennsylvania Rules of Civil Procedure within thirty days. Finally, appellant is deemed to have waived its opportunity under Pa. R.C.P. 4019(g)(1) for a hearing. Prior to the imposition of a compliance order, appellant failed to respond to the permittee's motion for sanctions despite the fact that a greater period of time than that normally allowed for such a response has passed.

OPINION

In this appeal of a surface mining permit issued to Durant by DER, Permittee Durant has moved for sanctions against Appellant Flannery for failure to properly answer interrogatories. As of this date, Flannery has not responded to this motion; the due date was December 18, 1985. Therefore, we shall rule on Durant's motion without waiting any longer to hear Flannery's views.

Durant's Interrogatories 1 through 5 inclusive request the identity of any expert witnesses Flannery intends to call, and information about each such witness. Flannery answered Interrogatories 1 through 5 as follows:

> "Appellant has not yet decided who he will call as an expert witness at the hearing in this matter. Upon reaching that decision Appellant will seasonably supplement his answer."

Durant objects to this answer, and asks the Board to rule that Flannery must answer within thirty days or be forever barred from offering expert testimony; in this regard, Durant argues that it would be greatly prejudicial to Durant if Flannery were to come forth with its experts "at the last minute." We agree that Flannery should not be allowed to come forth with its experts at the last minute. At present, however, the hearing on the merits of this matter is scheduled to begin on March 2, 1987. Under these circumstances, Flannery's failure to name its expert witnesses as of this date cannot reasonably be said to have prejudiced Durant. Similarly, with a hearing date so far in the future, Flannery's answer that it has not yet decided on its expert witnesses is reasonable. Consequently, Flannery is ordered to answer Interrogatories 1 through 5, but the due date for the answers is set at November 3, 1986. This due date allows Durant four months for analyzing Flannery's expert witnesses' reports and for deposing those experts (if Durant so desires), which should be sufficient time for Durant to prepare its case. Durant will be given permission to conduct such discovery.

We are aware that the Board's normal procedures allow only 75 days for discovery after filing of the Notice of Appeal, whereupon pre-hearing memoranda become due (see our Pre-Hearing Order No. 2), but, of course, these procedures were established in a happier period when hearings could be held shortly after the pre-hearing memoranda had been filed, vacancies in the Board's membership were promptly filled and the number of appeals filed per year were half the number presently being filed.

Durant's Interrogatories 6, 7, and 17 ask for information about the non-expert witnesses Flannery intends to call at the hearing. Flannery's answer to each of Interrogatories 6 and 7, was:

> "Appellant has not yet decided whom he intends to call as a witness other than as an expert witness. Upon reaching that decision, Appellant will seasonably supplement his answer."

Flannery's answer to Interrogatory 17 was almost the same. Durant objects to these answers and requests that we order Flannery to answer within thirty days under threat of being barred from calling any witnesses. For reasons explained supra, we will not grant Durant's request as such, but do order Flannery to answer Interrogatories 6, 7, and 17 within six months of the hearing date. Here we have set a six months deadline--rather than four months--advisedly. Where Flannery has filed a pre-hearing memorandum listing 35 largely purely conclusory numbered paragraphs of facts "which appellant intends to prove" and contends that the appealed-from surface mining permit was issued to Durant in violation of no less than 36 statutory and regulatory sections, Flannery should know--and Durant is entitled also to know--the identities of Flannery's non-expert witnesses six months before the hearing date, but no more than a year after the appeal was filed. We add that Interrogatory 7, which requests Flannery to state the facts to which each non-expert witness will testify, need be answered only sufficiently for Durant to decide whether it wishes to depose any of those witnesses;

interrogatories concerning the facts about which non-expert witnesses will testify need not be answered in the detail required by Pa. Rules of Civil Procedure Rule 4003.5 for expert witnesses.

Interrogatory No. 8 requests Flannery to list in detail and with specificity all facts upon which Flannery relied in alleging--in its Notice of Appeal--that DER's action in issuing the permit was arbitrary, capricious and an abuse of discretion. Flannery's answer was:

> "The facts are contained in answers to these interrogatories as well as facts which will be stated in the Pre-Hearing Memorandum as required by the rules and regulations of the Environmental Quality Board."

We agree with Durant that this answer was and is unsatisfactory. Under Pa. R.C.P. Rule 4006, Flannery's answers were due 30 days after the Interrogatories were filed. Flannery's answers originally were due September 25, 1985; after an extension of time, the Interrogatory answers were filed October 10, 1985. It was quite improper, therefore, for Flannery's interrogatory answers to make reference to its as yet unfiled pre-hearing memorandum, which actually was not filed until November 8, 1985. Moreover, as already mentioned supra, Flannery's pre-hearing memorandum contains a plethora of conclusory "factual" allegations; for instance, the pre-hearing memorandum's paragraph 9 of the facts which Flannery intends to prove reads in full and without elaboration elsewhere:

> The amount of the bond, as submitted, is inadequate for reclaiming the acreage proposed to be affected or for correcting any post-mining hydrologic problems which may occur.

This unadorned "fact" is absolutely useless to Durant's preparation for trial, and clearly is an inadequate response to Interrogatory No. 8. Interrogatory No. 8 makes a request which is well within the scope of discovery. Pa. R.C.P. Rule 4003.1. Flannery is ordered to answer Interrogatory No. 8 fully, within thirty days.

Interrogatory No. 12 inquires about the source of Flannery's claimed title to the land on which are situated the pond and water supply which Flannery fears Durant's mining activities will affect. Flannery's answer was, simply, "Objected to," signed by Flannery's counsel as required by Pa. R.C.P. Rule 4006(a)(2). However, Rule 4006(a)(2) also requires that "the reasons for the objection shall be stated in lieu of an answer." Flannery's objection obviously is grossly deficient in this regard, as Flannery's counsel must have known. Interrogatory No. 12 is perfectly proper under this Commonwealth's discovery rules; Flannery's objection is equally perfectly improper. Flannery must answer Interrogatory No. 12.

Interrogatory No. 18 requested Flannery "to identify all persons who participated in the preparation" of the Interrogatory answers. Flannery neither replied nor objected to this Interrogatory, in flagrant violation of Pa. R.C.P. Rule 4006(2). This Interrogatory is proper and must be answered.

An Order, consistent with the foregoing discussion, follows. Before closing we state that Flannery's failure to comply this this Order may subject Flannery to sanctions under the authority of Pa. R.C.P. Rule 4019. In this connection, we note that because Flannery has not responded in any fashion to Durant's motion, despite having been given ample time to do so,[1] the Board deems waived the "opportunity for hearing" required under Rule 4019(g)(1) before issuance of a compliance order whose disobedience may be cause for assessing costs, including attorney's fees.

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1 Under our Pre-Hearing Order No. 2, Flannery had 20 days to respond to the motion; the Board then waited another 16 days before preparing this Opinion. Standard Rules of Procedure for administrative agency hearings only allow ten 1 days for response for a motion. Pa.Code §35.179.

ORDER

WHEREFORE, this 13th day of January, 1986, it is ordered that:

1. Flannery must answer Durant's Interrogatories 1 through 5 inclusive no later than November 3, 1986.

2. Flannery must answer Durant's Interrogatories 6, 7 and 17 no later than September 5, 1986.

3. Flannery must answer Interrogatories 8, 12 and 18 within 30 days from the date of this Order; the answer to Interrogatory No. 18 must be current as of the date it is filed, and must be supplemented appropriately when the answers required by paragraphs 1 and 2 supra are filed. Pa. R.C.P. Rule 4007.4(3).

4. The "opportunity for hearing" afforded by Rule 4019(g)(1) before issuance of a compliance order is deemed waived by Flannery.

5. Flannery's failure to timely file the answers required in paragraphs 1-4 supra, or to file answers which are consistent with discovery requirements as discussed in the foregoing Opinion, may subject Flannery to sanctions under Rule 4019.

6. Durant, but only Durant, may conduct discovery, without further leave of the Board, during the period from February 13, 1986 to April 18, 1986, and during the period from September 8, 1986 to December 31, 1986; any other discovery, by any party, requires the Board's permission. 25 Pa.Code §21.111(a).

7. Durant's request for a view of the premises is denied at this time, but may be renewed by Durant or any other party after January 1, 1987.

8. The Board reserves the right to modify any of the due dates and discovery periods listed supra, as might seem appropriate should it be possible to advance the date for hearing the merits of this appeal from its presently scheduled March 2, 1987 date.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: January 13, 1986

cc: Bureau of Litigation
Harrisburg, PA

For the Commonwealth, DER:
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Western Region

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For the Permittee:
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SHIRLEY ANDERSON	:	
	:	
V.	:	DOCKET NO. 85-245-M
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and EASTERN INDUSTRIES, INC., Permittee	:	Issued: January 14, 1986

OPINION AND ORDER
SUR MOTION FOR SANCTIONS

Synopsis

Appellant's failure to respond to Board orders regarding the submission of a pre-hearing memorandum and its failure to respond to Permittee's Motion for Sanctions result in the dismissal of her appeal pursuant to Rule 21.124.

OPINION

Shirley Anderson (Appellant) filed a notice of appeal with the Board on June June 17, 1985, contesting the issuance of a permit by the Department of Environmental Resources (DER) to Eastern Industries, Inc. (Permittee) to conduct mining at a site in Eldred Township, Monroe County, Pennsylvania.

On July 30, 1985, the Board issued its Pre-Hearing Order No. 1, wherein, inter alia, Appellant was required to file a pre-hearing memorandum on or before October 15, 1985. The said Order was mailed to counsel for Appellant who had filed the notice of appeal on behalf of Appellant. As part of the order Appellant was advised that failure to comply with the said order could lead to the imposition of sanctions by the Board.

As of October 24, 1985, Appellant had not filed, as required, a pre-hearing memorandum. On October 24, 1985, the Board advised counsel for Appellant that unless a pre-hearing memorandum was filed with the Board by November 4, 1985, the Board "may apply sanctions" including "dismissal of an appeal." Said notice was forwarded to counsel for Appellant by certified mail, return receipt requested. The return receipt therefor was returned to the Board indicating delivery of said notice on October 29, 1985. Neither Appellant nor anyone acting on her behalf has responded to said notice.

On November 5, 1985, Permittee filed a Motion for Sanctions with the Board. On November 14, 1985, the Board notified Appellant, through her counsel, that it had received Permittee's Motion for Sanctions, and that any objections thereto were to be filed with the Board on or before December 4, 1985. Neither Appellant nor anyone acting on her behalf has filed any such objections with the Board as of the time of the writing of this opinion.

Under the provisions of 25 Pa. Code §21.124 the Board may impose the sanction of dismissal of an appeal "for failure to abide by a Board order." Appellant herein has failed and refused to abide by a Board order, and no excuse or explanation has been given by Appellant. In view of this and by reason of Appellant's failure to timely respond to Permittee's Motion for Sanctions, we find the Appellant in default in its appeal and impose the sanction of dismissal herein.

ORDER

AND NOW, this 14th day of January, 1986, the appeal of Shirley Anderson, at EHB Docket No. 85-245-M is DISMISSED, with prejudice.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Anthony J. Mazullo Jr.

ANTHONY J. MAZULLO, JR., MEMBER

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

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DATED: January 14, 1986
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ANTHONY J. MAZULLO, JR., MEMBER
EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

KOCHER COAL COMPANY :
:
V. : Docket No. 84-236-M
:
COMMONWEALTH OF PENNSYLVANIA, : Issued: January 15, 1986
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

The Department of Environmental Resources (DER) moved this Board to dismiss objections made by appellant to DER's Requests for Admissions, and DER also moved this Board to compel responsive answers to its Requests for Admissions, to require clarification of responses to its Requests for Admissions, and to impose sanctions against appellant. The Board dismisses appellant's General Objections to DER's Requests for Admissions because they are unnecessary under the Pennsylvania Rules of Civil Procedure to protect appellant's rights, and could possibly be used by appellant to prevent its being bound by its own admissions. The Board, however, denies DER's Motion to Compel Responsive Answers to Requests for Admissions, to Require Clarification of Responses to Requests for Admissions and to Impose Sanctions because appellant's responses to DER's Requests for Admissions are entirely adequate under the Pennsylvania Rules of Civil Procedure.

On or about August 15, 1985 the Department of Environmental Resources (DER) served on appellant, Kocher Coal Co., the Commonwealth's Request for Admissions--First Set. Kocher served on DER its Response to the Commonwealth's Request for Admissions--First Set on or about October 7, 1985. Then, on October 29, 1985 this Board received from DER a Motion to Dismiss Objections of Kocher Coal Company, to Compel Responsive Answers to Requests for Admissions, to Require Clarification of Responses to Requests for Admission and to Impose Sanctions. Kocher filed with this Board a memorandum in response to this motion on November 26, 1985. DER's first objection to Kocher's response to DER's Request for Admissions is to the following preface and general objections in Kocher's response:

> Appellant Kocher Coal Company ("Kocher") hereby files the following responses to the Commonwealth's Request for Admissions -- First Set. All such responses are made without any waiving or intending to waive, but on the contrary, intending to preserve and preserving:
>
> (1) All questions as to competency, relevancy, materiality, privilege and admissibility as evidence for any purpose in any subsequent proceeding or trial of this or any other action;
>
> (2) The right to object to the use of any of these responses in any subsequent proceeding, or the hearing of this or any other action on any ground;
>
> (3) The right to object on the ground at any time to a demand for further response to these or any other admissions, or other discovery procedures involving or relating to the subject matter of these requests for admissions; and
>
> (4) The right to further supplement and/or amend these responses based upon the discovery of additional information.
>
> **GENERAL OBJECTIONS**
>
> A. Kocher objects to each of the Commonwealth's Request for Admissions to the extent that it seek (a) attorney's work product; (b) privileged information, including but not limited to attorney-client privilege; (c) trade secrets; or (d) documents and tangible things prepared in anticipation of litigation or for trial by Appellant or its attorneys, agents, or representatives.

> B. Kocher objects to each of the Commonwealth's Request for Admissions to the extent that the information sought is not relevant to the subject matter involved in this litigation, nor reasonably calculated to lead to the discovery of admissible evidence.

DER argues that the preface and general objections render Kocher's responses to DER's requested admissions meaningless and unreliable for any purpose. Kocher responds that its general objections are appropriate to preserve objections to admissibility at trial.

The Board holds that Kocher's preface and general objections are unnecessary to protect Kocher's rights. Under Pennsylvania's Rules of Civil Procedure, the scope of discovery is broader than the scope of what is admissible at trial. Pa R.C.P. 4003.1 sets forth the scope of discovery:

> **Rule 4003.1.** Scope of Discovery Generally
>
> Subject to the provisions of Rules 4003.2 to 4003.5 inclusive and Rule 4011, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Under Rule 4003.1, inadmissibility at trial is not a ground for objecting to a discovery request. Further, responses to discovery that contain information that would not be admissible at trial do not constitute a waiver of admissibility objections at the time of trial. See Hysick v. J.T.E. Enterprises, Inc., 34 Leh. L. J. 515 (1972) (Holding that an admission does not bar the opponent from moving to exclude it at trial on the grounds of

inadmissibility). Therefore, the Board holds that Kocher must respond to DER's Requests for Admissions, without objection, to the extent that the admissions requested are discoverable. Nevertheless, Kocher is free to move for the exclusion of any of its admissions at the hearing on the grounds of inadmissibility.

Rule 4003.1 also provides that a party may obtain discovery regarding any matter, provided that it is not privileged. Therefore, the discovery of privileged matters is expressly barred under Pennsylvania's Rules of Civil Procedure, and a general objection to Requests for Admissions to the extent that they seek privileged information is unnecessary to protect Kocher's rights. Rather than making this general objection, Kocher should object specifically to any particular request that seeks to discover attorney's work product, information protected by an attorney-client privilege, or any other privileged information. Therefore, the Board will strike Kocher's preface, and dismiss Kocher's General Objections in its response to DER's Requests for Admissions since they are unnecessary to protect Kocher's rights and could possibly be used by Kocher to prevent its being bound by its own admissions.

DER has also moved this Board to compel Kocher to provide clear and responsive answers to DER's Requests for Admissions and to impose sanctions against Kocher. The Board fails to see any basis for this component of DER's Motion. The Board has reviewed all of DER's Requests for Admissions--First Set, and all of Kocher's responses to these requests, and finds Kocher's responses entirely adequate under the Rules of Civil Procedure. Therefore, the Board denies DER's Motion to Compel Responsive Answers to Requests for Admissions, to Require Clarification of Responses to Requests for Admission and to Impose Sanctions.

ORDER

AND NOW, this 15th day of January, 1986, DER's Motion to Dismiss Objections of Kocher Coal to DER's Requests for Admissions--First Set filed in the consolidated cases at EHB Docket No. 84-236-M is granted. Kocher Coal's preface is stricken from the Response to DER's Request for Admissions and Kocher Coal's General Objections are dismissed. DER's Motion to Compel Responsive Answers to Requests for Admissions, to Require Clarification of Responses to Requests for Admissions and to Impose Sanctions is denied.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., MEMBER

cc: Bureau of Litigation

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Philadelphia, PA

DATED: January 15, 1986
nb

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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PENGROVE COAL COMPANY : Docket No. 85-195-G

: Issued January 17, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO DISMISS

SYNOPSIS

This appeal is dismissed as having been taken from an unappealable DER action. The action at issue, a letter sent to a coal operator, merely embodied DER's legal opinion that a release executed by a former landowner, authorizing mining within 300 feet of his house, was insufficient to allow the coal operator to mine within 300 feet of the house after the property had been sold to another individual. 52 P.S. §1396.4b(c). A statement of legal opinion does not bind the operator. No enforcement action has been taken. Therefore, the operator's rights, duties, obligations and privileges have not been affected and the action is unappealable. 25 Pa.Code §21.2(a) and §21.52(a). Moreover, since the rights of the landowner and the coal operator can only be finally determined by a court of competent jurisdiction, any decision which the Board could render would be purely advisory. Therefore, the appeal must be dismissed.

* * *

This is an appeal taken from a letter written by the Chief of Technical Services within DER's Bureau of Mining and Reclamation. DER has moved to have the appeal dismissed on the basis that the letter constitutes an unappealable action. The appellant has not responded to DER's motion. The letter concerns the effect of a release executed by a landowner in favor of appellant, Pengrove Coal Company ("Pengrove"). The disposition of this matter is governed in part by the following provisions of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. (SMCRA):

> (c) From the effective date of this act . . . no operator shall conduct surface mining operations . . . within three hundred feet of any occupied dwelling, unless released by the owner thereof. 52 P.S. §1396.4b(c).

This prohibition is reiterated in §1396.4e(h)(5) of SMCRA:

> (h) Subject to valid existing rights as they are defined under §522 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 et seq., no surface mining operations . . . shall be permitted:
>
> * * *
>
> (5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof . . .

The letter at issue in this appeal was written in response to Pengrove's request that DER provide a written statement of its interpretation of §1396.4b(c). The circumstances which brought about Pengrove's request are as follows; the facts apparently are undisputed. Pengrove has been issued a mine drainage permit by DER. In order to obtain this permit, Pengrove was required to obtain consent to its entry onto property from landowners whose property might by affected by the mining. Pursuant to 52 P.S. §1396.4(a)(2)(F), the written consent to entry --

termed a "Supplemental C" form by DER -- was obtained from the current owner of the property at issue here, Mr. McGill, and duly recorded. Pengrove also obtained consent from Mr. McGill to mine within 300 feet of the McGill residence. This second release is not a recordable document. Subsequently, the McGills sold their house to Mr. John Byler. Pengrove has not obtained a release from Mr. Byler authorizing mining within 300 feet of his house.

Pengrove requested that DER make a decision whether the release executed by Mr. McGill was sufficient to allow Pengrove to mine within 300 feet of the house now owned by Mr. Byler. It was in response to this request that the letter at issue here was written.

The letter concludes that the release executed by Mr. McGill does not suffice to meet the requirements of the SMCRA, set forth supra. However, the letter notes that DER's expertise does not extend to analyses of chains of title and therefore, DER would be bound to follow a decision of a court of competent jurisdiction concerning the effect of the property transfer upon the release. The concluding portion of the letter states that, as a consequence of its opinion that the release executed by the McGills is insufficient, "the Department is authorized to allow mining within 300 feet of the dwelling owned by Mr. Byler only upon receipt of a notarized letter from . . . Mr. Byler."

We concur with DER's position that the letter at issue is not an appealable action. As we have repeatedly held, a mere statement of opinion on an issue is unappealable. Doan Mining Company v. DER, EHB Docket No. 84-419-G (Opinion and Order dated April 19, 1985); Snyder Township Residents for Adequate Water Supplies v. DER, 1984 EHB 842 (Opinion and Order dated October 30, 1984); Gary Huey v. DER, 1984 EHB 667 (Opinion and Order dated May 15, 1984). Statements of opinion by DER which are essentially nothing more than its interpretation of the statutes and regulations under which it operates do not bind anyone.

DER has taken no action to prevent mining within 300 feet of the Byler house.

Indeed, it has not even threatened to take such action. Thus, none of Pengrove's rights, duties, obligations or privileges have been affected in any way. In order for an action of DER to be appealable to this Board it must affect "personal or property rights, privileges, immunities, duties, liabilities or obligations" of the litigant. 25 Pa.Code §21.2(a) and §21.52(a). Sunbeam Coal Company v. Commonwealth, DER, 8 Pa.Cmwlth 622, 304 A.2d 169 (1973); Standard Lime and Refractories v. Commonwealth, DER, 2 Pa.Cmwlth 434, 279 A.2d 383 (1971). The most that can be said is that Pengrove has now been made aware of the possibility of enforcement action against it if it were to mine within three hundred feet of the Byler house. If and when such enforcement action is taken, Pengrove will have an opportunity to appeal.

It is equally important to recognize that DER's interpretation of the effect of the McGill release is dependent upon a decision by a court of competent jurisdiction on the effect of the property transfer upon the release. For example, if a court were to hold that the release executed by Mr. McGill passed with the property and now binds Mr. Byler, DER would be hard pressed to require Pengrove to obtain a separate release from Mr. Byler before mining could take place within three hundred feet of Mr. Byler's house, regardless of the decision contained in the letter DER sent to Pengrove. Thus, if we were to permit this appeal to go forward, any decision we would render necessarily would be advisory. The ultimate effect of the McGill release will have to be determined by a court with jurisdiction to conclusively determine the respective rights of Pengrove and Mr. Byler.

O R D E R

WHEREFORE, this 17th day of January, 1986, it is ordered that this appeal is dismissed as having been taken from an unappealable DER action.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, Chairman

Anthony J. Mazullo, Jr.
ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy
EDWARD GERJUOY, Member

cc: Bureau of Litigation
For the Commonwealth: Joseph K. Reinhart, Esq.
Pittsburgh, PA
For the Appellant: Raymond S. Woodard, Esq.
Franklin, PA

DATED: January 17, 1986

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

ROBERT KWALWASSER :

:

: Docket No. 84-108-G

: Issued: January 24, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and KERRY COAL COMPANY, Permittee

ADJUDICATION

By Edward Gerjuoy, Member

SYLLABUS

This appeal of a surface mining permit is brought by a landowner who resides within an area covered by the permit upon which the mine operator expects to conduct mining operations at some future date; the permit does not authorize operations on Appellant's land at present, however. The permit was issued under the authority of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. and the Clean Streams Law, 35 P.S. §691.1 et seq. The appeal is sustained in part and dismissed in part.

The Board holds that DER abused its discretion in failing to insert a condition in the permit requiring the permittee to monitor its own compliance with the dust control measures which the permit requires, assuming such monitoring is technologically possible. In addition, the Board concludes that DER abused its discretion by failing to consider the noise levels which might be generated by the mining operation, since there is a possibility that such levels could constitute a public nuisance.

DER did not err in failing to consider Appellant's special health problems, the possible effects upon the value of Appellant's land, or the possible effect of truck traffic from the mine upon Appellant's use and enjoyment of his property when it issued the permit. DER likewise did not err in failing to require an overburden analysis, or in failing to put in writing its decision not to require such an analysis. Finally, DER did not err in failing to require landowner consent to entry with regard to portions of the permit area upon which mining operations have not yet been finally authorized.

FINDINGS OF FACT

1. The Appellant is Robert Kwalwasser ("Kwalwasser"), an individual residing at 168 Camp Fatima Road, Renfrew, PA 16053.

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), the agency of the Commonwealth authorized to administer the provisions of the Surface Mining Conservation and Reclamation Act, as amended, 52 P.S. §1396.1 et seq. ("SMCRA"), and of the Clean Streams Law, as amended, 35 P.S. §691.1 et seq. ("CSL").

3. On February 13, 1984, DER issued Surface Mining Permit No. 10803005 (the "permit") to Kerry Coal Company ("Kerry"), Route 2, Box 19, Portersville, PA 16051.

4. The permit has been timely appealed by Kwalwasser.

5. Kwalwasser resides on a parcel of land he owns of approximately 65 acres in Connoquenessing Township, Butler County (the "Township").

6. The permit covers 1087.2 acres in the Township, Butler County, of which 895.5 acres ultimately are planned to be affected by Kerry's surface mining operations.

7. However, Part C of the permit only grants Kerry the authorization to mine on 44.3 acres of the 1087.2 acres covered by the permit; this is the so-called Phase One area.

8. The permit explicitly states that mining is prohibited outside the aforesaid 44.3 acres Phase One area without further authorization by DER; all told, Kerry's mining plan under the permit envisions no less than 14 mining phases.

9. Kwalwasser's property (see Finding of Fact 5) lies within the 1087.2 acres covered by the permit.

10. The initially authorized 44.3 acres whereon mining can be conducted (Finding of Fact 7) do not include any portion of Kwalwasser's land.

11. At the time of the hearing on the merits of this appeal, in March 1985, the location of Kerry's active mining operations still was on Phase One, about a mile and a half from Kwalwasser's property. (Tr. 259)

12. Kerry does intend to mine on Kwalwasser's property in due course, under so-called Phases 12 and 13 of its mining plan. (Tr. 417, App.Ex. 1)

13. DER has not yet authorized Phases 12 and 13.

14. Under 25 Pa.Code §§86.37(a)(7) and 86.64(b)(1), DER may not authorize mining on Kwalwasser's property without Kwalwasser's written consent.

15. Kwalwasser has not consented to Kerry's intended mining operations on Kwalwasser's property. (Tr. 259)

16. Phase 11 of Kerry's mining plan includes land bordering on Kwalwasser's property. (Tr. 418, App.Ex. 1)

17. Kerry will be able to mine within its Phase 11 without entering upon Kwalwasser's land.

18. Kerry intends to mine Phase 11 in a fashion which will not physically affect Kwalwasser's land.

19. Kerry intends to avoid physically affecting Kwalwasser's land under Kerry's Phase 11 by confining its mining to Phase 11 areas which will drain away from Kwalwasser's land. (Tr. 419)

20. Although Kwalwasser originally appealed the issuance of Mine Drainage Permit 10800108 to Kerry, the parties now agree that this Mine Drainage Permit and the appealed-from permit described in Finding of Fact 3 are in essence one and the same. (Tr. 8)

21. The confusion in permit terminology has arisen because DER procedures have changed with the passage of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. (Tr. 8-9)

22. Kwalwasser was wounded while serving in the U. S. armed forces.

23. Kwalwasser was left with a "sucking chest wound." (Tr. 264)

24. Kwalwasser has had a number of myocardial infarctions and has undergone open heart surgery.

25. Kwalwasser believes that the dust and dirt from Kerry's mining operation will force Kwalwasser to live indoors with the windows of his house closed, in order to prevent aggravation of his medical problems.

26. Kwalwasser's medical problems caused him to close his previous business and to "move to the country," where he expected to find "peace and quiet." (Tr. 265)

27. Kwalwasser claims to be upset by the noises he already has heard emanating from Kerry's mining operation some nights, when the mining operations still were on Phase One.

28. The permit was issued under the authority of the SMCRA and the CSL, and the regulations promulgated thereto, together with the Air Pollution Control Act as amended and its regulations, 35 P.S. §4001 et seq. ("APCA"). (App.Ex. 2)

29. Drainage from Kerry's mining operations conceivably could reach the groundwater flowing beneath Kwalwasser's land, as well as surface streams flowing through or bordering his land.

30. Drainage from Kerry's mining operations conceivably also could flow past Kwalwasser's land into groundwater flowing "downstream" of his land, and also conceivably could reach surface streams downstream of Kwalwasser's property.

31. There has been no showing whatsoever that Kwalwasser could be injured by pollution, if any, in ground or surface waters downstream of Kwalwasser caused by Kerry's mining operations; nor did Kwalwasser testify that he made use of such waters.

32. Kwalwasser has made no showing that he could be injured by DER's having issued the appealed-from permit without having obtained the written consent of every landowner (other than Kwalwasser) whose land is included in the 1087 permitted acres. (Finding of Fact 6)

33. There has been no showing whatsoever that Kwalwasser could be injured by various alleged inaccuracies and omissions in Kerry's permit application concerning which the Board refused to hear testimony, e.g., the alleged omission of a property known as the Connoquenessing Estates from the map accompanying the applications. (Tr. 261-3).

34. DER's grant of the permit is subsequent to DER's final review of the expected environmental effects of the proposed mining on the entire 1087.2 acres covered by the permit.

35. DER's grant of the permit signifies DER's conclusion that the permit application conforms to the requirements of relevant environmental statutes and regulations.

36. Later reviews by DER, prior to granting Kerry authorization to mine outside of the presently authorized 44.3 acre Phase One area, will be confined to Kerry's compliance history, the size of the bond, the suitability of the bonding entity and the like, including of course whether Kerry has received the landowner's consent to entry.

37. Mr. Kwalwasser has had a moderate amount of experience in real estate transactions, though he is neither a real estate appraiser nor a broker.

38. Mr. Kwalwasser estimates that inclusion of his property in the full 1087 acre permit area had caused a 50% devaluation of his property.

39. Although there has been no showing that the aforementioned 50% estimate is well-founded, Kerry's mining activities probably will cause some diminution in the value of Kwalwasser's property, especially when Kerry's mining activities reach Phase II, bordering on Kwalwasser's property.

40. During the hearing, Kerry and DER agreed with Finding of Fact 39, although Kerry qualified its agreement with the observation that the value of Kwalwasser's property might increase if mine operators like Kerry were to conclude the property had coal resources worth mining.

41. DER's review of the permit application did not take into account the possible effects of Kerry's mining operations on Kwalwasser's property value.

42. DER's review of the permit application did not take into account Kwalwasser's special health problems (Findings of Fact 22-27).

43. Kwalwasser's expert Jim R. Casselberry stated that he "had not proved through any rigorous scientific certainty that any contamination from the mine site will enter Mr. Kwalwasser's water supply."

44. Mr. Casselberry mainly argued that before DER could find that there was "no presumptive evidence of potential pollution of the waters of the Commonwealth" (as DER is required to find by 25 Pa.Code §86.37(a)(3)) DER should have required overburden analyses of the areas Kerry intended to mine.

45. DER did not require an overburden analysis of any portion of the permit site.

46. Casselberry thought DER should have required one overburden analysis on about every ten acres of the area Kerry intended to mine. (Tr. 76-78)

47. DER's hydrogeologist Nancy Pointon did not believe any overburden analyses were needed to decide whether Kerry's mining operations were likely to cause pollution of Commonwealth waters.

48. Kerry has submitted water analyses to DER, of samples taken at 84 sampling points on the permit site.

49. The analyses at two of these sampling points (17 and 29 on App.Ex. 4) manifest pH's and pollutant concentrations characteristic of acid mine discharges. (Tr. 48)

50. Casselberry's reasons for believing overburden analyses should have been required rest largely on the inferences he drew from the water analyses at sampling points 17 and 29.

51. Pointon believes the analysis Kerry reported for sampling point 29 in App.Ex. 4 is erroneous.

52. According to Pointon, DER analyses at sampling point 29 show the pH of the discharge at that point is about 6.5 rather than the 4.0 value stated in App.Ex. 4. (Tr. 656-7)

53. According to Pointon, another Kerry sample at point 29 (not the sample reported in App.Ex. 4) also had shown a pH of 6.5.

54. A Kerry sample taken November 24, 1981 at sampling point 29 showed a pH of 4.8. (App.Ex. 13)

55. The discharges at sampling points 17 and 29 emanate from abandoned deep mines.

56. According to Casselberry, in the past there also has been strip mining in the vicinity of those deep mines.

57. According to Casselberry, discharges from deep mines in the vicinity of the Kerry site normally are alkaline.

58. Casselberry believes the acid mine discharges observed at sampling points 17 and 29 originate from the strip mining spoil; rain water filters through this spoil into the deep mine discharge, rendering acid a deep mine discharge which otherwise would have been alkaline.

59. Pointon asserts that DER's records show past surface mining in the vicinity of the 1087 acre permitted site, including surface mining by Kerry on a site adjacent to the instant site, has not caused any acid drainage; DER's Scott Horrell, Chief of Permits and Technical Services for the Greensburg region, corroborated this claim. (Tr. 675-6)

60. According to Pointon, any acid drainage at the sampling points 17 and 29 must have been caused by the original deep mining, not by any infiltration into the deep mine discharge of water which had passed through strip mining spoil.

61. According to Pointon, there are deep mines in the vicinity of the site which manifest acid mine drainage even though no surface mining has occurred nearby.

62. Pointon does not believe there has been surface mining in the vicinity of sampling point 29.

63. Kerry submitted drill logs to DER, taken at various locations on the permit site. (App.Ex. 7)

64. These drill logs frequently report black shale layers immediately above the Upper Freeport coal seam.

65. Kerry intends to mine the Upper Freeport coal seam.

66. According to Casselberry, black shale frequently contains pyrite, which is a common source of acid mine drainage.

67. According to Pointon, black shale overlies the Upper Freeport coal seam throughout Butler County.

68. According to Pointon, this Butler County black shale is known to contain lots of calcium carbonate, which would neutralize acid discharges tending to come, e.g., from pyrite in the black shale. (Tr. 552-3)

69. Casselberry testified that while walking the site he had found a highly acid discharge at the northern end of the site.

70. This just-mentioned discharge was not shown on the permit map, and had not been sampled by Kerry.

71. Casselberry believed this discharge supported his theory that strip mining in the vicinity of a deep mine can cause the deep mine discharge to become acid.

72. DER has investigated discharges in the area of Casselberry's reported discharge.

73. DER has determined that the discharge Casselberry reported came from the gob and boney pile of the Mary Elizabeth deep mine in that vicinity. (Kerry Ex. C)

74. Mr. Kwalwasser, who walked the site with Casselberry, and who was present when DER investigated discharges in the area of Casselberry's reported discharge, was not sure that DER had found the discharge Casselberry had reported. (Tr. 312-319)

75. Casselberry testified that photographs shown him by Kerry did not show the locale where he had found a discharge. (Tr. 195-7)

76. The permit application originally was submitted in 1979. (Tr. 542)

77. The permit was granted on February 13, 1984. (App.Ex. 2)

78. The decision not to require any overburden analyses had been reviewed a number of times during the time between submission of the application and grant of the permit. (Tr. 588-9)

79. DER's decision not to require overburden analyses was taken deliberately, after careful consideration of the permit application.

80. Mr. Casselberry and Ms. Pointon are about equally qualified.

81. Both Casselberry and Pointon appeared to be giving their honest opinions.

82. There is nothing in the record that would justify favoring Casselberry's opinions over Pointon's.

83. Before issuing the permit, DER determined that overburden analyses were not necessary because DER had in its possession equivalent information, as required by 25 Pa.Code §87.44(3). (DER Ex. 1; Tr. 581-2, 685-6)

84. The aforesaid determination (Finding of Fact 83) was not made in writing before issuance of the permit.

85. DER's Exhibit 1, entered into evidence on the last day of the hearing, was the first occasion that DER had put its aforesaid determination into writing; this Exhibit contains a statement by DER's Horrell and Pointon that the determination required by 25 Pa.Code §87.44(3) had been made before the permit was issued.

86. In 1980, at the time the aforesaid determination first was made, the regulations did not require a determination in writing.

87. The permit was issued after 25 Pa.Code §87.44(3), requiring a written determination, became effective.

88. Kerry's drill holes show no coal on that western portion of Phase 11 which could drain onto Kwalwasser's property.

89. The testimony did not make it clear that the permit as issued excludes mining on Phase 11 areas which could drain onto Kwalwasser's property.

90. Kerry will not be mining Phase 11 for another two years (from March 20, 1985). (Tr. 490)

91. Kerry already has the landowners' consents needed to mine Phase 11.

92. Kwalwasser lives close to an abandoned (no longer maintained) Township road known as Old Camp Fatima Road.

93. Some 600 feet from Kwalwasser's house is a newer, maintained Township dirt road called New Camp Fatima Road.

94. West and northwest of Kwalwasser's property is a State road, LR 10029.

95. Three or four cars per day travel on Old Camp Fatima Road; twelve to fifteen cars per day use New Camp Fatima Road.

96. All the aforementioned roads are winding and steep.

97. Some portions of the State road are unpaved or no more than one lane.

98. At times, dust clouds raised by cars speeding along New Camp Fatima Road have reached Kwalwasser's house.

99. Some time in the past, before strip mining began, portions of the 1087 acres included in the permit area were logged; the logging trucks used the aforementioned roads.

100. Kwalwasser was disturbed by the logging trucks, and the logging truck traffic interfered with his use of the aforementioned roads.

101. Kwalwasser presented no evidence on the amount of coal truck traffic to be expected, or on the truck sizes to be used.

102. Kwalwasser believes the aforementioned roads will be used by coal truck traffic during mining on the non-Kwalwasser portions of the permit.

103. No evidence was presented to show that the aforementioned roads really will be used by coal truck traffic during Kerry's mining operations.

104. DER's Scott Horrell testified that DER had not considered the possibly hazardous effects of the coal truck traffic on the aforementioned roads or on other traffic using those roads.

105. DER did not consult with PennDOT about possible coal truck traffic effects.

106. DER regards road use regulation as outside its province, though within the province of, e.g., PennDOT or the Township.

107. The permit as approved incorporates a dust control plan submitted by Kerry; the plan lists various specific measures Kerry will undertake to minimize fugitive dust generation.

108. Kwalwasser offered no evidence that these dust control measures would be inadequate to prevent dust from adversely affecting Kwalwasser's health or property.

109. Kwalwasser's home has solar heating panels and a greenhouse, which would be adversely affected by dust accumulation.

110. The permit imposes no requirements for monitoring the effectiveness of Kerry's dust control measures.

111. The permit imposes water monitoring requirements on Kerry.

112. Kwalwasser has not presented any testimony, expert or otherwise, on the need for dust control monitoring.

113. DER issued the permit without giving any consideration to the amount of noise which Kerry's mining operations might generate.

114. There are no regulations specifically requiring DER to examine noise generation in the course of review of a surface mining application.

115. No persons other than Kwalwasser have complained about the noise generated by Kerry's mining operation.

116. There was no testimony on the noise levels Kerry's mining operations generate or are likely to generate.

DISCUSSION

A. LIMITATION OF ISSUES

On November 15, 1984, the Board issued an Opinion and Order is this appeal limiting the issues which Kwalwasser would be permitted to raise at a hearing on the merits of this appeal. Robert Kwalwasser v. DER and Kerry Coal Company, 1984 EHB 886. The basis for the Board's ruling is set forth in the November 1984 opinion and need not be reviewed in detail here. Kwalwasser, however, was given the opportunity to justify the relevance to this appeal of numerous other issues not ruled out by the November 1984 Opinion, which had been raised in Kwalwasser's Notice of Appeal and Pre-Hearing Memorandum; Kwalwasser was given until December 5, 1984 to provide such justification.

By December 26, 1984, Kwalwasser had not filed anything in support of the requested justification. Therefore, the Board issued an order on December 26, 1984, further limiting the scope of this appeal. On December 28, 1984 the Board received a document titled "Second Supplemental Pre-Hearing Memorandum" from Kwalwasser, which apparently was intended to be the filing called for in our November 15, 1985 order. Thereafter, on January 16, 1985, Kwalwasser filed a "Petition for Argument En Banc", alleging that the Board had inappropriately limited Kwalwasser's presentation of evidence. At about the same time, Kwalwasser petitioned Commonwealth Court for permission to appeal the Board's rulings limiting the issues Kwalwasser was permitted to raise. On January 22, 1985 the Board dismissed Kwalwasser's Petition for Argument En Banc as being essentially a request for reconsideration and/or rehearing of interlocutory orders, a request

the Board normally does not grant. Magnum Minerals v. DER, 1983 EHB 589 (Opinion and Order, November 22, 1983). The Board has not been officially informed of the Commonwealth Court's action on Kwalwasser's attempt to appeal to that Court, but the permittee and DER have alleged that the Commonwealth Court refused Kwalwasser's requested permission to appeal. (Tr.23).

The hearing on the merits of this appeal was held on March 18-21, 1985. During the course of the hearing the Board, on various occasions, affirmed the rulings of its earlier Opinion and Order of November 15, 1984 and the Order of December 26, 1984. In essence, the Board sought to limit the hearing to evidence bearing on the following issues:

> 1. Whether Kerry's mining operations under the permit would adversely affect the groundwater or other waters on Kwalwasser's property.
>
> 2. How the noise and dust from the mining operation would affect Kwalwasser's use and enjoyment of his property.
>
> 3. How traffic on public roads Kwalwasser regularly uses to and from his property might affect Kwalwasser.
>
> 4. Whether DER should have required any overburden analyses before issuing the permit, and whether its decision on the question should have been in writing.

The Board also allowed some testimony on the following issues which the Board considered to be irrelevant, but which the Board did not wish to wholly rule out without the benefit of the parties' briefs:

> 5. Whether DER before granting the permit should have considered the effect of Kerry's mining activities on the value of Kwalwasser's property.

6. Whether DER's review of the permit application should have taken into account the special circumstances of Kwalwasser's health. (See Findings of Fact 22-27).

The Board, however, definitively refused to hear testimony on certain issues which it considered irrelevant to this appeal, in that the allegations could not bear upon any claimed adverse effects to Kwalwasser. Examples of such issues included:

7. Alleged effects on high quality streams which would be reached by discharge from Kerry's mining operations only after passing through and past Kwalwasser's property. (TR.88)

8. Whether landowners other than Kwalwasser had given their written consent to Kerry's mining on their lands within the 1087 permitted acres. (Tr.260)

9. Technical inaccuracies in the permit application which have no relevance to possible adverse effects upon Kwalwasser or his land. (Tr.261-2, 687-93)

Kwalwasser's post-hearing brief has not addressed any issues beyond the issues 1 - 9 listed supra. Therefore, any other issues are deemed waived. Pennsylvania Environmental Management Services v. DER, 1984 EHB 94 at 136 (Adjudication, May 29, 1984); Equipment Finance, Inc. v. Toth, 476 A.2d 1366 (Pa.Super.1984);

Schneider v. Albert Einstein Medical Center, 390 A.2d 1271 (Pa. Super.1978). This adjudication will be confined to examination of issue 1, on which the Board allowed evidence, plus issue 8 which raises some significant legal questions.

B. EFFECTS ON KWALWASSER'S PROPERTY VALUES

The Board permitted a certain amount of testimony by Kwalwasser concerning the anticipated effects on the value of Kwalwasser's property caused by the anticipated mining activities of Kerry. Kwalwasser, who has had a moderate amount of experience in real estate transactions, though he is neither a real estate broker nor appraiser, estimated that inclusion of his property in the full 1087 permit acre had caused a 50% reduction in his property value. The Board does not believe that this 50% estimate has been shown to be well-founded. The Board agrees, however, that Kerry's mining activities probably will cause some diminution in the value of Kwalwasser's property, especially when Kerry's mining activities reach Phase 11, bordering on Kwalwasser's property. Indeed, Kerry and DER agreed that such a diminution likely would occur, but Kerry qualified its agreement with the observation that the value of the property might increase if mine operators like Kerry were to conclude that the property has coal reserves worth mining. (Tr.281-2)

The issue here, however, primarily is whether DER should have considered the probable diminution in value of Kwalwasser's property when issuing the permit. We think it obvious that refusing Kerry's permit because Kwalwasser's property will be devalued would diminish Kerry's prospects of financially profitable operations, although admittedly there was no testimony directly on this point. However, there is no basis in the Clean Streams Law or the Surface Mining Act for DER to favor Kwalwasser's interests over Kerry's. Nor, as we have ruled in the past, should DER attempt to balance the financial gains or losses of the various private parties when deciding whether to grant a permit. Pennsylvania Mines Corp. v. DER, 1982 EHB 215 (Adjudication, September 9, 1982). Although the Commonwealth Court reversed Pennsylvania Mines, supra, its opinion specifically stated:

> We therefore hold that DER cannot issue or deny a permit upon consideration of which entity. . . will be more financially harmed, or proportionately more financially harmed, once it has been determined the well can be safely drilled.

Einsig v. Pennsylvania Mines Corp., 69 Pa.Cmwlth 351, 452 A.2d 558 (1982), appeal dismissed as having been improvidently granted, 464 A.2d 1225 (1983). In light of the foregoing, we conclude that DER had no duty to consider the possible effect upon the value of Kwalwasser's property and that therefore, the issue is irrelevant to this appeal.

C. EFFECTS ON KWALWASSER'S HEALTH

Kwalwasser argues that DER should have taken his special health problems into consideration in deciding whether to issue the permit. (See Findings of Fact 22-27). No legal basis is offered, however,

for imposing such a duty on DER. Kerry has not addressed this issue in its post-hearing brief, and DER has filed no brief. This issue appears to present a question of first impression for this Board and perhaps for the courts of this Commonwealth. Certainly our own research has found no Pennsylvania cases which have specifically addressed the question.

In examining this question, we note first that it would be unreasonably impractical to require DER to ascertain whether there are any persons in the vicinity who have special health problems needing special protection, for every mining permit application under review; we regard this assertion as obvious, although again, no evidence was presented on this point. Moreover, and more to the point, the environmental statutes and regulations which DER must enforce, presumably have been promulgated by the Legislature and the Environmental Quality Board ("EQB") with the intent of striking a reasonable balance between the Commonwealth's legitimate government functions of protecting the health of its citizens and permitting responsible harvesting of its resources (in this appeal, its coal resources). Thus, we must presume that DER would be exceeding its enforcement role, and possibly exercising a legislative function, if it were to reject a permit application that otherwise complied with applicable statutes and regulations merely because, in DER's view, those statutes and regulations failed to consider the special health problems of persons such as Kwalwasser.

This conclusion is supported by analogy to well-established principles pertaining to the law of nuisance. Interference with the use and enjoyment of another's property ordinarily will not be termed

a nuisance unless that interference will be deemed unreasonable by most persons. Prosser, "Law of Torts" (4th Ed.) p.578. For example, as our Supreme Court has stated, in Firth v. Scherzberg, 366 Pa. 443, 77 A.2d 443 (1951):

> Noise which constitutes an annoyance to a person of ordinary sensibility to sound, so as to materially interfere with the ordinary comfort of life and to impair the reasonable enjoyment of his habitation to him, is a nuisance. (Emphasis added).

Similarly, a Common Pleas Court has stated that:

> A man who carries on an exceptionally delicate business cannot complain because he is injured by his neighbor doing something lawful on his property, if it is something which would not injure an ordinary trade or anything but an exceptionally delicate one.

Lebanon Theatres Corp. v. Northeastern Swim Club, 13 Leb. 29, 51 D&C 2d 21 (1970).

Thus, by analogy, while DER does have a duty to protect the public against threats to its health, safety and welfare, (consistent with the limits imposed by its statutory mandate, 71 P.S. §510-1 et seq.) this duty should not be construed to require DER to do more than protect against unreasonable interferences with these public interests. The fact that a particular individual may be adversely affected by a mine operation due to a health condition which makes him more sensitive than the general public does not mean that the mine operation is "unreasonable", i.e., something which DER should not condone. For these reasons, we conclude that DER's failure to take Kwalwasser's special health problems into consideration was not an abuse of discretion.

D. FAILURE TO OBTAIN CONSENT TO ENTRY

Kwalwasser claims that the permit covering all 1087 acres should not have been issued in view of the fact that Kwalwasser—whose 65 acres lie within these 1087 permitted acres—has not given the written consent to entry upon his land required by §315(g) of the CSL. This issue seems to be primarily a matter of statutory construction. Section 315(g) reads:

> (g) The application for a permit shall include, upon a form prepared and furnished by the department, the written consent of the landowner to entry upon any land to be affected by the operation of the operator. . .

The same language is contained in the regulations found in 25 Pa.Code §86.64(c), governing the general "right of entry" requirements for surface coal mining permits.

This language seems clear enough. Kwalwasser has not given written consent to Kerry for entry upon his land. Therefore, if the permit indeed would allow Kerry to mine Kwalwasser's land, we would not hesitate to rule that granting the permit was an abuse of DER's discretion, in violation of §315(g) and §86.64(c).

The permit issued to Kerry unequivocally states, however, that Kerry has been authorized to mine only a portion of the entire 1087 acres, i.e., the area designated Phase One, which does not include any of Kwalwasser's land. Paragraph 2 of the permit reads:

> 2. The permit is for 1087.2 acres of which 895.5 coal acres are planned to be affected. Permittee may conduct surface coal mining activities only on that area of the permit outlined on the Authorization to Mine and accompanying maps contained in Part C of this permit. Initial authority to conduct mining activities is granted for an area of 44.3 acres described in Part C of this permit. Additional authority to conduct mining activities may be granted by written approval of the Department and attached to Part C of this permit. Permittee is prohibited from conducting coal mining activities on that portion of the permit area which has not been

> authorized for mining by the Department, in writing, and shown on the bond approval and mining authorization map[s] contained in Part C of this permit.

In addition, Part C, titled "Authorization to Mine", states:

> Surface coal mining activities are limited to the area designated as Phase I in the map submitted in support of the request for this Mining Authorization which covers 44.3 acres.

Thus, it is clear that there has been no violation of §315(g) or the applicable regulations, since under the present terms of the permit Kerry legally cannot affect Kwalwasser's land.

In addition, we see nothing in §315 or §86.64 which prohibits DER from issuing a surface mining permit for the entire area proposed to be mined but granting "incremental phase" approval for present mining activity to only those areas for which a bond, and landowners' consent to entry, have been furnished, as generally contemplated by 25 Pa.Code Chapter 86, Subchapters B and F. Under those regulations, before an operator such as Kerry may receive permission to mine on a given tract of land, DER must approve a bond submitted by the operator for that tract. A permit application is not complete until such a bond has been submitted. 25 Pa.Code §86.37(a)(12). Prior to approval of the bond, the consent of the landowner to entry upon his land must be obtained by the operator. 25 Pa.Code §86.37(a)(7). And, no approval of an incremental phase of a mining operation under a permit shall be granted until the bond has been filed with the department and the consent to entry has been obtained. 25 Pa.Code §86.37(b). Therefore, the fact that the permit at issue here was granted to Kerry despite the lack of Kwalwasser's consent to entry does not mean that DER abused its discretion. Such consent must be obtained before DER grants incremental phase approval to mine on that portion of the permit within which Kwalwasser's land is included. Nothing in the law requires that DER assure that the landowner's consent be obtained earlier.

The immediately preceding discussion raises another issue, however: why is DER's issuance of the permit appealable by Kwalwasser if mining cannot take place on his land until DER approves a bond, and grants incremental phase approval for mining on Kwalwasser's property?[1] It might appear that Kwalwasser's appeal would not be ripe until and unless DER had approved such mining (projected to occur at Phases 12 and 13 of Kerry's mining plan [See App.Ex. 1]). This question is related to the issue of Kwalwasser's standing.

In the first place, Kwalwasser has standing to appeal the permit issuance because he has satisfactorily alleged that the mining already authorized under Phase One will cause pollution of the ground and surface waters reaching his property. Furthermore, issuance of the permit takes place after DER's final review of the possible environmental effects of the proposed mining, such as the mining's expected effect upon the surface and groundwaters reaching Kwalwasser's property. Once the permit has been issued, future approval of additional phases will be limited to a review of the operator's compliance history, the acceptability of the bond, the suitability of the bonding entity and the like. (Tr.17). In short, DER's issuance of the permit constitutes DER's final approval—as consistent with relevant statutes and regulations—of the environmental effects of Kerry's entire proposed mining activities (as approved under Phase One and under additional phases possibly approved in the future); therefore review at this stage of the permit approval process is appropriate. Kwalwasser clearly has standing to appeal those portions of the permit dealing with environmental effects which may affect his interests.

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[1] Although this issue was not raised by the parties it is discussed here since failure to do so might leave the readers of this opinion with false impressions.

E. WATER POLLUTION AND OVERBURDEN ANALYSIS

We turn now to the issues on which the Board heard full testimony, beginning with issues 1 and 4 supra. In this third party appeal, Kwalwasser bears the burden of proof that the permit grant was an abuse of DER's discretion. 25 Pa. Code §21.101(c)(3). In particular, it is Kwalwasser's burden to show that Kerry's mining operations were sufficiently likely to adversely affect ground waters or surface waters reaching Kwalwasser's property [issue 1] that the permit issuance must be regarded as an abuse of discretion.

The Environmental Quality Board, pursuant to its assigned statutory responsibility, 71 P.S. §510-20, has promulgated a comprehensive scheme of regulations governing the issuance of surface mining permits. These regulations largely are contained in 25 Pa. Code Chapters 86 and 87, which have been issued under the authority of the SMCRA and CSL. There is the presumption, therefore, that the regulations DER consulted before deciding to grant the appealed-from permit met the objective of the CSL, "to prevent further pollution of the waters of the Commonwealth." 35 P.S. §691.4(3); Coolspring Township, supra, at 174.

Under the circumstances just described, Kwalwasser essentially has only two possible means of meeting his burden of showing that Kerry's mining operations are likely to adversely affect waters of the Commonwealth reaching Kwalwasser's property. First, Kwalwasser can try to show that the applicable regulations, though fully complied with by DER, are insufficient to prevent water pollution by Kerry's mining operation. In other words, Kwalwasser can try to rebut the aforesaid presumption associated with the existence of a comprehensive regulatory scheme; this task, though heavy, is not necessarily impossible to meet, as has been discussed in Coolspring, supra.

Kwalwasser, however, has not attempted to meet his burden via this just described means. Rather, it was argued that the information submitted in the permit

application was insufficient for DER to properly evaluate it. Mr. J. R. Casselberry, Kwalwasser's sole expert witness testified (Tr. 161):

> I have not proved through any rigorous scientific certainty that any contamination from the mine site will enter Mr. Kwalwasser's water supply.
>
> The focus of my testimony, I hope, was to show that there is enough red flags as far as things that would want me to define whether mine drainage is possible. Mr. Kwalwasser's water supply is adjacent to the backfill strip jobs at the same elevation as the coal so he's getting his water from the coal unit they strip. Then, his water supply most likely will be degraded. I have not studied the particulars in Mr. Kwalwasser's water supply that any mine drainage from this site would necessarily be connected to Mr. Kwalwasser's public, not public, but a predictive water supply.
>
> Obviously, you have a strip mine and a discharge that has toe spoil in the discharge area, you're going to affect that discharge area, such as the stream. There's Semiconon or Connoquenessing. But I have not taken the time or spent any effort on looking at Mr. Kwalwasser's water supply singularly and trying to say if he got X amount of mine drainage at Y Point in the mine site, it's going to end up in his well.

Mr. Casselberry's testimony was foreshadowed by Kwalwasser's counsel Lee Golden, who stated at the outset of the hearing (Tr. 11)

> The application submitted did not present enough evidence to the Department for them to make an intelligent decision whether or not acid mine drainage would occur.
>
> . . .
>
> HEARING EXAMINER: Well, are you alleging that his well will be degraded by the operation of the mine? Is that what you are alleging?
>
> MR. GOLDEN: Again, that's impossible to predict from the information submitted in the application.

The claim that the information submitted in the permit application was insufficient amounts to the claim that DER improperly applied the applicable regulations, because one must presume the comprehensive regulatory scheme laid out by the EQB requires that a permit application contain sufficient information for DER to make an intelligent decision whether acid mine drainage or other pollution of the waters of the Commonwealth are likely to occur. Thus (in effect) Kwalwasser sought to meet his burden by showing that DER has failed to comply fully with the comprehensive regulatory scheme the EQB has promulgated. Indeed, just as compliance with the applicable comprehensive regulatory scheme raises the presumption that pollution of the waters of the Commonwealth will not occur, so failure to comply with the applicable regulatory scheme must be regarded as raising the presumption that pollution of the waters of the Commonwealth cannot be ruled out, i.e., that DER could not have justifiably made the finding required by 25 Pa. Code §86.37(a)(3). See Del-Aware Unlimited, Inc. v. DER, Docket No. 84-361-G (Opinion and Order, November 21, 1985). 25 Pa. Code §86.37(a) reads:

> (a) No permit or revised permit application shall be approved, unless the application affirmatively demonstrates and the Department finds, in writing, on the basis of the information set forth in the application or from information otherwise available, which is documented in the approval, and made available to the applicant, that all of the following exist:
>
> (1) The permit application is accurate and complete and that all requirements of the acts and this chapter have been complied with.
>
> (2) The applicant has demonstrated that the coal mining activities can be feasibly accomplished as required by the act and this chapter under the operation and reclamation plan contained in the application.
>
> (3) The applicant has demonstrated that there is no presumptive evidence of potential pollution of the waters of the Commonwealth.

Insofar as the possibility of water pollution is concerned, Kwalwasser's main contention about DER's failure to properly apply the applicable regulations concentrates on 25 Pa.Code §87.44(3), which reads:

> Each application shall contain a description of the geology within the proposed permit and adjacent area down to and including the aquifer system that may be affected below the lowest coal seam to be mined including the following:
>
> . . .
>
> (3) Chemical analyses of the coal and overburden or a request for a waiver. The Department may waive the chemical analysis after making a written determination that it has equivalent information in a satisfactory form.

DER did not require an overburden analysis for any portion of the permit site. Kwalwasser's post-hearing brief argues, citing primarily Mr. Casselberry's testimony, that overburden analyses should have been required. Kerry's post-hearing brief, citing primarily the testimony of DER's hydrogeologist Nancy Pointon, argues overburden analyses were not required and were properly waived. DER did not file a post-hearing brief.

i) The Experts' Testimony

Thus it appears that the Board's decision on issue 4 supra, whether any overburden analyses should have been required before issuing the permit, rests primarily on the Board's evaluation of the relevant testimony on both sides. Mr. Casselberry asserted that overburden analyses should have been required primarily because two (but only two) of the numerous water sample analyses Kerry submitted with its permit application manifested pH's and pollutant concentrations characteristic of acid mine discharge; these analyses are identified as sampling points 17 and 29 on Appellant's Exhibit 4, which lists 84 sampling points in all. Ms. Pointon did not dispute that these water analyses display the characteristics of

acid mine drainage. However, Ms. Pointon believes Kerry's water analyses on sample point 29 probably are erroneous. According to Pointon, another Kerry sample at point 29 showed a perfectly acceptable pH of 6.5, rather than the pH of 4.0 reported for sampling point 29 in App.Ex. 11; moreover, DER's inspectors had taken a number of water samples at sampling point 29, all of which also showed perfectly acceptable pH's. On the other hand, a November 24, 1981 sample taken by Kerry at sampling point 29 shows a pH of 4.8.

In short, Casselberry identified at most two of Kerry's 84 sampling points on the 1087-acre permit site where acid mine drainage appeared to be present; Pointon would say acid mine drainage is to be found at no more than one location on the permit site, namely at sampling point 17. Even if Casselberry is correct about sampling point 29, however, Pointon strongly disagrees with the conclusions Casselberry draws from the sampling point 17 and 29 data. The discharges at sampling points 17 and 29 emanate from abandoned deep mines. However, according to Casselberry, in the past there also has been stripping in the vicinity of these mines. Casselberry believes the acid mine discharges observed at sampling points 17 and 29 originate from the strip mining spoil; according to Casselberry, rainwater filters through this spoil into the deep mine discharge, rendering acid a deep mine discharge which otherwise would have been alkaline, as normally is observed from deep mines in the vicinity of the Kerry site. In Casselberry's own words (Tr. 61-62):

> The reason the deep mines becomes important is the fact that it is there and it is discharging water. When they go in and try to strip a piece of the deep mine like they have in the Coates Mine and disaggregate the rock, then the drainage all of a sudden is acidic. That's a by-product of the strip mine.
>
> HEARING EXAMINER: Essentially all you're saying is that the surface mining is producing acid mine drainage and then you're simply saying that the deep mine was a vehicle for that discharge to get out.

THE WITNESS: Right.

That's exactly what I'm saying.

HEARING EXAMINER: It's not a correlation with deep mining.

THE WITNESS: The correlation is simply that when we see the drainage in there which happens to be coming out of the deep mine openings, when you see that drainage in areas not affected by strip mining it's alkaline. When you see it in areas that have been affected by strip mining, that drainage from the deep mine seems to be acidic in nature.

Casselberry concludes that there is evidence surface mining on the site can cause acid mine drainage, and therefore further concludes that DER should have required overburden analyses at a reasonable number of locations straddling the entire 1087 acres (he recommends approximately one overburden analysis every ten acres) to ensure that Kerry's surface mining will not result in acid discharges. Casselberry bolsters his conclusions by referring to the drill logs taken by Kerry at various locations on the site. These drill logs frequently report black shale layers immediately above the Upper Freeport coal seam Kerry intends to mine. According to Casselberry, black shale frequently contains pyrite, which is a common source of acid mine drainage.

On the other hand, Pointon asserted that past surface mining in the vicinity of this 1087-acre site, including surface mining by Kerry on a site adjacent to the instant site, has not caused acid drainage. She also asserted that the acid mine drainage at the sampling points 17 and 29 (assuming there is acid mine drainage at 29) must have been caused by the original deep mining, not by infiltration into the deep mine discharge of water which had passed through the strip mining spoil. In support of these assertions, Pointon stated that there are deep mines in the vicinity which manifest acid mine drainage although no surface mining has occurred nearby; indeed, Pointon averred, sampling point 29

is one such deep mine—Pointon disagrees with Casselberry's statement that there has been surface mining in the vicinity of sampling point 29 (Tr. 574-5). Moreover, according to Pointon, the black shale layer alluded to by Casselberry overlies the Upper Freeport coal seam throughout Butler County and is known to contain lots of calcium carbonate, which would neutralize any acid discharges of the sort Casselberry postulated, e.g., from pyrite in the black shale.

Kwalwasser and DER disagreed on the significance of other (not discussed above) facts possibly bearing on the need for overburden analyses. For example, Casselberry claimed that while walking the site he had found a highly acid discharge at the northern end of the permit area, which discharge was not shown on the permit application map (App.Ex. 1) and had not been sampled by Kerry; Casseberry believed this discharge also supported his theory that strip mining in the vicinity of a deep mine can cause the deep mine discharge to become acid. On the other hand, DER investigated discharges in the area of Casselberry's reported discharge, and determined that Casselberry's discharge came from the gob and boney pile of the Mary Elizabeth deep mine in that vicinity; thus, according to DER, Casselberry's discharge was completely irrelevant to the need for an overburden analysis. But again on the other hand, there was testimony suggesting that DER might not have found the discharge Casselberry sampled (Findings of Fact 74 and 75).

The preceding by no means exhausts the facts on whose significance Kwalwasser and DER (along with Kerry of course) differed; we have neither the time nor the space to detail all those facts and differences however. The foregoing has amply conveyed the nature of the testimony and the arguments advanced by the parties on the issue of the need for overburden analyses. Pointon's testimony made it clear that DER's decision not to require any overburden analyses had been taken deliberately, and had been reviewed a number of times over the more

than four year period between the original submission of the permit application (1979) and the grant of the permit (1984). 25 Pa.Code §87.44(3) unequivocally gives DER the discretion to waive an overburden analysis. Our de novo review of the reasons for DER's decision to waive the overburden analysis indicates the decision was quite reasonable, accepting Pointon's (i.e., DER's) opinions on the significance of the water samples taken and the drill logs reported. Casselberry's opinions on the significance of these facts might imply a different decision than the one DER took, but we saw no basis for favoring Casselberry's opinions over Pointon's. In our judgment, Mr. Casselberry and Ms. Pointon were about equally qualified, and they both appeared to be giving their honest opinions. Moreover Casselberry's main argument for requiring an overburden analysis was his theory (it cannot be termed anything else) that the acid mine drainage emanating from at most three points on the permit site (sampling points 17 and 29 and the discharge Casselberry had personally found) had resulted from surface mining in the vicinity of deep mines, Pointon's reasons for rejecting this theory were cogent, and her testimony (corroborated by DER's Scott Horrell) that strip mining in the vicinity of the permit site never had caused acid discharges was not refuted and is compelling. In sum, we conclude Kwalwasser did not meet his burden of showing that DER's decision to waive overburden analyses was an abuse of discretion.

ii) Need For Written Waiver

The conclusion we have just reached implies that DER properly complied with the requirements of 25 Pa.Code §87.44(3), quoted supra. Kwalwasser points out, however, that §87.44(3) permits a waiver of overburden analyses only after a written DER determination that DER "has equivalent information in a satisfactory form." DER did not make such a written determination before it granted the Kerry permit. Kwalwasser therefore insists (once again in effect) that DER's grant of

the permit must be considered a "per se" abuse of DER's discretion, on the sole (but Kwalwasser believes sufficient) grounds that the requirements of §87.44(3) were not fully complied with. Kwalwasser argues that DER's failure to comply literally with the requirements of §87.44(3) conceivably could result in pollution of the waters reaching Kwalwasser's property.

DER's Mr. Horrell explained DER's failure to make the aforesaid written determination (that overburden analyses were not necessary) before granting the permit by the fact that the regulations in force in 1980—when the determination first was made—did not require a writing (Tr. 685). This explanation is not to the point. The permit was issued after 25 Pa. Code §87.44(3) became effective (in 1982). This Board and the Pennsylvania courts have ruled on numerous occasions that DER is bound by its regulations, and indeed by the regulations which are effective at the time a permit is issued even if the application had been submitted to DER before the regulations became effective. Magnum Minerals v. DER, 1983 EHB 522 and 589; Doraville Enterprises v. DER, 1980 EHB 489; U. S. Steel v. DER, 1980 EHB 1, aff'd 442 A.2d 7 (Pa.Cmwlth. 1982); East Pennsboro Township Authority v. DER, 18 Pa.Cmwlth. 58, 334 A.2d 978 (1975).

However, the decisions just cited do not imply that this Board, after a full hearing de novo, necessarily must reject a permit grant (in this case Kerry's permit) where DER's failures to comply with applicable regulations have been purely procedural, easily correctable and environmentally inconsequential. As we put it in Coolspring, supra at 182, where we refused the appellants' request (similar to Kwalwasser's in the instant appeal) to deem DER's permit grant a per se abuse of

discretion for any failure, however inconsequential, to comply with applicable regulations: "[S]urely the proper remedy at this stage of these proceedings is to order correction of these easily correctable environmentally inconsequential deficiencies." The instant permit was reviewed for more than four years before being granted; it now is close to six years since the application first was submitted to DER. The evidence clearly shows that DER did make (though not in writing) the determination called for in 25 Pa.Code §87.44(3) before issuing the permit. Our de novo review has concluded this determination was not an abuse of DER's discretion. We therefore further conclude that DER's waiver of overburden analyses did not become an abuse of DER's discretion merely because the determination called for in §87.44(3) had not been committed to writing before the permit was issued.

The obvious purpose of the writing called for in §87.44(3) is to ensure that the decision to waive overburden analyses is made after due deliberation, by identifiable DER employees who have accepted responsibility for the decision and who later can be asked to defend it. We agree this purpose is desirable and important, and do not believe we should approve a permit grant unless the record made in our de novo review indicates there has been substantial (i.e., sufficient to achieve the aforementioned purpose) compliance with the writing requirement of §87.44(3). At the hearing we ruled that this substantial compliance would be achieved if the responsible DER employees would state on the record and under oath that the determination called for by §87.44(3) had been made; the hearing transcript, we stated, then would constitute the required writing (Tr. 70-73). We now affirm this ruling. Certainly, under the circumstances, where the permit application originally had been submitted in 1979, the proper remedy at this stage of the proceedings was not to cause further delay in reaching the true merits of this appeal by remanding the permit to DER—as Kwalwasser's post-hearing brief vigorously urges us to do—merely for the purpose of allowing DER to make

its written determination and then to reissue the permit.

DER's Scott Horrell and Nancy Pointon did state for the record that the aforesaid determination had been made. Actually, Horrell and Pointon went further; on the fourth day of the hearing DER introduced a written statement by Horrell and Pointon that the determination required by §87.44(3) had been made. This written statement was admitted into evidence as DER's Exhibit 1, over Kwalwasser's objection which was renewed in his post-hearing brief. We also affirm our acceptance of DER Exhibit 1, whose function—as we see it—serves primarily to demonstrate that DER's prior failure to comply fully with the writing requirement of §87.44(3) really was so easily correctable that remanding the permit to DER solely for the purpose of producing this writing must be considered an improper remedy. The testimony by Horrell and Pointon that the determination had been made before waiving overburden analyses constituted substantial compliance with the writing requirement of §87.44(3). Neither this testimony nor DER Exhibit 1 are needed nor were used by us in reaching our conclusion that DER's determination (that overburden analyses were not needed) had sufficient substantive basis to be well within DER's discretion.

F. SURFACE WATER DRAINAGE ONTO KWALWASSER'S PROPERTY

Before closing our discussion of issue 1, supra, we wish to examine a question which was raised by the Board during the hearing. Kerry testified that its mining on Phase II (which includes land bordering on Kwalwasser's property) would not cause surface water affected by mining to drain onto Kwalwasser's property (hereafter "unwanted drainage") because Kerry only intends to mine Phase II areas which drain away from Kwalwasser's land. The reason for this intention, according to Kerry, is that Kerry's drill holes indicate there is no coal in the Phase II areas which could cause unwanted drainage.

On the other hand, the western portion of Phase II does encompass land from which water, if affected by mining, could cause unwanted drainage. The testimony (Tr. 418-419) did not make it clear to the Board whether Kerry already has submitted mining plans--on which DER relied when it granted the permit--that exclude mining on Phase II land which could cause unwanted drainage. Certainly, however, DER should not approve mining on Phase II unless mining on the western portion of Phase II, from which surface water could drain onto Kwalwasser's land, has been excluded.

G. ROAD TRAFFIC

We now examine issue 3, supra. Kwalwasser had expressed his concern that coal truck traffic on roads near his house will cause hazardous deterioration of these roads and will spread dust over his property. Kwalwasser's unrefuted testimony was that he lives close to an abandoned (that is to say, no longer maintained) Township road known as Old Camp Fatima Road. Some 600 feet from his house is a newer, maintained Township road called New Camp Fatima Road. West and northwest of his property is a State road, LR 10029. Three or four cars a day travel on Old Camp Fatima Road; twelve to fifteen cars per day use New Camp Fatima Road. All three of these roads are winding and steep. Even the State road is unpaved and no more than one lane in some portions; New Camp Fatima Road is a dirt road. At times the dust clouds raised by cars speeding along New Camp Fatima Road have reached Kwalwasser's house.

Some time in the past, before strip mining began, portions of the 1087 acres included in the permit area were logged; the logging trucks used the

aforementioned roads. Kwalwasser's observations of the effects of logging truck traffic on those roads, and the interference by those trucks with Kwalwasser's use of the roads, constitute the main basis for Kwalwasser's concerns about coal truck traffic. However, Kwalwasser presented no evidence on the amount of coal truck traffic to be expected, or on the truck sizes to be used. In fact, Kwalwasser made no showing that Kerry coal trucks really would use the aforementioned roads during mining on non-Kwalwasser property, although he obviously did believe those roads would be used.

Under the facts summarized in the preceding paragraphs, we must conclude that Kwalwasser has not met his burden of showing the coal truck traffic on the roads would be so hazardous, or would cause so much dust to fall on Kwalwasser's house, that granting the permit was an abuse of DER's discretion.

There remains another point to be discussed, however, before we can altogether dismiss this issue 3.

DER's Scott Horrell admitted that DER had not considered the possibly hazardous effects of the coal truck traffic on the aforementioned roads or on other traffic using those roads, nor had DER consulted with PennDOT on this question; DER regarded road use regulations as outside its province, though within the province of, e.g., PennDOT or the Township. In Township of Indiana and Concerned Citizens of Rural Ridge v. DER, 1984 EHB 1 (Adjudication, January 3, 1984), we gave serious consideration to the claim that DER had abused its discretion by granting a landfill permit without sufficiently weighing the effects on road safety of the refuse truck traffic to the landfill. In Indiana we ruled DER had not abused its discretion, but only upon evidence that DER had requested information on traffic effects, and had requested PennDOT to review this information.

If DER has a duty to review traffic effects, or has a duty to consult with PennDOT on traffic effects, then DER's failure to consider road traffic

effects in the instant appeal--on the grounds that such effects are outside DER's province--would be an abuse of DER's discretion. But Kwalwasser has given us no authority for holding that DER has such a duty. Kwalwasser does quote Doris J. Baughman v. DER, 1979 EHB 1 at 19, where we held:

> Article I, Section 27, of the Pennsylvania Constitution requires that when the DER is made aware of an activity for which a party is seeking from the DER a permit has the potential to cause a nuisance or an environmental incursion, the DER must at least determine the likelihood of its occurrence, and if need be, take steps to require the applicant to prevent or minimize the incursion.

However, we do not believe this quotation implies DER has the duty to consider road traffic effects in its evaluation of every surface mining application DER receives, nor do we believe it would be good public policy for DER to be assigned this duty. There is no indication whatsoever, in the evidence Kwalwasser presented, that Kerry's coal truck traffic on the aforementioned roads has any reasonable likelihood of becoming a nuisance.

Moreover, the aforesaid quotation from Baughman, supra, was written by the Board in the course of justifying a ruling that DER should have considered noise generation before issuing plan approvals for operation and construction of a coal cleaning plant. Road traffic apparently was not within the contemplation of the Board when it issued the above-quoted Baughman ruling. Indeed, in Township of Salford v. DER, 1978 EHB 62 at 89, the Board rejected a contention that a permit for a surface mining permit to operate a rock quarry should have been denied because of adverse truck traffic effects, saying (in effect) that traffic regulation was a matter for other governmental bodies than DER. This Salford statement is consistent with our later ruling in Indiana, supra, wherein we stated, "The primary responsibility for evaluating road utilization from the standpoint of traffic safety is PennDOT's, not DER's."

Therefore, although the issue is not wholly free from doubt, but recognizing that Kwalwasser has the burden of showing DER abused its discretion, we hold that in this appeal DER's failure to consider coal traffic effects on the aforementioned roads near Kwalwasser's property was not an abuse of DER's discretion.

H. DUST

This brings us to our last issue requiring discussion, namely issue 2, supra. Kwalwasser has experienced concerns about the noise and dust which Kerry's mining operations will produce; the dust referred to here is exclusive of the dust from road traffic, discussed supra. First, we shall examine this dust contention. There was unrebutted testimony that DER had reviewed and approved a dust control plan, submitted by Kerry as part of its permit application, and incorporated into the permit by paragraph 5 of the permit face sheet (Kwalwasser Ex. 2). The dust control plan which was admitted into evidence (Kerry Ex. I), lists various specific measures Kerry will undertake to minimize fugitive dust generation. Kwalwasser offered absolutely no evidence that these dust control measures would be inadequate to prevent dust from adversely affecting his person or his property, even if Kwalwasser's poor health (Findings of Fact 23-25) and his home's special construction (Finding of Fact 109) are taken into account.

Therefore we cannot conclude that Kwalwasser has met his burden of showing that DER's approval of the permit (with its incorporated dust plan) was an abuse of discretion. We are concerned, however, that the permit imposes no requirements whatsoever on Kerry for monitoring the effectiveness of Kerry's dust control measures. The permit imposes very specific water monitoring requirements on Kerry, in accordance with applicable regulations, e.g., 25 Pa.Code §87.116. We recognize that there are no corresponding regulations requiring DER to provide for monitoring of Kerry's dust control measures, but we do not believe this lack

of regulations relieves DER of the responsibility for requesting dust fall monitoring, if such a request would not be unreasonable. As we stated in Coolspring Township v. DER, 1983 EHB 151 at 177:

> [A]ppellants have the burden of showing DER abused its discretion in granting the permit. However, DER certainly has the responsibility of seeing to it that the permit, once granted, is operated in a fashion which preserves the public health, safety and welfare, including conducting necessary inspections. . . [W]here appellants have produced as much expert testimony about the need for monitoring as they have in this appeal, and where the monitoring would be inexpensive and unoppressive (as it would be in the instant appeal), we feel the burden falls on DER to show that adding monitoring requirements to the permit is unlikely to additionally protect the public health, safety and welfore.

In Coolspring, supra, on the strength of the just-quoted holding, we held that DER's monitoring requirements were insufficient and an abuse of discretion; we then exercised our discretion to modify DER's monitoring requirements, under the authority of Warren Sand and Gravel, Inc. v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). In the instant appeal Kwalwasser has not put forth expert testimony about the need for monitoring dust levels; on his sole testimony about his concerns that dust from Kerry's mining operations will adversely affect him, we cannot hold that DER has abused its discretion in failing to require dust fall monitoring. Indeed, we do not know if requesting such monitoring would be reasonable, although we do note that EQB-approved means of measuring dust fall apparently do exist. 25 Pa.Code §139.4(5). Nevertheless, we do think it would be an abuse of discretion for DER to permit Kerry's mining to approach closer and closer to Kwalwasser's property without ever giving any thought to the possibility of monitoring the effectiveness of Kerry's dust control measures so that those measures —if insufficient—can be improved before mining commences on Phase 11 immediately

adjacent to Kwalwasser's property.

I. NOISE

DER issued the permit without giving any consideration to the amount of noise which Kerry's mining operations might generate. Mr. Horrell testified that there were no rules and regulations requiring DER to examine noise generation in the course of DER's review of a surface mining permit application. Kwalwasser testified that he already has heard some noise at night from the mining operation at a time when Kerry still was mining in Phase One, about a mile and a half from Kwalwasser's home. Kwalwasser's post-hearing brief argues that under the authority of Baughman, as quoted supra, DER's failure to consider noise generation before granting the permit was an abuse of discretion. Kerry's post-hearing brief argues that--absent a clear showing that the noise from Kerry's mining operations would rise to the level of a public nuisance--DER has no authority to review the permit from the standpoint of the mining operations' potential for noise generation, or to set noise limit conditions on those operations. Kerry further argues (in effect) that because only Kwalwasser has complained about the noise, the Board cannot conclude the noise from Kerry's mining operations constitutes a public nuisance.

We agree with Kerry that DER should not reject Kerry's permit application because DER believes the noise from Kerry's mining operations will be a private nuisance to Kwalwasser. Such a rejection would amount in essence to a DER determination that Kwalwasser's continued use and enjoyment of his property deserves greater weight than Kerry's use and enjoyment of its property. As explained supra--in connection with our refusal to consider the diminution of Kwalwasser's property value which Kerry's mining operations may cause--DER's decision to grant or reject a permit must not be based on any attempted balancing of the individual property rights of the interested private parties.

On the other hand, we do not agree that Kerry's mining-generated noise necessarily is a private nuisance because only one person, Kwalwasser, has come forward to complain about the noise. There may be many possible reasons why there have been no other complainants about noise in this appeal; correspondingly, the willingness of other persons in the area to bear with highly obtrusive noise levels, for whatever reasons such persons may have, would not imply DER must regard such noise levels as not constituting a public nuisance and therefore beyond DER regulation.

The Restatement 2d of Torts, §821B, defines a public nuisance as "an unreasonable interference with a right common to the general public" [a similar definition is given in Commonwealth v. Barnes and Tucker, 303 A.2d 544 (Pa. Cmwlth. 1973), rev'd on other grounds, 319 A.2d 871 (Pa. 1974)]. Some of these public rights, e.g., to clean air and pure water, are enumerated in Article One, Section 27 of the Pennsylvania Constitution. We believe that enjoyment of quiet, serene surroundings is another public right. There is no reason why transients, e.g., hikers, who normally would not be expected to register complaints with the local authorities, should be subjected to highly objectionable noise levels while in the area near the mine. Moreover, DER has the power to reject permits which would cause public nuisances, even in the absence of specific statutory authority. Cambria Coal Company v. DER, 1983 EHB 23. Therefore we hold that DER can and should regulate noise generation from Kerry's mining activities, to prevent such noise from unreasonably interfering with Kwalwasser's right to quiet serenity, if DER finds the noise could be sufficiently loud and extensive to constitute a public nuisance. If Kerry's mining operations on Phase 11 many hundreds of feet from Kwalwasser's house, or on even more distant Phases from Kwalwasser, can cause unreasonable noise disturbances at Kwalwasser's house, Kerry's mining-generated noises must be unreasonably disturbing throughout the community surrounding those

operations, i.e., must be a public nuisance. The holding immediately supra is consistent with the result in Baughman, supra, wherein the Board determined that DER had abused its discretion by not examining noise impact before issuing plan approvals for a proposed coal cleaning plant. Baughman (at note 11) also points out that until 1978 DER's Bureau of Air Quality was titled the Bureau of Air Quality and Noise Control, and was regulating noise under DER's general power to abate nuisance, 71 P.S. §510-17. This power under 71 P.S. §510-17 has been affirmed by the Pennsylvania courts. Ryan v. DER, 373 A.2d 475 (Pa.Cmwlth. 1977).

We conclude that DER's failure to give any consideration to noise generation when reviewing Kerry's permit application was an abuse of discretion. Before granting a permit, DER is required to consider the possibility that the noise levels from operations under the permit will rise to the level of a public nuisance. DER should not grant a permit which will cause a public nuisance.

CONCLUSIONS OF LAW

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

2. All issues other than those designated as issues 1 - 9, supra, are irrelevant to this appeal and/or have been waived.

3. DER did not abuse its discretion in failing to consider the possible effects upon the appellant's property values caused by the permittee's mining operations.

4. DER did not abuse its discretion in failing to give consideration to the appellant's special health problems when it issued the permit.

5. DER did not abuse its discretion by failing to require the consent

to entry of landowners whose lands lie within the area generally covered by the permit where incremental phase approval for mining on the portion of the permit covering those lands has not yet been granted.

6. DER did not abuse its discretion in failing to require an overburden analysis or by failing to put its decision not to require such an analysis in writing.

7. DER did not abuse its discretion by failing to consider the possible effect of traffic to and from the mine upon appellant's use and enjoyment of his property.

8. DER did abuse its discretion by failing to consider the possibility of requiring appropriate monitoring by the permittee of its compliance with the permit's dust control plan.

9. DER abused its discretion in failing to give consideration to the possibility that noise generated by the mining operations may rise to the level of a public nuisance.

10. DER should not grant a permit which will cause a public nuisance.

O R D E R

WHEREFORE, this 24th day of January , 1986, Kwalwasser's appeal is sustained. The permit is suspended and remanded to DER for action consistent with the foregoing discussion.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, MEMBER

ANTHONY J. MAZULLO, JR., MEMBER

Chairman Woelfling did not participate in this adjudication.

DATED: January 24, 1986

cc: Bureau of Litigation
Harrisburg, PA

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Western Region

For Appellant:
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Pittsburgh, PA

For Permittee:
Bruno A. Muscatello, Esq.
Butler, PA

IRA W. FAST :
:
v. : EHB Docket No. 85-298-W
:
COMMONWEALTH OF PENNSYLVANIA : (Issued: January 24, 1986)
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis:

Appeal is dismissed pursuant to Rule 21.124 for Appellant's repeated failure to comply with Board orders regarding the filing of a pre-hearing memorandum.

OPINION

By telegram dated July 22, 1985, Ira W. Fast notified the Board that he was challenging the Department of Environmental Resources' June 25, 1985 forfeiture of certain surety and collateral bonds posted by Mr. Fast in connection with Mining Permits 1398-1, 1398-1CA, and 1398-2. As is the Board's practice, the telegram was docketed as a skeleton appeal and, on July 23, 1985, an acknowledgment and request for additional information was sent to Mr. Fast. The requested information was received by the Board on August 19, 1985.

Pre-Hearing Order No. 1 requiring the submission of a pre-hearing memorandum by Mr. Fast on or before November 4, 1985, was issued by the Board on August 20, 1985. When Appellant failed to file his pre-hearing memorandum, the Board, by certified letter dated November 22, 1985, warned him that unless his

pre-hearing memorandum was filed on or before December 2, 1985, it could apply sanctions. This letter was returned, unopened, to the Board. Another certified letter, dated December 6, 1985, was sent to Mr. Fast, informing him that unless he filed his pre-hearing memorandum by December 6, 1985, the Board would apply sanctions. That letter was also returned, unopened. Because Mr. Fast was proceeding pro se, the Board made yet another attempt to impress upon him that he had an obligation to file a pre-hearing memorandum. The Board has yet to receive any response, returned letter or otherwise, to its last certified letter of December 26, 1985. All of this correspondence was directed to Mr. Fast at the address indicated on his Notice of Appeal.

The Board makes every attempt, within reason, to explain its procedures to appellants who are proceeding pro se. The Board is also reluctant to dismiss appeals for failure to obey its orders, especially in matters such as the one before us where the Department bears the burden of proof. But, continued and unexplained disregard for the Board's orders warrants dismissal of an appeal, under Rule 21.124, even in situations where the Department has the burden of proof. Elbe Contracting Company v. Commonwealth, DER, EHB Docket Nos. 85-109-G and 85-110-G (Opinion and Order issued August 29, 1985).

ORDER

AND NOW, this 24th day of January, 1986, the appeal of Ira W. Fast is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

Anthony J. Mazullo Jr.
ANTHONY J. MAZULLO, JR., MEMBER

Edward Gerjuoy
EDWARD GERJUOY, MEMBER

DATED: January 24, 1986

cc: Bureau of Litigation
Harrisburg, PA

For the Commonwealth, DER:
Chief Counsel
Western Region

For Appellant:
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R. D. 1, Box 218
Masontown, PA 15461

bl

WABO COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 85-416-W**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	(Issued: January 24, 1986)

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Synopsis:

The Petition for Supersedeas is denied because there is little likelihood petitioner will succeed on the merits. Petitioner has contended that the Department of Environmental Resources' ("Department") issuance to it of a compliance order pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., is a prohibited, retroactive application of that statute. The application of the Surface Mining Act is held not to be retroactive. The permittee is responsible for violations on its permit area, and partial bond release does not absolve it of responsibility for any violations on the permit area.

OPINION

This appeal arises out of a September 11, 1985, compliance order issued by the Department to the petitioner, WABO Coal Company (hereinafter "WABO"), and Robert Barnhart, Sr., directing them to complete backfilling and remove toxic materials deposited on the area encompassed by Mining Permit 164-1 and Mine Drainage Permit No. 5470330 by November 9, 1985, and to revegetate the area in accordance with the applicable requirements by May 30, 1986. WABO filed a timely appeal of the order and a petition for supersedeas. It also challenged the Department's proposed civil penalties assessment for the violations encompassed by the compliance order. A conference call was held with the Board on October 21, 1985, and the Board issued an order on October 22, 1985, scheduling a hearing, noting that WABO was withdrawing its appeal as it related to the proposed civil penalties assessment, and directing that the parties submit briefs on the issue of whether the Surface Mining Act or a predecessor statute regulating anthracite mining, the Anthracite Strip Mining and Conservation Act, the Act of June 27, 1947, P.L. 1095, amended, ("Anthracite Mining Act") was applicable to the instant proceeding. Following a hearing on November 4, 1985, an order denying the supersedeas was issued on November 8, 1985, with an Opinion to follow.

The record established at the supersedeas hearing could easily obscure the applicable legal principles. It is replete with allegations of failure on the part of the Department to properly administer and enforce the permit requirements, as well as with contentions that personal conflict within the Barnhart family may have motivated the complaints to the Department which led to the Department's eventual discovery of the purported violations and issuance of the compliance order now before the Board. However sympathetic one may be to these facts, the matter must still be judged in light of Rule 21.78 and the

applicable case law.

Rule 21.78(a) provides that:

> §21.78 Circumstances affecting grant or denial
>
> (a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the following factors:
>
> (1) Irreparable harm to the petitioner.
> (2) The likelihood of the petitioner's prevailing on the merits.
> (3) The likelihood of injury to the public.

The Board has previously ruled that a party seeking a supersedeas must satisfy all three standards enumerated in Rule 21.78(a). See Carroll Township Authority v. Commonwealth, DER, 1983 EHB 239, 240. However, it is not necessary to determine whether the petitioner will suffer irreparable harm or whether injury to the public will occur where the Department had no underlying authority to take the action at issue. Ny-Trex, Inc. v. Commonwealth, DER, 1980 EHB 355. The issue of Department authority is particularly relevant to this matter, since WABO's permit was originally issued under the Anthracite Mining Act, mining on the site was allegedly completed prior to the passage of the 1980 amendments to the Surface Mining Act, and the compliance order herein appealed was issued pursuant to the Surface Mining Act and the approved primary program enacted thereunder.

The Department of Mines and Mineral Industries issued a permit to WABO in 1971 to conduct anthracite strip mining pursuant to the Anthracite Mining Act, and WABO submitted a $5000 bond as required. The piece of property to be mined by WABO was leased from Walter Barnhart, the uncle of Robert Barnhart, Sr., the president of WABO. The property contained pits which were opened and abandoned

without reclamation by a previous operator. The area encompassed by the mine drainage permit was approximately ten acres.

The property was mined by WABO, beginning in late 1970 and continuing until the end of 1971. Robert Barnhart then worked construction until 1973 and resumed mining coal in 1974. He claims WABO terminated operations at the site in June, 1976, although he admitted stockpiling coal on two areas within the permit area and selling it to Meadowbrook Coal Company and several other companies in 1980 and 1981. This is substantiated by royalty checks to the heirs of Walter Barnhart. Equipment remained on the site until 1982, and WABO claims reclamation was completed in 1982-1983.

Two of Robert Barnhart's sons, both of whom are alienated from their parents, testified that their father had left an open cut on the permit area, ostensibly for the purpose of avoiding having the Department declare the area abandoned, and that they had assisted their father. However, they were unclear as to the exact dates. Their testimony was corroborated by one Glen Greenawald, who is the husband of Jane Barnhart, a daughter of Walter Barnhart and one of his heirs. Mr. Greenawald was also a friend of the late Walter Barnhart and was familiar with the site.

The Department inspected the WABO operation in its active and reclamation phases. However, the Board was without benefit of the testimony of the inspector most familiar with the site, since he is deceased. Following inspections, the filing of completion reports relating to 1.5 acres within the permit area, and the publication of the required notices for bond release, the Department released $4700 of the $5000 bond posted for the site on September 13, 1983. The bond release application contained incorrect information regarding the identity of the property owners, listing Walter Barnhardt (sic) and Robert Barnhardt (sic). Aware

that Walter Barnhart was dead, the Department assumed the property passed to Robert Barnhart as joint owner and that notification of the property owner was unnecessary because he was the operator.

Subsequent to the bond release, a compliance order relating to the 1.5 acre area was issued in June, 1984. The appellant complied with the order. Greenawald, however, contacted the Department in October, 1984, regarding responsibility for backfilling the site. Coincidentally, this was at the time Robert Barnhart's sons, Robert, Jr. and Michael, obtained consent from Walter Barnhart's heirs for a proposed mining operation on another portion of the property. The Department was unaware of the two unreclaimed areas within the permit boundary, one having volunteer growth of eight to ten years and the other having volunteer growth of two to five years. Presumably, at the time the Department discovered these unreclaimed areas, it became aware that the reclamation which formed the basis for the bond release was on an area which was not within the permit and, therefore, not covered by the bond.

The likelihood of success on the merits of this appeal turns in large part upon whether the Department's issuance of the September 11, 1985, compliance order, given these facts, was an improper retroactive application of the 1980 amendments to the Surface Mining Act. Under Pennsylvania law there is a presumption against retroactivity unless a statute or regulation clearly states on its face that it is to be given retroactive application. §1926 of the Statutory Construction Act, 1 Pa. C.S.A. §1926 and Pa. State Education Association v. DPW, 68 Pa.Cmwlth. 279, 449 A.2d 89 (1982). Merely because the facts pertinent to the application of a law or regulation came into existence prior to the effective date does not necessarily result in a retroactive

operation. Mt. Rest Nursing Home, Inc. v. DPW, 73 Pa.Cmwlth. 42, 457 A.2d 600 (1983).

Appellants argue that the application of 25 Pa.Code §§88.115 (relating to completion of backfilling) and 88.119 (relating to covering of toxic material) to the instant situation is a proscribed, retroactive application of those regulations, since the mining activities allegedly terminated prior to the effective date of those regulations. The date that the extraction of the mineral terminated,that the sites were left open, or that toxic materials were left exposed is not germane. The critical issue is whether the lack of reclamation and the exposure of toxic materials continued after October 10, 1980.

There is unrebutted evidence that the unreclaimed areas exist on WABO's permit area and that they came into existence sometime subsequent to the issuance of WABO's permit in 1971. The presence of volunteer growth in the two unreclaimed areas indicates that one came into existence roughly in the time span of 1975 to 1977, and the other 1980 to 1983. With respect to the toxic materials, it is not entirely clear when they were deposited, but it is clear that they presently exist.

This situation is analogous to that in Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974), wherein the Pennsylvania Supreme Court held that the Department's issuance of an order pursuant to the 1970 amendments to the Clean Streams Law, 35 P.S. §691.1 et seq., which required the abatement of a polluting discharge from a mine in which all activity had ceased prior to the effective date of the amendments was not a retroactive application of the law. The condition, the Court held, rather than the event which created it, was the critical issue. If the condition existed on and after the effective date of the amendments, the amendments were applicable. Here, as in Barnes & Tucker, the

conditions--unreclaimed areas and uncovered toxic materials--are presently in existence and, consequently, the application of §§88.115 and 88.119 is not a retroactive application.[1]

Two other issues must be addressed. Partial release of its bond by the Department, WABO suggests, somehow immunizes it from any responsibility to properly reclaim its permit area. The bonding scheme in the Surface Mining Act was never intended by the General Assembly to be the exclusive means of assuring compliance with the mining regulatory program. Just as the Department is not barred from using other enforcement remedies to compel compliance subsequent to a bond forfeiture, it is not prohibited from employing those remedies where bond release has occurred and violations are present, 52 P.S. §§1396.40 and 1396.20.

Testimony was given by Robert Barnhart, Sr. that WABO was not responsible for opening the cuts which were the subject of the compliance order and, as a result, was not responsible for backfilling them. Mr. Barnhart's sons gave contrary testimony, but more importantly, the testimony of Bradley Elison, the Department's Compliance Specialist, establishes that these open cuts came into existence during the lifetime of WABO's permit. As permittee, WABO was and is responsible for conditions on its permitted area.

Since WABO's appeal is focused on the Department's lack of authority to issue the order in question and it is, in light of the above, unlikely to succeed on the merits, it is unnecessary to address the other two elements necessary for

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1 Identical or substantially similar requirements were imposed on WABO under the predecessor statutes and regulations. For example, 25 Pa.Code §§77.92(f)(1) (relating to backfilling) and 77.92(f)(3) (relating to burial of toxic materials), both now repealed, were made applicable to permits issued under the Anthracite Mining Act by virtue of 25 Pa.Code §77.86, now repealed. No greater or more onerous standard of conduct in this respect has been imposed by the 1980 amendments to the Surface Mining Act.

the issuance of a supersedeas. Ralph Bloom, Jr. v. Commonwealth, DER, 1984 EHB 685.

ORDER

For the foregoing reasons, the November 8, 1985 denial of WABO Coal Company's Petition for Supersedeas is affirmed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: January 24, 1986

cc: Bureau of Litigation
Harrisburg, PA

For the Commonwealth, DER:
Timothy Bergere, Esq.
Central Region

For the Appellant:
Richard J. Wiest, Esq.
WILLIAMSON, FRIEDBERG & JONES
Pottsville, PA

bl

U. S. COAL, INC. :
:
v. : EHB Docket No. 85-413-W
:
COMMONWEALTH OF PENNSYLVANIA : Issued: January 27, 1986
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis:

This appeal is dismissed because it was not timely filed and appellant has not shown sufficient facts to allow an appeal nunc pro tunc.

OPINION

U. S. Coal, Inc. petitioned this Board on October 10, 1985 to allow an appeal nunc pro tunc from a notice, dated June 3, 1985, from the Department of Environmental Resources (DER) of intention to forfeit certain bonds posted by U. S. Coal for its mining operations. In its Petition for Allowance of Appeal Nunc Pro Tunc, U. S. Coal alleged that it mailed to the Board a Notice of Appeal on June 6, 1985, but the Board has no record of receiving this Notice of Appeal. DER filed a Motion to Dismiss U. S. Coal's petition on November 6, 1985.

Because U. S. Coal, in its Petition for Allowance of Appeal Nunc Pro Tunc, raised a factual question as to whether this Board was responsible for its appeal not having been timely docketed, the Board, by Opinion and Order dated December 13, 1985, gave U. S. Coal an additional opportunity to show facts sufficient to allow an appeal nunc pro tunc. Nevertheless, by letter dated December 27, 1985, U. S.

Coal informed the Board that it had no proof that the Board received the Notice of Appeal other than its standard procedure of mailing the original document directly to the Board's offices by ordinary, first class mail.

For the Board to allow an appeal nunc pro tunc, the untimely filing of the Notice of Appeal must have been the result of fraud or a breakdown in the Board's procedure. Petricca v. DER, 1984 EHB 519; Soberdash Coal Company v. DER, 1983 EHB 323. Moreover, the date of receipt by the Board is determinative of timeliness, and not the claimed date of mailing. Petricca v. DER, 1984 EHB 519. Thus, U. S. Coal has the burden of showing that this Board received its Notice of Appeal within the thirty day appeal period, and U. S. Coal has not met this burden.

U. S. Coal has requested this Board to defer ruling on DER's Motion to Dismiss, pending the outcome of a proceeding between DER and U. S. Coal in the Bankruptcy Court for the Western District of Pennsylvania. The Board fails, however, to see the relevance of the outcome of the bankruptcy proceeding to the issue of whether fraud or a breakdown in the Board's procedure caused U. S. Coal's appeal to be untimely. This Board simply has no jurisdiction over untimely filed appeals, Rostosky v. DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976), and U. S. Coal has not shown any circumstances that would warrant the granting of an appeal nunc pro tunc.

ORDER

AND NOW, this 27th day of January, 1986, the Petition of U. S. Coal, Inc., at EHB Docket No. 85-413-W, for Allowance of Appeal Nunc Pro Tunc is denied, and this case is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

Anthony J. Mazullo Jr.
ANTHONY J. MAZULLO, JR., MEMBER

Edward Gerjuoy
EDWARD GERJUOY, MEMBER

DATED: January 27, 1986

cc: Bureau of Litigation
Harrisburg, PA

For the Commonwealth, DER:
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Western Region

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

GIOIA COAL COMPANY :

:

Docket No. 84-211-G

:

Issued: January 28, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By Edward Gerjuoy, Member

Syllabus

This appeal of a DER order directing a mine operator to replace a private water supply, under §1396.4b(f) of the Surface Mining Act, 52 P.S. §1396.1 et seq., is dismissed. Although the operator has provided a well to replace an affected spring, the well does not provide a source of water adequate in quantity for the purposes served by the original supply. Where the original water supply was shared by two parties, each having control over access to the supply, the replacement water supply must allow each party control of access to the supply as well. The replacement supply provided by the mine operator allows one party's supply to be cut off through the unilateral action of the other party. Therefore, the replacement supply cannot be said to be an alternate source adequate in quantity. The mine operator must provide a water supply which enables each party to control their own supply.

The replacement water supply which has been installed by the mine operator is otherwise satisfactory however. It is sufficiently reliable and does not require excessive operating and maintenance costs. The legislature in enacting 52 P.S. §1396.4b(f) did not require that a replacement water supply require no more maintenance than the original source.

FINDINGS OF FACT

1. Appellant Gioia Coal Company ("Gioia") operates a surface mine ("the mine") in Wharton Township, Fayette County, Pennsylvania, under Mine Drainage Permit No. 3375SM63 ("the permit").

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), which is the agency of the Commonwealth empowered to administer and enforce the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. ("SMCRA").

3. On June 8, 1984 DER ordered Gioia, under the authority of section 4.2 of the SMCRA, 52 P.S. §1396.4b, to restore or replace the water supply at the residence of Albert and Ruth Novotnak ("the Novotnaks") in Wharton Township, Fayette County.

4. This order was timely appealed by Gioia, under the above-captioned docket number.

5. A hearing on the merits of this matter was held on November 13, 1984.

6. At the outset of this hearing, at the request of the parties, the Board orally consolidated the appeal at 84-211-G with a previously filed Gioia appeal docketed at 84-206-G, which was concerned with the same issues as the appeal at 84-211-G; the appeals were consolidated under the above-captioned docket number.

7. Commencing on August 11, 1981 and continuing to March 3, 1983, Gioia conducted its mining activities at the mine as a subcontractor to a company named Mt. Thor Minerals ("Mt. Thor").

8. On March 3, 1983, the permit was transferred to Gioia, which thereafter operated the mine as the permittee, not as a subcontractor to Mt. Thor.

9. For about seventeen years the Novotnaks have owned a cottage in Wharton Township, Fayette County, in the neighborhood of the mine.

10. Adjacent to the Novotnaks' cottage is a cottage owned by Ethel McGregor ("McGregor").

11. Formerly the Novotnaks and McGregor obtained their water supply from the same source, a spring; they cooperated amicably in the use and maintenance of the spring.

12. The spring ran into a cistern, to which were connected pipes from each cottage (the Novotnaks' cottage and McGregor's cottage).

13. Each cottage had its own pump, which pumped water from the cistern into the cottage.

14. Mr. Novotnak testified that the spring had been located on his property; McGregor believes the spring was located on the property line between the two cottages.

15. No surveying evidence, whether supporting or contradicting Mr. Novotnak's testimony about the spring location, was offered at the hearing.

16. The Novotnaks mainly use their cottage in the summer and fall, but occasionally use it at other times of the year.

17. The spring dried up some time in August 1982.

18. Shortly after the spring dried up, DER requested Gioia to replace the Novotnak and McGregor water supplies.

19. Gioia agreed to do so, after conversations with DER inspectors and without a formal order from DER.

20. At the hearing on the merits Gioia, though not explicitly admitting responsibility for loss of the spring, did not challenge the justification for DER's original request to Gioia to replace the Novotnak and McGregor water supplies.

21. After consultation with DER inspectors, Gioia decided to drill a well which would replace the original spring.

22. The well was drilled on September 9, 1982, very soon after Gioia was requested to replace the spring.

23. The well was drilled to a depth of 100 feet.

24. The well was drilled on McGregor's property because Mr. Novotnak refused to give Gioia permission to drive the well-drilling equipment onto the Novotnaks' property; Mr. Novotnak did not complain to Gioia when he saw the well being drilled on the McGregor property (Tr. 31).

25. A pipe runs from the well to the cistern that previously had been supplied by the spring.

26. The well contains a pump.

27. The pump forces water from the well into the pipe mentioned in Finding of Fact 25; and thence into the cistern; a mechanical float system in the cistern activates the pump when the water level in the cistern drops to about half of its full value.

28. The float system operates much like the float controlling water flow in a toilet tank.

29. Once the water reaches the cistern from the well, the system of pipes and pumps described in Findings of Fact 12 and 13 operates as previously to bring water into the two cottages.

30. The pump which delivers water to the Novotnak cottage from the cistern is energized from the main electrical power line into the Novotnak cottage.

31. The pump which delivers water to the McGregor cottage from the cistern is energized from the main electrical power line into the McGregor cottage.

32. The pump in the well is energized from the main electrical power line into the McGregor cottage; the fuse box for this main power line is located inside the McGregor cottage.

33. The electrical and mechanical design of the replacement water supply installed by Gioia was not discussed with DER before installation, but was inspected by DER shortly after installation.

34. At the time, DER made no complaints about the installation.

35. The well furnishes water of satisfactory quality; the quantity of water available probably is greater than the spring regularly supplied.

36. McGregor has had no problems with the replacement water supply since September 1984, when she returned from Florida to once again occupy her cottage.

37. McGregor has had tenants in the cottage since the well was drilled; none of these tenants has complained to McGregor about problems with the replacement water supply.

38. DER issued the appealed-from order to Gioia because of complaints from Mr. Novotnak about the adequacy of the replacement water supply.

39. Mr. Novotnak's complaints are as follows:

a. As presently designed, if McGregor's electricity is shut off the pump in the well will not operate and the Novotnaks cannot get any water.

b. As presently designed, if the float system installed in the cistern gets stuck in the full position, or otherwise fails to activate the well pump when the cistern water level falls, the Novotnaks will be unable to get water.

c. The electrical wiring installed by Gioia presents a shock hazard.

40. On at least one occasion, McGregor's electricity had been shut off by the electric power company when the Novotnaks wanted to occupy their cottage.

41. The float system in the cistern is of simple and reliable design, but does require some maintenance.

42. The float system operates satisfactorily, but occasional sticking of the float in the full position cannot be ruled out.

43. If the cistern becomes empty because the well pump has failed to operate, the pipes connecting the cistern to the Novotnak and McGregor cottages also empty and the pumps drawing water from the cistern to the cottages become inoperative; refilling the pipes is a tedious procedure which, for the Novotnak cottage, requires Mr. Novotnak to carry many bucketfulls of water several hundred feet.

44. At the time of the hearing, Mr. Novotnak was 62 years old.

45. The well and the cistern float system, along with the necessary electrical wiring, were installed by a competent contractor hired and paid by Gioia; the wiring was done by a certified electrician.

46. Gioia received a four year guarantee on the installation.

47. Gioia has not escrowed any funds to cover necessary repairs on the water replacement system it installed, nor has Gioia escrowed funds to cover the electricity costs for operating the system.

48. Gioia has not been requested to escrow such funds.

49. McGregor has been paying the electricity bill regularly in recent months, and intends to continue to do so, without making any demands on Novotnak for his share of the costs of running the pump in the well.

50. It is likely the float in the cistern would become inoperative at times when the temperature was low enough to freeze the water in the cistern.

51. For reasons of possible hazard to men working on the pump in the well and associated wiring, the power company does not want to have the well pump energized by two separate lines, one running from the main power line into the McGregor cottage, and the other running from the main power line into the Novotnak cottage.

52. One reason why Gioia connected the pump in the well to the McGregor main power line is that Mr. Novotnak indicated he intended to turn off his electricity during those portions of the year when he did not expect to use his cottage.

53. At the close of the hearing the Board declared its belief that this matter could and should be settled by agreement between the parties.

54. On December 5, 1984, the Board issued an Order affirming its belief that the parties could and should settle this matter, but declaring that if the Board did have to adjudicate this matter the adjudication probably would incorporate the following terms:

a. The requirement that the electrical system installed by Gioia conform to standards, as attested by a registered electrician.

b. The provision that Gioia make a pre-payment of electric power costs to run the pump for a reasonable number of years, with this pre-payment to be divided in some fair way between McGregor and Novotnak.

c. The requirement that there be a mechanism to prevent the power from being turned off when Novotnak is using or seeks to use the newly installed well.

55. As of this date, more than a year after issuance of our December 5, 1984 Order, the parties--though they have tried--have not been able to reach a settlement.

56. On March 12, 1985, the electrical system installed by Gioia was inspected by J. R. Heinsberg, Regional Manager of the Middle Department Inspection Agency, and certified as safe.

57. DER has accepted Mr. Heinsberg's certification as evidence that the electrical system installed by Gioia is safe and in compliance with requirements of the National Electrical Code (Board Ex. 1).

58. Since November 13, 1984, DER has received no complaints from the Novotnaks concerning malfunctioning of the pump installed in the well or the float system in the cistern (Board Ex. 1).

59. DER has stipulated that the adequacy of the electrical system no longer is at issue in this litigation.

60. DER has stated that it does not consider the reliability of the mechanical apparatus installed by Gioia to be at issue in this litigation.

61. There was no evidence that the reliability of the mechanical apparatus has been attained only via an inordinate maintenance effort.

62. There was no evidence that the electricity costs attendant upon operating the pump in the well were "excessive".

63. McGregor has been paying the electricity bills without complaint.

64. McGregor has not found it necessary to ask Novotnak to pay his share of the electricity costs of operating the well pump, which costs are billed solely to McGregor (recall Finding of Fact 32).

65. DER has not specified how Gioia is to comply with the appealed-from order; according to DER, that is up to Gioia to decide (Tr. 104). In particular, DER is not necessarily insisting that Gioia drill a new well to serve just the Novotnak cottage.

OPINION

The foregoing Findings of Fact make it quite clear that this matter should have been settled between the parties, without need for adjudication by the Board. Nevertheless, for reasons which are not on the record, the parties have been unable to settle. Therefore, the Board must and does adjudicate this dispute.

In essence our resolution of this matter rests on the construction of the SMCRA, 52 P.S. §1396.4b(f), which reads:

> (f) Any surface mining operator who affects a public or private water supply by contamination or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply. If any operator shall fail to comply with this provision, the secretary may issue such orders to the operator as are necessary to assure compliance.

It is undisputed that Gioia affected the original Novotnak-McGregor spring, received a DER request to replace the Novotnaks' and McGregor water supplies, and then proceeded to drill a well intended to serve as such replacement. Nevertheless, DER--after receiving complaints from the Novotnaks but not from McGregor--determined that for the Novotnaks the well Gioia had drilled (along with its arrangements for pumping water to the cistern and thence to the Novotnak cottage) was not "an alternate source of water adequate in quantity and quality for the purpose served" by the original spring. DER's appealed-from order to Gioia was the obvious conse-

quence of the aforesaid DER determination. We must decide whether DER's order was an abuse of DER's discretion. Warren Sand and Gravel, Inc. v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). The burden of proof in this matter falls on DER. 25 Pa.Code §21.101(b)(3). To our knowledge, §1396.4b(f) has not been construed under any facts even remotely resembling those in the present appeal. The parties have waived the filing of post-hearing briefs, and therewith have not proposed any constructions of §1396.4b(f) for our consideration.

The evidence shows that the well water supply, when flowing to the Novotnaks, assuredly is adequate in quantity and quality when compared to the water supplied the Novotnaks by the original spring. The evidence also shows that there are reasons why the well water supply may not prove to be quite as reliable as the original spring. These reasons are those stated in Findings of Fact 39a and 39b, which on the evidence we judge to be non-frivolous complaints by Mr. Novotnak. Mr. Novotnak's complaint 39c, though perhaps made by Mr. Novotnak out of serious concern, now is seen to have been without merit in the light of Findings of Fact 56 and 57, a conclusion with which DER now obviously agrees (Finding of Fact 59).

A. Reliability and Maintenance

Insofar as the Novotnaks are concerned, the original spring required maintenance only of the cistern, the pipe from the cistern to the Novotnak cottage, and the pump which via this pipe delivers water from the cistern to the Novotnak cottage. The system installed by Gioia has introduced extra elements requiring maintenance, namely the well, the pump in the well, the pipe from the well to the cistern, the mechanical float system in the cistern, and the electrical wiring, etc., needed to energize and control the pump in the well. The first question we must decide is whether this additional apparatus, which must be maintained and obviously has some possibility of failure, per se implies that the well system is

not an "alternate source of water adequate in quantity and quality" under 52 P.S. §1396.4b(f).

We do not believe the Legislature intended or expected that replacement sources of water complying with §1396.4b(f) necessarily would require no more maintenance than the original source. The Legislature must have been aware that many residences in Pennsylvania have a spring as primary water supply. When a spring must be replaced, a well is likely to be the best replacement from the standpoint of the user. A well, with an attendant pump--which frequently is required, as this appeal illustrates--is likely to require more maintenance than the original spring. To construe §1396.4b(f) as requiring that the replacement water supply need no more maintenance than the original supply would imply that the Legislature did not intend that §1396.4b(f) be a remedy for households whose original water supply was a spring which required little or no maintenance. We find this implication absurd; the Legislature is presumed not to intend an absurd result. 1 Pa.C.S.A. §1922(1). We conclude that a replacement water supply which requires more maintenance than the original supply can be consistent with the requirements of §1396.4b(f).

On the other hand, we doubt the Legislature intended that a replacement water supply which (compared to the original water supply) is unreliable or needs excessive maintenance would satisfy the requiements of §1396.4b(f). The question becomes, therefore, whether the replacement water supply installed by Gioia can be characterized as unreliable or as needing excessive maintenance. We find this question must be answered in the negative; certainly DER did not come close to meeting the evidentiary burden required for an affirmative answer. Despite the Novotnaks' complaint summarized in Finding of Fact 39b, McGregor has had no problems with the replacement water supply (Findings of Fact 36 and 37) and the

Novotnaks have not complained about malfunctions since the hearing (Finding of Fact 58). In fact, DER no longer considers the reliability of the apparatus installed by Gioia to be at issue in this litigation. There was no evidence at the hearing that this reliability had been attained only via an inordinate maintenance effort. Similarly, there was no evidence that Gioia's replacement supply was excessively expensive for the Novotnaks compared to the original supply because, e.g., the electricity bills now were very much greater than previously. In the first place, the bills are being paid by McGregor, from whose power line the well pump is energized. Moreover, even if Novotnak had to assume the expenses of paying the bills, there was no evidence that the electricity costs of operating the well pump could be characterized as "excessive"; there was evidence that McGregor has been paying the electricity bills without complaint and without finding it necessary to ask the Novotnaks to pay their share.

In sum, we conclude that relative to the Novotnaks the replacement water supply met the requrements of 52 P.S. §1396.4b(f) insofar as considerations of reliability, maintenance and operating costs are concerned. From these standpoints, the appealed-from DER order requiring Gioia to furnish a new replacement water supply for the Novotnaks (in replacement of the replacement water supply already installed by Gioia) cannot be justified. We stress that this conclusion does not imply that the Novotnaks (and/or McGregor) have no possible damage claims against Gioia; the replacement water supply Gioia installed may be somewhat less reliable and does require somewhat more maintenance and operating costs. We are holding only that on the evidence presented these deficiencies, whether or not quantifiable in money damages, do not rise to a level warranting a finding that the replacement water supply Gioia installed failed to satisfy the requirements of §1396.4b(f). Damages against Gioia, if warranted, must be awarded by the Court of Common Pleas, not by DER or this Board. For similar reasons, we will

not order Gioia to make a pre-payment to the Novotnaks and/or McGregor (see Finding of Fact 54b). While such a pre-payment might be a fair way to recompense the Novotnaks and/or McGregor for their damages, we do not intend to decide damages; indeed the record before us gives no basis for determining damages, if any.

B. Control

The foregoing has dealt with the Novotnak complaint summarized in Finding of Fact 39b. We now turn to the complaint stated in Finding of Fact 39a. In effect the Novotnaks are complaining that they cannot assuredly control their own water supply; in particular, they cannot turn on the electricity to the well pump when they choose, but must rely on McGregor to keep the well pump energized.

We take this complaint of the Novotnaks quite seriously. Previously the Novotnaks had complete control over their water supply, through their control over the electrical power to the pump bringing water to their cottage from the cistern. They still control this pump, but no longer control the pump delivering water to the cistern from the well. On at least one occasion, the power to the well pump had been cut off by the electric power company when the Novotnaks wanted to use their cottage. Although there was no evidence that such a cutoff has occurred more than rarely, the possibility of more frequent occurrences clearly exists, and will continue to exist with the present design of the replacement water supply. The problem for the Novotnaks is compounded by the fact that the fuse box controlling the power to the well pump is located inside the McGregor cottage. Thus, even if McGregor has paid her electricity bills and has not asked the electricity supplier to cut off the electricity to her house, there would be no way for Mr. Novotnak to get water to his cottage if McGregor (or her tenant) had departed the McGregor cottage leaving the fuse box switch in the off position.

We conclude that these just-stated facts meet DER's burden of showing that the replacement water supply Gioia installed did not meet the requirements of §1396.4b(g) with respect to the Novotnaks. Under this statute, the Novotnaks --who previously had total control over their water supply--were entitled to greater control than they presently have. To be specific, we do not believe the Legislature intended that a replacement water supply which might be cut off at any time by the acts of another person should be regarded as an "alternate source of water adequate in quantity" under §1396.4b(f). Therefore Gioia will have to modify its present installation to ensure that Novotnak does have the requisite control over his water supply.

What modification is to be made we leave up to Gioia, as does DER; moreover, again like DER, we do not see that the circumstances necessarily require Gioia to drill a new well serving just the Novotnak cottage, whose well pump would be energized solely from the Novotnak main power supply. We do not recommend the obvious solution of transferring the well pump's power source from the McGregor main line to the Novotnak main line, because this change probably would merely transfer the lack of control problem to McGregor from the Novotnaks (see Finding of Fact 52). The equally obvious solution of having the well pump energized jointly, from the McGregor and the Novotnak main power lines, has been regarded as impractical because of possible safety hazards to men working on the well pump (see Finding of Fact 51). We are not convinced, however, that the mind of man cannot solve this rather modest technical problem. For example, we do not see why the power line to the well pump cannot run through a junction box containing a switch having three positions--connected to McGregor, connected to Novotnak, and off, with the off position capable of being locked by someone working on the electrical system. Such a box, installed near the well and readily accessible to Mr. Novotnak, Mrs. McGregor and workmen, seemingly would satisfy control and safety requirements.

The immediately preceding is just a suggestion, however, perhaps also impractical for reasons which presently escape us. We repeat, it is up to Gioia, not DER or this Board, to decide how to give the Novotnaks their required control. If no way can be found by Gioia other than drilling a new well for the Novotnaks alone, then such a new well will have to be drilled. We recognize that having to drill a new well seems rather hard on Gioia, who promptly installed the present replacement water supply upon DER's request, without argument or recourse to litigation, and who put the well on McGregor's property largely because of Novotnak's uncooperativeness (Finding of Fact 24). The location of the well is not the basic source of the control difficulty which concerns us, however, and Gioia's good intentions cannot excuse the inadequacies of its installation; the control difficulty stems from Gioia's system design, which energized a well pump intended to serve two cottages from the main power line to a single cottage, thereby almost guaranteeing control problems of the sort which have arisen. It is implicit in the immediately preceding ruling that under the facts of this appeal an arrangement which enables Novotnak to control and maintain the well pump without having to enter the McGregor cottage will comply with the requirements of §1396.4b(f), even if such control and maintenance may require that Mr. Novotnak enter upon the McGregor property.

The foregoing ruling has ignored arguments by Gioia, contained in correspondence filed with the Board, to the effect that rights reserved in the Novotnaks' property deed prevent McGregor from depriving the Novotnaks of control over their water supply. These arguments and associated evidence, e.g., the property deed, were not put on the record at the hearing, and the record has not been reopened to admit such material; in fact, Gioia has stipulated that no further testimony need be taken and that the Board can adjudicate this matter on the record before

us (letter from Gioia's counsel to the Board, dated December 11, 1985). Since Gioia also has waived its right to file a post-hearing brief (same December 11, 1985 letter), we rule that issues concerning the Novotnaks' and McGregor's respective rights to access and control the well water supply are not before us. Furthermore, even if these issues had been put before us in proper fashion, we would not decide them, on the well-established basis that this Board does not determine individual property rights. Donald T. Cooper and Kathleen Cooper v. DER, 1982 EHB 250. Once again, such determinations are for Common Pleas Court to make, not DER or this Board.

CONCLUSIONS OF LAW

1. The burden of proof in this appeal falls on DER. 21 Pa.Code §21.101(b)(3).

2. The allegation that the electrical wiring installed by Gioia represents a shock hazard is rejected as without merit.

3. 25 Pa.Code §1396.4b(f) requires that (compared to the original water supply) a replacement water supply not be unreliable, or need excessively more maintenance, or be excessively more expensive to operate.

4. The replacement water supply Gioia installed, whose further replacement is the subject of the appealed-from DER order, met the requirements of Conclusion of Law No. 3 supra.

5. Conclusion of Law No. 4, supra, does not imply that Gioia is not liable for damages to the Novotnaks (and/or McGregor), but such damages, if warranted, must be awarded by the Court of Common Pleas, not by DER or this Board.

6. 25 Pa.Code §1396.4b(f) does require that the user of a replacement water supply--who originally had complete control over his supply--be able to

avoid having the replacement supply cut off at any time by the acts of another person.

7. The Board will not specify how Gioia is to modify its presently installed replacement system so as to bring it into compliance with the requirement stated in Conclusion of Law 6, supra.

8. Issues concerned with the Novotnaks' and McGregor's respective rights to access and control the replacement water supply deriving from deeds and the like are not before this Board; if before this Board, we would not decide them because the Board does not determine individual property rights.

O R D E R

WHEREFORE, this appeal is dismissed; Gioia must furnish the Novotnaks with a replacement water supply which allows the Novotnaks to control their supply in a fashion consistent with the above Opinion. The mechanical reliability and electrical safety of the present installation is satisfactory, and need not be improved, but must not be worsened by any modifications introduced by Gioia in compliance with this Order.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, Chairman

Anthony J. Mazullo Jr.

ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: January 28, 1986

cc: Bureau of Litigation, Harrisburg, PA
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HERMAN BOLLINGER	:	
	:	
v.	:	**EHB DOCKET NO. 85-400-W**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 4, 1986

OPINION AND ORDER

Synopsis:

Pursuant to Rule 21.124, the Board dismisses an appeal for the Appellant's failure to comply with Board orders regarding the filing of a pre-hearing memorandum.

OPINION

On September 30, 1985, the Appellant, Herman Bollinger, filed an appeal with the Board contesting a compliance order issued by the Department of Environmental Resources (Department). The compliance order required Bollinger to cease the removal of material stockpiled on his non-coal surface mining operation in the Borough of Palmerton.

The Board issued its Pre-Hearing Order No. 1 on October 1, 1985, requiring Appellant to file its Pre-Hearing Memorandum with the Board on or before December 16, 1985. Upon Appellant's failure to file its Pre-Hearing Memorandum on the required date, notices were sent to Appellant's counsel on two occasions (December 24, 1985, and January 15, 1986) ordering compliance with the Board's Pre-Hearing Order No. 1. The Appellant neither requested an extension of time in which to comply with the Board's order, nor filed the required Pre-Hearing

Memorandum. Pre-Hearing Order No. 1 and the two notices sent to Appellant warned that sanctions, including dismissal, could be imposed by the Board under Rule 21.124 for failure to comply with Board orders.

Because the Department bears the burden of proof in an appeal of a compliance order, the Board is very reluctant to impose the sanction of dismissal for an appellant's failure to comply with its orders. However, in this case, the Appellant has ignored the Board's orders and made no attempt to prosecute its appeal. The Appellant bears the responsibility of prosecuting his appeal through the timely filing of pleadings or other documents required by the Board or the requesting of extensions of time, Etna Equipment and Supply Company v. DER, 1984 EHB 607.

ORDER

WHEREFORE, this 4th day of February, 1986, it is ordered that the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: February 4, 1986

cc: Bureau of Litigation
Harrisburg, PA

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For Appellant:
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Jim Thorpe, PA

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JAMES E. MARTIN	:	
	:	
v.	:	**EHB DOCKET NO. 85-064-G**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	Issued February 7, 1986
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER
SUR
PETITION FOR ATTORNEY'S FEES

Synopsis:

The Costs Act, 71 P.S. §2031 et seq., has no application to this proceeding; the Commonwealth did not "initiate" an adversary adjudication in this matter. Rather, it responded to a request for action from the appellant. The Costs Act and the costs provision of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4(b), are statutes in pari materia and therefore must be construed together, if possible. 1 Pa. C.S.A. §1932. However, this does not mean that the Surface Mining Act's provision must be construed in exactly the same fashion as the Costs Act has been. It is sufficient if the construction of the two statutes does not produce conflicting or inconsistent obligations for the parties to whom the statutes are addressed.

Under the Surface Mining Act's costs provision, an award of attorney's fees can be made to a prevailing party or to one who, although not successful on the merits of its case, demonstrates exceptional circumstances, e.g., that the party had made a substantial contribution to a full and fair determination of the

issues presented or had served the objectives of the legislation in some substantial way. The Board defers a decision as to whether the appellant herein can be characterized as a prevailing party pending receipt of briefs from the parties and oral argument. Where the matter has been dismissed as moot following a settlement by the parties, a determination of who is the prevailing party poses particularly difficult questions which the Board is hesitant to address without the benefit of briefs.

OPINION

On October 10, 1985, the Board dismissed this appeal, which appellant had brought challenging DER's failure or refusal to modify a provision of appellant's mining permit. Several months after the appeal had been filed, DER did modify the permit as requested; therefore, the appeal was dismissed as moot, upon a motion to that effect filed by DER. Within a month following the dismissal, counsel for the appellant filed a petition for an award of attorney's fees, to which DER has responded. Before discussing the merits of the petition, a discussion of the facts underlying this matter is necessary.

The appellant has conducted surface mining operations under the authority of mine drainage permit #357SM14 and mining permit #419-6. By a letter dated May 23, 1983, DER informed the appellant--apparently in response to his request--that it would approve backfilling of the permit site to terrace, rather than to approximate original contour, upon receipt from the appellant of proof of publication of the proposed permit revision and an amended page of the mine drainage permit. On April 3, 1984, DER received the requested information. DER did not approve the permit revision, however; it avers that, as of April 3, 1984, the appellant was in violation of the Pennsylvania Surface Mining Conservation

and Reclamation Act (Pennsylvania SMCRA), 52 P.S. §1396.1 et seq. Section 1396.3a(d) of that Act provides:

> The department shall not issue any surface mining permit or renew or amend any permit if it finds, after investigation and an opportunity for an informal hearing, that 1) the applicant has failed and continues to fail to comply with any of the provisions of this act or of any of the acts repealed or amended hereby . . .[1]

In light of this statutory prohibition, DER contends that it was unable to approve the requested permit modification. On January 28, 1985, DER notified appellant of its position by letter directed to appellant's counsel. The instant appeal was taken from the January 28, 1985 letter. As noted above, however, DER eventually did approve the requested permit alteration, on August 21, 1985. The DER letter granting the approval does not set forth the reason for DER's reversal of its earlier position.

There are two possible bases for an award of attorney's fees in this matter. The first of these, the Costs Act, 71 P.S. §2031 et seq., provides that:

> (a) Except as otherwise provided or prohibited by law, a Commonwealth agency that initiates an adversary adjudication shall award to a prevailing party, other than the Commonwealth, fees and other expenses incurred by that party in connection with this proceeding, unless the adjudicative officer finds that the position of the agency, as a party to the proceeding, was substantially justified or that special circumstances make an award unjust. 71 P.S. §2033(a) (emphasis added)

The Costs Act provides the following definition of the phrase "substantially justified":

> The position of an agency as a party to a proceeding is substantially justified when such position has a reasonable basis in law and fact. The failure of an agency to prevail in a proceeding, or the agreement of an agency to

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1 Section 609 of the Clean Streams Law, 35 P.S. §691.609, contains nearly identical language.

> settle a controversy shall not raise a presumption that the position of the agency was not substantially justified. 71 P.S. §2032.

The Board recently has had occasion to construe section 2033(a), supra. In Clair and Vicki Hardy et al. v. DER, Docket No. 83-127-M (Opinion and Order dated June 4, 1985) we interpreted the phrase "initiates an adversary adjudication" to mean that the Costs Act is applicable only in those cases in which an agency takes, upon its own initiative, some action against a party. This construction is consistent with section 2031(c)(2) of the Act which provides that it is the intent of the General Assembly to "deter the administrative agencies of this Commonwealth from initiating substantially unwarranted actions against individuals, partnerships, corporations, associations and other nonpublic entities." 71 P.S. §2031(c)(2). It is apparent that the idea was to create a deterrent to abusive exercise of prosecutorial power.

In light of the foregoing, we conclude that the Costs Act has no application here. DER "initiated" no action giving rise to the instant appeal; rather, its decision not to modify the permit was taken in response to a request from the appellant. In this regard, the facts of this appeal parallel those at issue in Hardy, where the DER action appealed was a refusal to order a municipality to revise its official sewage facilities plan upon a request by the appellants.

An alternative basis for awarding attorney's fees in this appeal is found in section 1396.4(b) of the Pennsylvania SMCRA, which provides that:

> The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably

incurred by such party in proceedings pursuant to this section.[2]

DER urges us to construe this provision in pari materia with the Costs Act, citing section 1932(b) of the Statutory Construction Act, which provides that, if possible, statutes in pari materia should be construed together. 1 Pa. C.S.A. §1932(b). While we agree that the two statutes are in pari materia, since they "relate to the same persons or things or to the same class of persons or things," we do not believe we are constrained to give the two statutes the same interpretation.

First, we do not believe the requirement that statutes in pari materia be construed together necessarily implies that the statutes be given identical interpretations. In fact, the Statutory Construction Act requires us to construe such statutes together only "if possible." The intent of the Statutory Construction Act is satisfied so long as the statutes are not construed in a manner which would create conflicting or inconsistent responsibilities for the parties subject to the statutory provisions. Secondly, we note that the Costs Act, which was enacted after the Pennsylvania SMCRA provision in question, explicitly states that it applies "except as otherwise provided or prohibited by law." 71 P.S. §2033(a), supra. The legislature clearly did not intend that the Costs Act supersede preexisting statutes allowing for an award of fees and expenses.

More importantly, the case law interpreting statutes, such as the Pennsylvania SMCRA, supra, allowing an award of costs, sets forth standards for making such an award which differ significantly from the prerequisites contained

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2 "This section" evidently refers to section 1396.4 as a whole, which deals with the grant and denial of mining permits and the posting and release of bonds, inter alia.

in the Costs Act, i.e., that there be an adversary adjudication initiated by a Commonwealth agency whose position in the matter was not substantially justified. For this reason, we conclude it is more reasonable to interpret §1396.4(b) in light of the established case law precedents than as if its language were qualified by the subsequently enacted Costs Act.

We are aware of only one decision construing the costs provision of the Pennsylvania SMCRA. That decision, Sheesley v. DER and Equitable Coal Co., 1982 EHB 85 (Adjudication dated April 29, 1982), interpreted §1396.4(b) in light of federal environmental statutes containing similar provisions, i.e., the Clean Air Act, 42 U.S.C. §7607(f) and the federal Surface Mining Control and Reclamation Act (federal SMCRA), 30 U.S.C. §1270. Both of these statutes allow an award of the costs of litigation, including attorney's fees, when the court determines an award is "appropriate." The federal case law as of the date of the Sheesley decision permitted an award to the "prevailing party." In addition, as Sheesley points out, under the federal law an award could be "appropriate" even if the party seeking it had not "prevailed," if that party had made a substantial contribution to a full and fair determination of the issues or had served the objectives of the legislation in some substantial way, regardless of the outcome of the case. Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co., 62 F.R.D. 353, aff'd 510 F.2d 969 (3rd Cir.1975). The Board concluded that, in general, costs would be awarded under §1396.4(b) only to a prevailing party, but refused to rule out the possibility that an unsuccessful litigant also could recover its costs. In such a case, however, exceptional circumstances would have to be shown.

The federal case law in this issue has changed since the Sheesley decision was written. In Ruckelshaus v. Sierra Club et al., 463 U.S. 682 (1983), the

Supreme Court rejected the idea that an unsuccessful party could recover its costs under the Clean Air Act, or under any of several federal environmental statutes, including the federal SMCRA, containing language identical to the Clean Air Act's costs provision. It held that under these statutes an award would be "appropriate" only if the party seeking it could be characterized in some sense as the "prevailing party." The court noted that it was not necessary that the party be successful on all issues presented, but that it must, at a minimum, obtain some success on the merits.

Despite the Ruckelshaus holding, we see no reason to disavow our conclusion in Sheesley that an award of costs can be made to other than a prevailing party where special circumstances warrant. Certainly we are not bound by the Supreme Court's interpretation of federal environmental statues, and we believe that in the absence of arguments to the contrary, principles of stare decisis should prevail. Moreover, we are aware of no special circumstances of the sort contemplated in Sheesley in connection with the instant matter. Rather, our focus here must be upon whether the appellant can be characterized as a "prevailing party" in this matter.

We are aware of no cases, state or federal, construing the meaning of the term "prevailing party" where the case has been dismissed as moot. Under the Costs Act a prevailing party is one "in whose favor an adjudication is rendered on the merits of the case or who prevails due to withdrawal or termination of charges by the Commonwealth agency or who obtains a favorable settlement approved by the Commonwealth agency initiating the case." 71 P.S. §2032. This definition which, of course, does not apply directly to this matter, may provide guidance in deciding whether the appellant herein is a prevailing party and therefore entitled to attorney's fees. C.J.S., Costs §8, defines "prevailing

party" as "the party in whose favor the decision or verdict in the case is or should be rendered and judgment entered . . . A party may be the prevailing party although immaterial matters are decided against him or the other party is successful in defeating the larger part of his claim or has an affirmative defense decided in his favor." (Emphasis added.) C.J.S. also states: "In determining this question, the general result should be considered and inquiry made as to who has, in the view of the law, succeeded in the action."

Both the Costs Act, which requires that the Board decide whether the Commonwealth's position was substantially justified, and C.J.S. contemplate that a determination be made as to the probable success on the merits of the party who is seeking an award of costs. Where the matter has been dismissed as moot, however, it seems inappropriate, and possibly inconsistent with principles of administrative finality, for us to reexamine the merits of the case, e.g., whether DER was correct in its contention that the appellant was in violation of the Pennsylvania SMCRA as of January 28, 1985, the date it denied his request for permit modification.

We are aware of only one decision which has addressed this rather difficult question; although the case did not involve a dismissal on mootness grounds, the circumstances were similar to those confronting us here. In Ford v. Selective Service System, U.S. Civil Service Commission, 439 F.Supp. 1262 (M.D.Pa. 1977), the plaintiff brought an action under the Freedom of Information Act, 5 U.S.C. §552, seeking disclosure of information. During the course of the litigation, the government released the requested information. The court held that in order for the plaintiff to obtain an award under the FOIA's costs provision, 5 U.S.C. §552(A)(4)(E), he would have to show, at a minimum, "that the prosecution of the action reasonably could have been regarded as necessary and that the bringing of

the action had a substantial causative effect on the delivery of the information."[3] A plaintiff meeting this standard would be said to have "substantially prevailed." A standard of this sort eliminates the need for the courts to examine the unadjudicated merits of the action and avoids the implication that the court is inquiring as to the motives of the defendant (or the Commonwealth, in a case such as the instant one) in settling the matter.

We do not decide at this time what definition should be assigned to the term "prevailing party" in the context of an appeal dismissed as moot after a settlement by the parties. Since the issue seems to be one of first impression and not free from difficulty, the parties are given an opportunity to submit briefs and present oral argument if they so desire.

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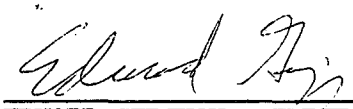
3 Although the court found that the plaintiff had met this criterion, it denied the request for costs on other grounds.

ORDER

WHEREFORE, in light of the foregoing, it is ordered that within sixty days of this date the parties may submit briefs and request oral argument on the following issue:

> How should the term "prevailing party" be defined where the merits of the claim presented for adjudication have not been decided due to a dismissal on grounds of mootness following settlement by the parties?

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY, MEMBER

DATED: February 7, 1986

cc: Bureau of Litigation
Harrisburg, PA

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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GEORGE AND SHIRLEY WISNIEWSKI et al. :

Appellants :

: Docket No. 82-045-G

: Issued: February 7, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Appellee

WALTER KUHL and GREENE INDUSTRIAL LANDFILL

Permittees

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

By Edward Gerjuoy, Member

Syllabus

This appeal of a solid waste permit is sustained in part and dismissed in part. Appellants, landowners who reside in the vicinity of the landfill for which the permit was issued, failed to sustain their burden of proof, under 25 Pa.Code §21.101(c)(3) with regard to many of the issues raised. Insufficient evidence was presented to establish that there was a likelihood of groundwater contamination presented by the landfill or that surface water run-off from the landfill would cause problems for the appellants. Although it was established that the driveway which provides access to the landfill presents a potential traffic hazard, appellants did not sustain their burden of showing that DER

failed to take this into consideration in issuing the permit; nor did the appellants show that DER did not advise the appropriate state authority, the Pennsylvania Department of Transportation, of the potentially hazardous condition. The Board is aware of no legislation which grants DER authority to regulate traffic conditions.

Appellants failed to sustain their burden of proof with regard to alleged past violations of the Commonwealth's environmental laws on the part of the permittee. Under section 503 of the Solid Waste Management Act, 35 P.S. §6018.503(c), DER may deny a permit to an individual who has shown a lack of ability or intention to comply with the state's environmental laws or to an individual who has failed or continues to fail to comply with those laws. Appellants presented evidence indicating that the permittee had been convicted of a violation of a township zoning ordinance; however, §503(c) does not permit DER to take such violations into consideration. Although there was evidence to suggest that appellant had violated the Commonwealth's environmental laws, appellants presented no evidence to indicate the subject matter of those apparent violations. Since §503(c) is discretionary, i.e., DER need not deny a permit automatically for any violation, the Board cannot conclude that DER abused its discretion in issuing the permit without evidence indicating the nature of such violations.

By failing to address the issue of noise pollution generated by the landfill in their post-hearing brief, Appellants have waived the issue.

Appellants did sustain their burden of proof with regard to air pollution resulting from dust created by traffic on the driveway leading to the landfill. Therefore, the Board requires that the permit be remanded to require the permittee to submit a more specific dust control plan and to appropriately monitor compliance with the dust control plan.

INTRODUCTION

This is an appeal of the issuance of a solid waste permit; the appeal has been brought on behalf of several landowners who reside in the immediate vicinity of the landfill for which the permit was issued. The appeal was filed with the Board on February 16, 1982, thirty days following publication in the Pennsylvania Bulletin of the fact of the permit's issuance. (12 Pa.Bull. 353; Saturday, January 16, 1982). Several continuances have been granted during the course of this appeal, at the request of the parties, pending resolution of related litigation in the Erie County Court of Common Pleas, and subsequently, the Commonwealth Court. Following a decision by the Court of Common Pleas that the permittee lacked legal access to the landfill, the Department of Environmental Resources suspended the permit with which this appeal is concerned. Accordingly, all proceedings in this appeal were stayed pending resolution of the issue of access to the landfill. By a decree dated May 31, 1984, the Court of Common Pleas granted a private road to the permittee which allowed access to the site. Shortly thereafter the permit was reinstated by the department, and the stay of proceedings in this appeal was lifted. A hearing on the merits was conducted on April 10 and 11, 1985. For reasons made obvious by our Findings of Fact 1 - 7 infra, the Order which follows dismisses this appeal as to all appellants except George and Shirley Wisniewski and Helen Morehouse, for failure to appear at the hearing and prosecute their joint appeal.

FINDINGS OF FACT

1. This is an appeal of solid waste permit No. 101251 to Walter Kuhl and Greene Industrial Landfill ("permittee") for the operation of a Class I demolition waste landfill in Greene Township, Erie County, PA. The permit was issued on December 22, 1981.

2. The Notice of Appeal was filed by John E. Cooper, Esquire, on behalf of George and Shirley Wisniewski, of 6421 Wattsburg Rd., Erie, PA; Chester and Nancy Aleksandrowicz, of 8350 Morehouse Rd., Erie, PA; and Helen Morehouse, of 6423 Wattsburg Rd., Erie, PA.

3. On April 13, 1982, the Board received a withdrawal of appearance from Attorney Cooper; the withdrawal pertained only to representation of George and Shirley Wisniewski, however.

4. On April 13, 1982, the Board received an entry of appearance on behalf of George and Shirley Wisniewski from Howard L. Rubenfield, Esquire.

5. On May 20, 1982, the Board received an Amended Notice of Appeal stating that the "appellants" (who were stated to include the Wisniewskis, the Aleksandrowiczs, and Ms. Morehouse) "hereby appeal the issuance of [the above referenced permit]." Attorney Rubenfield's signature appears at the end of the Amended Notice of Appeal, as "attorney for the appellants".

6. The hearing on the merits of this appeal was scheduled for April 8-12, 1985. On April 8, 1985 no attorneys appeared to represent any of the appellants. After a conference call among the parties, it was agreed that the Board would hold the hearing on April 10 and 11, 1985.

7. On April 10, 1985, the Board received a Notice of Appearance on behalf of George and Shirley Wisniewski and Helen Morehouse from George M. Schroeck, Esquire. No withdrawal of appearance has been filed by Attorney Rubenfield. Attorney Schroeck was present at the hearing and represented the interests of the Wisniewskis and Ms. Morehouse. No attorney represented the interests of the Aleksandrowiczs at the hearing.

8. The Department of Environmental Resources ("DER") is the agency of the Commonwealth authorized to administer and enforce the provisions of the Solid

Waste Management Act, 35 P.S. §6018.101 et seq., and the regulations promulgated thereunder.

9. The Wisniewskis' property abuts the permitted landfill area. (Tr. 6)

10. Ms. Morehouse's property is adjacent to the property which is used as the landfill. (Tr. 7)

11. The permittee obtains access to the landfill via a "driveway" which runs immediately adjacent to the Wisniewski property line. (Tr. 35-36)

12. The driveway is about 5 to 10 feet from the Wisniewski house. (Tr. 35-36)

13. The driveway abuts the property of Ms. Morehouse. (Tr. 7)

14. In order to enter the driveway, trucks must turn off of State Route 8, which runs in front of the Wisniewski house. (Tr. 8)

15. The Wisniewski house is 35 feet from the edge of State Route 8. (Tr. 89)

16. Traffic on State Route 8 generally travels at a rapid rate of speed. (Tr. 26)

17. At the intersection of the landfill driveway and State Route 8 there is a blind curve. (Tr. 78)

18. The grade of the driveway at its intersection with State Route 8 is quite steep. (Tr. 176)

19. Due to the traffic speed, the blind curve, and the steep grade at the intersection, the driveway to the landfill presents a potential traffic hazard.

20. Appellants presented no evidence concerning review of the safety of the driveway by the Pennsylvania Department of Transportation ("PennDOT"), either at PennDOT's initiative or upon referral from DER.

21. The driveway is constructed of gravel; no plans have been made to have it paved. (Tr. 172, 210)

22. Trucks traveling to and from the landfill on the driveway create substantial amounts of dust. (Tr. 12, 116)

23. The permit for the landfill contains no special requirements for dust control or dust monitoring; however, the permit application, which is incorporated into the permits, described methods for dust control, i.e., application of water, oil or sodium chloride. (Tr. 154; Cmwlth.Ex. A; Cmwlth.Ex. B).

24. No credible evidence was presented to establish that use of oil or sodium chloride for dust control purposes would result in groundwater contamination.

25. No credible evidence was presented to establish that operation of the landfill under the terms of the permit is likely to result in groundwater contamination.

26. The direction of surface water flow at the landfill site is away from the Wisniewski and Morehouse residences. (Tr. 51, 141-143).

27. Insufficient evidence was presented to establish the direction of groundwater flow in the vicinity of the landfill.

28. The water table in the vicinity of the landfill is encountered at quite shallow depths. (Tr. 140)

29. It is probable that wastes placed three feet below the surface of the ground at the landfill would come into contact with groundwater. (Tr. 303)

30. The landfill is authorized to accept only Class I demolition waste, i.e., soil, rock, stone, gravel, brick, block and concrete. (Cmwlth.Ex. B)

31. Only materials such as stone, concrete, soil, etc. will be placed in the first three feet of the landfill. (Tr. 302).

32. Placing materials such as stone, concrete, soil, etc. in the first three feet of the landfill was not shown to present a threat to the quality of the groundwater.

33. Permittee Walter Kuhl has been convicted of a violation of a Greene Township zoning ordinance for unlawfully disposing of industrial waste in a gravel pit. (App.Ex. 3)

34. DER's answers to appellants' interrogatories state that DER has cited permittee Walter Kuhl for violations of the Clean Streams Law, 35 P.S. §691.1 et seq. and that DER has initiated investigations and enforcement actions against Mr. Kuhl. (App.Ex. 1)

35. Appellants presented no evidence to indicate the nature of the violations to which reference is made in DER's answers to the interrogatories.

36. Appellants' witness, Mr. Cavanugh, stated that there always is a noise pollution problem in the operation of a landfill. (Tr. 117)

37. Appellants' testimony in support of their contention that operation of the landfill would cause disturbing noise levels was wholly speculative.

38. Appellants presented no evidence that noise from operation of the landfill would be audible above, e.g., the noise from traffic on State Route 8.

DISCUSSION

Under the Board's rules, the burden of proof in a third party appeal of a permit issuance falls upon the appellants. 25 Pa.Code §21.101(c)(3). It is the appellants' burden to demonstrate that the Department of Environmental Resources ("DER") in issuing the permit, acted unreasonably, arbitrarily or capriciously or in violation of law. Board of Supervisors of Springfield Township v. Commonwealth, DER, 1982 EHB 104 (June 30, 1982). For the most part, we conclude that Appellants failed to meet their burden in this case.

We begin with the one issue upon which Appellants have sustained their burden, namely the air pollution created by dust disturbance on the driveway leading

to the permitted landfill site. Access to the landfill is via a gravel driveway which abuts the Wisniewski and Morehouse properties. The driveway lies five to ten feet from the Wisniewski house. Considerable unrebutted testimony established that trucks traveling to and from the landfill along this driveway create significant amounts of dust, which--given the driveway's proximity to the Wisniewski's home--reasonably can be expected to cause substantial discomfort and inconvenience.

25 Pa.Code §75.33(i)(1)(i), "Standards for Construction and Demolition Waste Disposal," requires that Class I waste disposal facilities shall minimize and control dust at all times. §75.26(h)(1), which contains general operating standards for sanitary landfills, provides that, to control dust, one or more of the following measures shall be implemented:

1) Paving of access roads and roads leading to the unloading area.

2) Application of moisture absorbing chemicals such as calcium chloride to roadways.

3) Application of oil to the roadways.

4) Spraying water, as needed, on roadways.

During the hearing DER took the position that the permit need not contain a dust control plan because of the operational requirements in these regulations. The permit itself contains no special dust control requirements. The permit application, which is incorporated by reference into the permit, provided that the permittee would implement dust control measures, "if dust control becomes a problem." (Cmwlth. Ex. A, p.8)

Section 75.24 is entitled "General Standards for Sanitary Landfills." Although so titled, it enumerates various requirements for permit applications. Subsection (c)(3) provides that "A detailed written operational plan shall be submitted to address the standards as specified in this chapter." Those standards certainly include the dust control standards in §§75.26(h)(1) and 75.33(i)(1)(i). A statement that the permittee will implement dust control measures "if dust control becomes a problem" can hardly be considered "a detailed written operational plan." Consistent with §§75.24(c)(3), 75.26(h)(1), and 75.33(i)(1)(i), the permit application

should address the minimization of dust through both preventative and remedial measures. And, the Department should impose monitoring conditions as appropriate to determine compliance. The permittee's vague statement in this case cannot be characterized as the detailed plan necessary to satisfy §75.24(c)(3), nor can the permittee's obligation to comply with §§75.26 and 75.33 during the operational phase substitute. The Department committed an abuse of discretion in accepting the permittee's dust control measures as adequate.

With regard to the remaining issues raised by the Appellants, however, we are constrained to conclude that insufficient evidence was presented to make out a prima facie case of error on the part of DER. Appellants claim that DER abused its discretion in issuing the permit without giving consideration to the traffic hazard presented by the driveway to the landfill. It was Appellants' burden to substantiate this claim. The evidence on the record does suggest that the driveway poses a significant hazard. However, there is no indication that DER failed to give consideration to this fact.[1] As we have previously held, where a significant traffic hazard is likely to be created by an operation for which DER is considering issuing a permit, DER should bring this possibility to the attention of the appropriate agency, e.g., the Pennsylvania Department of Transportation. Township of Indiana et al. v. DER and Duquesne Light, 1984 EHB 1 (January 3, 1984); Robert Kwalwasser v. DER and Kerry Coal Company, EHB Docket No. 84-108-G (Adjudication dated January 24, 1986). We are aware of no authority which would require DER to do more than make PennDOT aware of the situation; DER is not empowered to regulate traffic conditions.[2] 71 P.S. §501-1 et seq. Appellants, who had the

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[1] DER counsel stated at the hearing that DER had referred the issue of the traffic safety to the Pennsylvania Department of Transportation for comment, but had received no response. No evidence concerning this assertion, pro or con, was put on the record. Therefore we will not rule on the issue--which the parties have not addressed--whether DER should have insisted on obtaining a response from PennDOT before finally issuing the permit.

[2] At the hearing, the Board Member in charge expressed his sentiments that DER should not approve a permit which would give rise to an obvious traffic hazard. These sentiments probably are worthy. However, we see no way for DER to deal with the traffic hazard problem other than by notifying PennDOT of a potential hazard. Nor do we see how DER can force PennDOT to respond promptly to every such notification by DER.

burden, have not shown that DER failed to notify PennDOT of the possible traffic hazard. Therefore, in the absence of indications to the contrary, we must presume that DER acted properly. DER's actions are entitled to a presumption of regularity. Del-Aware, Unltd. v. DER et al., 1984 EHB 178 (June 18, 1984). On this issue, Appellants have failed to meet their burden of showing that DER abused its discretion.

Appellants claimed that the operation of the landfill will contaminate the groundwater and that this will result in harm to the Appellants. Insufficient evidence was presented to establish the direction of groundwater flow, however, and the evidence concerning the possible contamination of groundwater from the placing of painted concrete blocks or other painted materials in the landfill was speculative at best. There was nothing to indicate that any such painted materials would be placed in the landfill or that, even if they were, they actually would contribute to groundwater pollution. Likewise, no evidence was offered in support of Appellants' contention that application of salt or oil to the driveway for dust control would cause contamination of the groundwater in the vicinity of the Wisniewski well; the sole testimony presented by Appellants on this issue does nothing more than restate this concern. Nothing was offered to suggest the likelihood of such contamination, the pathways by which such contamination possibly could occur, or the like. Moreover, DER's witness stated that the channels on either side of the driveway would convey any dust controlling chemicals and oil away from the area of the Wisniewskis' well. Therefore, we conclude that DER did not abuse its discretion or otherwise err in granting the permit without imposing additional requirements upon the permittee addressing possible groundwater contamination.

For similar reasons we reject Appellants' contention that surface water run-off from the landfill site will pose a problem. The testimony directed to this

issue established that surface water run-off will be controlled by means of a ditch surrounding the landfill which will convey the run-off away from the direction of the Wisniewski and Morehouse properties. Therefore, we cannot conclude that DER erred in any respect with regard to this issue.

Appellants had contended that noise pollution was likely to be a problem during operation of the landfill. The only testimony offered on this point was a single statement by Appellants' witness that noise often accompanies such operations. This falls far short of what would be required to meet the burden set forth, supra, in a case such as this. Moreover, at the time this testimony was offered the Board indicated to counsel for Appellants that if they desired to pursue this issue they would have to discuss it in their post-hearing brief. The brief which has been filed on behalf of Appellants makes no mention of the noise issue, and we therefore deem it waived.

Finally, Appellants contend that §503 of the Solid Waste Management Act, 35 P.S. §6018.503, precludes the issuance of a solid waste permit to permittee, Walter Kuhl. Section 503 provides, in relevant part:

> (c). In carrying out the provisions of this Act, the department may deny, suspend, modify, or revoke any permit or license if it finds that the applicant, permittee or licensee has failed or continues to fail to comply with any provision of this Act, the . . . Clean Streams Law, . . . the Air Pollution Control Act, . . . the Dam Safety or Encroachments Act, or any other state or federal statute relating to environmental protection or to the protection of the public health, safety and welfare; or any rule of the department, or any order of the department, or any condition of any permit or license issued by the department, or if the department finds that the applicant, permittee or licensee has shown a lack of ability or intention to comply with any provision of this act or any of the acts referred to in this subsection or any rule or regulation of the department, or any condition of any permit or license issued by the department as indicated by past or continuing violations.

Appellants point to a conviction of Walter Kuhl for violation of a township zoning ordinance as support for their contention that Mr. Kuhl has a long history of non-compliance with the Commonwealth's environmental laws. In addition, Appellants cite certain DER answers to Appellants' interrogatories which they claim indicate that Mr. Kuhl has a long violation history, which should have been taken into account by DER in its decision to issue the instant permit.

While the evidence offered by Appellants is relevant, it is insufficient to establish that section 503(c), supra, should apply to preclude issuance of the permit. Section 503(c) does not allow DER to consider violations of zoning ordinances in determining whether a permit should or should not be issued. In addition, the answers to interrogatories 8, 11 and 12 simply state that DER initiated investigations and enforcement actions against Mr. Kuhl; DER did not indicate what the results of these proceedings were. We cannot presume that Mr. Kuhl violated the Commonwealth's environmental laws solely on the basis of such statements. The answers to interrogatories 9 and 10 similarly are inadequate to establish that DER should not have issued the permit to Mr. Kuhl. Even if we were to assume that the violations mentioned are established for our purposes by DER's answers to the interrogatories, section 503(c) is discretionary; under its terms DER is not required to automatically deny a permit to anyone who ever has violated the Commonwealth's environmental laws, as enumerated in section 503(c). It is part of Appellants' burden to demonstrate that the violations are sufficient to warrant permit denial. No evidence was presented explaining the factual background of the claimed violations. Under these circumstances we cannot find that DER should have denied the permit on the basis of section 503(c).

CONCLUSIONS OF LAW

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

2. The burden of proof in this appeal is upon the appellants.

3. DER abused its discretion in issuing the permit without requiring a more detailed dust control plan, and without imposing monitoring conditions as appropriate to determine compliance. 25 Pa.Code §75.26(h); §75.33(i)(1)(i).

4. Appellant failed to meet its burden of proof with regard to all issues other than that concerning dust control, i.e., with regard to the issues of traffic safety, surface water run-off, groundwater contamination, and the permittee's compliance history.

5. DER does not have the authority to regulate traffic conditions. 71 P.S. §510-1 et seq.

6. Under section 503 of the Solid Waste Management Act, 35 P.S. §6018.503(c), DER is not entitled to consider violations of zoning ordinances in considering whether to issue a permit.

7. Section 503 of the Solid Waste Management Act is discretionary; DER is not required to automatically deny a permit to any person who has ever violated the Commonwealth's environmental laws.

O R D E R

WHEREFORE, this 7th day of February, 1986, it is ordered that:

1. This appeal is sustained with regard to the issue of dust control, and the permit is suspended and remanded to DER for action consistent with the foregoing Opinion.

2. The appeal is dismissed with regard to all issues raised by Appellants other than that addressed in paragraph 1 of this Order.

3. The appeal is dismissed with respect to Chester and Nancy Aleksandrowicz.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Chairman

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: February 7, 1986

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EDWARD W. BEEDLE	:	
	:	
v.	:	**EHB DOCKET NO. 85-512-W**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 14, 1986

OPINION AND ORDER

Synopsis:

This is an appeal of a compliance order issued by the Department of Environmental Resources ("Department") to the Appellant pursuant to the Oil and Gas Act, the Act of December 19, 1984, P.L. 1140, 58 P.S. §601.101 et seq. ("Oil and Gas Act") and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 ("Administrative Code"). The Department's motion to dismiss the appeal is granted because the appeal was not timely filed in accordance with 25 Pa. Code §21.52.

OPINION

The Department, in a compliance order dated September 30, 1985, directed the Appellant, Edward W. Beedle, Jr. to plug an abandoned gas well on his property from which natural gas was allegedly escaping onto an adjoining property. The order was issued pursuant to §503 of the Oil and Gas Act and §1917-A of the Administrative Code. Beedle's Notice of Appeal indicates the order was received on "October 4 (or 5)." The Notice of Appeal was received and docketed by the Board on November 22, 1985. The Department has moved the Board to dismiss the appeal for untimely filing, and Appellant responded thereto.

Rule 21.52 of the Board's rules of practice and procedure provides that the jurisdiction of the Board does not attach to an appeal from an action of the Department unless the appeal is in writing and filed with the Board within 30 days after the appellant has received written notice of the Department's action. The Commonwealth Court, in a line of cases beginning with Rostosky v. Com. of Pa, DER, 26 Pa.Cmwlth 478, 364 A.2d 761 (1976), has held that the failure to timely file an appeal in accordance with the Board's regulations deprives the Board of juristiction to hear an appeal.

Since Appellant did not file its appeal with the Board during the mandated 30 day appeal period, this Board is without jurisdiction to hear it and the appeal must be dismissed.

ORDER

AND NOW, this 14th day of February, 1986, it is ordered that the Department's motion to dismiss this appeal is granted, and the appeal of Edward W. Beedle is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: February 14, 1986

cc: Bureau of Litigation
Harrisburg, PA

For the Commonwealth, DER:
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Western Region

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MT. THOR MINERALS, INC.	:	
	:	
v.	:	**EHB Docket No. 84-410-G**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued February 21, 1986

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis:

DER's Motion for Summary Judgment, which the Board construes as a Motion for Judgement on the Pleadings under Pa. R.C.P. 1034, is granted. Appellant has failed to contest the factual basis for the DER order appealed, either in its Notice of Appeal or in its pre-hearing memorandum. The Board's rules, 25 Pa.Code §21.51(e), provide that objections not raised by the Notice of Appeal may be deemed waived. Likewise, the Board's pre-hearing order notified parties that contentions not set forth in the pre-hearing memorandum might be deemed waived. Appellant has failed to respond to the DER motion, despite the fact that the time period set for such response has passed. The Board concludes that the facts set forth in the order are deemed admitted. Appellant's contention that it cannot afford to comply with the DER order is not a defense to the order. Therefore, the Board holds that DER is entitled to judgment on the pleadings as a matter of law.

OPINION

On June 8, 1984, the Department of Environmental Resources ("DER") ordered Mt. Thor Minerals ("Mt. Thor") to restore or replace the water supply at the residence of Albert and Ruth Novotnak ("the Novotnaks") in Wharton Township, Fayette County. An identical order was addressed to the Gioia Coal Company of Elizabeth, Pennsylvania ("Gioia"). The order was issued under the authority of section 4.2 of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. ("SMCRA").

Mt. Thor has appealed this order, at the above docket number. Gioia also has appealed, at Docket No. 84-211-G. A hearing on the merits of Gioia's appeal has been held, and that appeal has been adjudicated. Gioia v. DER, Docket No. 84-211-G (Adjudication dated January 28, 1986). At the hearing, Gioia did not contest the fact that its surface mining activities had affected the Novotnaks' water supply. Gioia did assert, however, that it already had satisfactorily replaced the Novotnaks' original spring water supply, in the form of a well which Gioia had drilled. The sole issue at the Gioia hearing, therefore, was whether this well really was an adequate replacement for the original spring under the requirements of the SMCRA. Our adjudication decided that the well furnished water of acceptable quality and quantity, but that some features of the electric power supply needed to operate the well pump were not entirely satisfactory. Thus, we dismissed the Gioia appeal, and ordered Gioia to modify the objectionable features of its electric power supply arrangement.

A hearing on the merits of the instant appeal has not yet been scheduled, however, in large part because the parties have been engaged in settlement discussions. Apparently no settlement has been reached, because on November 20, 1985, DER filed a motion to dismiss the appeal, followed--on December 4, 1985--by a

motion for summary judgment. The legal grounds argued by DER in these two motions are essentially identical; consequently we will regard the later motion for summary judgment as a substitute for--and a withdrawal of--the motion to dismiss. Our Pre-Hearing Order No. 2 in the instant appeal, dated December 26, 1984, advised each party that responses to a motion filed by another party are due within 20 days of receipt of the motion. This 20-day period exceeds the 10-day standard set in the General Rules of Administrative Practice and Procedure, 1 Pa. Code §35.179. Nevertheless, as of January 6, 1985, when preparation of this Opinion was initiated, Mt. Thor had not replied to either of DER's motions. Hence we deem that Mt. Thor has waived its opportunity to respond to DER's motion for summary judgment, and proceed to rule on that motion.[1]

DER's appealed-from June 8, 1984 order "found and determined" that:

> A. Commencing on or before November 24, 1980 and continuing to March 3, 1983, Mt. Thor Minerals "(Mt. Thor") has operated a surface mine ("the surface mine") in Wharton Township, Fayette County under authorization of Mine Drainage Permit 3375SM63.
>
> B. Commencing on August 11, 1981 and continuing until March 3, 1983, Gioia Coal Company ("Gioia") conducted mining activities at the surface mine as a subcontractor. On March 3, 1983, Gioia transferred Mine Drainage Permit 3375SM63 to its own name and assumed all obligations and liabilities associated with the permit and the surface mine. Commencing on that date and continuing until the present, Gioia has operated the surface mine as the permittee and has conducted the mining activities.
>
> C. On or before August 27, 1982, Mt. Thor and Gioia, in operating the surface mine, adversely affected the private water supplies at the residences of Albert and Ruth Novotnak (the Novotnaks"). . .

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1. On January 13, 1986, after preparation of this Opinion had been completed, Mt. Thor's response to DER's motion for summary judgment was received. We find nothing in this response of Mt. Thor's which would cause us to modify this Opinion as originally prepared.

E. Mt. Thor and Gioia have failed to restore or replace the affected water supply at the Novotnaks' residence with an alternate source of water adequate in quantity and quality for the purposes served by the supply.

Mt. Thor has not contested the above findings. Its primary argument has been that it had executed an agreement with Gioia whereby Gioia was to have secured the transfer of Mine Drainage Permit 3375SM63 ("the permit") before January 19, 1982. According to Mt. Thor, Gioia had not effected this transfer, and had operated the surface mine without Mt. Thor's authorization after January 19, 1982. Therefore, Mt. Thor argued, Gioia alone was responsible for the loss of the Novotnaks' water supply, which loss (Mt. Thor alleged) occurred after January 19, 1982. Mt. Thor's pre-hearing memorandum, filed May 9, 1985, primarily amplifies Mt. Thor's claim that Gioia's surface mining under the permit had not been authorized between January 19, 1982 and March 3, 1983. These allegations are insufficient to raise a valid defense to the DER order at issue, however. Mt. Thor admits that it entered into an agreement with Cioia and therein granted Gioia permission to mine under the authority of Mt. Thor's mining permit. Mt. Thor is simply complaining that Gioia breached this agreement by failing to provide the liquidated damages as agreed if Gioia failed to secure transfer of the permit by January, 1982. This alleged failure on the part of Gioia in no way excuses Mt. Thor from responsibility for harm that has occurred as a consequence of its subcontractor's use of its mining permit. Black Fox Mining and Development Corp. v. DER, EHB Docket No. 84-114-G (Adjudication dated April 29, 1985); John E. Kaites et al. v. DER, EHB Docket No. 84-104-G (Opinion dated August 7, 1985). Contractual disputes between the permittee and its subcontractor are matters for resolution before the Courts of Common

Pleas,[2] and not for this Board's consideration. Consequently, the factual allegations of Mt. Thor concerning the alleged breach of its agreement with Gioia are insufficient to raise any issue of material fact.

Mt. Thor also has argued that it lacks the funds to carry out the requirements of the order at issue. Its pre-hearing memo states:

> Mt. Thor is willing to immediately correct the Novotnaks' situation as soon as it receives the monies due it by Gioia from the liquidated damages provision of the Agreement and Amendment to the Agreement.

Mt. Thor has affirmed this last statement in a motion for continuance pending settlement negotiations, filed November 12, 1985, wherein Mt. Thor declared:

> 6. Mt. Thor realizes the damages done by Gioia Coal Company to the Novotnaks' property, and is doing everything possible to bring its litigation against Gioia Coal Company to a conclusion. As soon as the litigation is concluded, and Mt. Thor receives the monies in the liquidated damages account, Mt. Thor will immediately do what is necessary to correct the Novotnaks' situation.
>
> 7. Mt. Thor would have already corrected this situation but it has insufficient funds, in that Gioia Coal Company took the monies in the escrow account.

Again, these statements fail to raise a valid defense to the DER order. The law of Pennsylvania on this point is clear. Financial inability to comply is not defense to a DER order. Ramey Borough v. Commonwealth, DER, 466 Pa. 45. 351 A.2d 613 (1975). Mt. Thor is correct that the Supreme Court in Ramey Borough stated that in an enforcement proceeding the defense of inability to comply might be raised. 351 A.2d at 616. Mt. Thor, however, fails to recognize that an appeal of a DER order to the Board is not such an enforcement proceeding. As the Ramey court stated: "the appeal from the issuance of the order serves only to determine the

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2. The pre-hearing memorandum was accompanied by a copy of a complaint filed by Mt. Thor against Gioia in the Westmoreland County Court of Common Pleas, asking for damages caused Mt. Thor by Gioia's allegedly unauthorized mining.

content and validity of the order." 351 A.2d at 615. Consequently, the allegations directed at the defense of financial inability fail to raise any material issues of disputed fact.

In short, since Mt. Thor has not contested the factual bases of the DER order, has raised no material factual issues itself and has failed to state a valid legal defense to the DER order, we conclude that DER is entitled to judgment as a matter of law.

ORDER

WHEREFORE, this 21st day of February, 1986, DER's motion is granted and the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: February 21, 1986

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SECHAN LIMESTONE INDUSTRIES, INC.,
Appellant
v.
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Appellee
and
SLIPPERY ROCK CLEAN WATER, INC.,
Intervenor
and
ARMCO, INC.,
Intervenor

EHB DOCKET NO. 85-162-G

(Issued February 21, 1986)

ADJUDICATION

By Edward Gerjuoy, Member

SYLLABUS

This appeal of three Department actions is dismissed. The Department did not abuse its discretion in taking any of the actions appealed herein. Termination of the interim status of Appellant, an operator of a hazardous waste disposal facility, was appropriate under 25 Pa.Code §75.265(z)(7) and the Solid Waste Management Act, 35 P.S. §6018.101 et seq. The Department is required by §75.265(z)(7) to terminate interim status following an operator's failure to submit information necessary to complete processing of a SWMA permit application.

Given the severe environmental problems existing at the site, the Department was fully justified in ordering the cessation of further disposal activities. Likewise,

given the continuing nature of the violations present, and the failure to effectively remedy them, suspension of the operator's solid waste permit was reasonable and appropriate.

Actions taken by the Department at another waste disposal facility are not relevant to the adjudication of this matter. The issue before the Board here is whether the Department acted properly under the circumstances of this case. Moreover, even if the Department has not acted in the same manner with regard to two different facilities, laxity of enforcement does not make out a case of discriminatory enforcement of the laws.

INTRODUCTION

This is a consolidated appeal of three actions taken by the Department of Environmental Resources (the "Department") concerning a hazardous waste disposal facility owned and operated by Sechan Limestone Industries ("Sechan"). By a letter dated April 24, 1985, the Department terminated Sechan's interim status, which had been granted under the authority of the Solid Waste Management Act ("SWMA"), 35 P.S. §6018.101 et seq., and Chapter 75 of the Department's Rules, 25 Pa.Code Chapter 75. In addition, on April 29, 1985, an administrative order was served upon Sechan, directing it to immediately cease disposal activities in a portion of the disposal facility known as the C-1 Cell.

Sechan's appeal of the letter of April 24, 1985 was docketed at #85-162-G; the appeal of the April 29, 1985 order was docketed at #85-180-G. By an order dated May 10, 1985, the Board consolidated the two appeals at the former docket number.

Shortly after the appeals were filed, Sechan petitioned for a supersedeas, alleging that cessation of operations would cause it irreparable harm through the loss of income and customers. The supersedeas was denied after a hearing, which was held

on May 3 and 6, 1985. No separate opinion was issued explaining the basis for the Board's decision; this opinion sets forth the reasons for the denial. The record developed during the supersedeas hearing has been made a portion of the hearing on the merits of this appeal, by agreement of the parties.[1]

The Board has had occasion to issue two interlocutory decisions in this matter. On June 18, 1985, in response to the Department's motion for a determination of the burden of proof, the Board ruled that Sechan bore the burden of production and persuasion for any affirmative defense it intended to raise, including the contention that the cause of the contamination which admittedly exists at the site had been eliminated, and that the burden must be met by clear and convincing evidence. This determination was based in part upon section 611 of SWMA, 35 P.S. §6018.611. We herewith affirm this earlier ruling. As will become apparent in the discussion infra, little credible evidence was offered in support of Sechan's affirmative defense. The burden assigned to Sechan simply was not met, even if we were to apply the usual standard, that the burden must be met by a preponderance of the evidence. Therefore, the "clear and convincing" evidence requirement did not figure in the adjudication of this matter. Finally, we note that our earlier ruling imposing this heavier burden upon Sechan under §6018.611 is consistent with section 901 of the Act, 35 P.S. §6018.901, which states that "the terms and provisions of this act are to be liberally construed, so as to best achieve and effectuate the goals and purposes hereof."

The second interlocutory ruling dealt with the issue of federal preemption of the Pennsylvania hazardous waste management program under the authority of the federal Resource Conservation and Reclamation Act ("RCRA"), 42 U.S.C. §6901 et seq. We ruled that RCRA does not preempt state authority under SWMA and its associated regulations

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[1] References to the transcript of the supersedeas hearing are designated "TR.SS"; references to the transcript of the hearing on the merits are designated "TR."

insofar as those provisions are applicable to this appeal. We affirm this ruling here as well. A brief discussion of the relevance of federal law to this appeal is contained in the opinion infra.

Intervention has been granted to two additional parties: Slippery Rock Creek Clean Water, Inc., a citizens' group concerned with the quality of Slippery Rock Creek, which lies in the vicinity of Sechan's facility, and Armco, Inc., one of Sechan's customers and a generator of some of the wastes deposited at the Sechan facility.

Following the close of the hearings the Board received several motions from the parties urging the consideration of additional evidence and testimony. The Board declined to permit reopening of the record; the record developed during the hearings is entirely adequate for reaching a determination of the issues raised in this appeal. For this reason documents appended to the parties' briefs which were not formally introduced into evidence have not been considered in the process of reaching the decisions embodied herein.

FINDINGS OF FACT

1. The Department of Environmental Resources ("Department") is the agency of the Commonwealth authorized to administer and enforce the provisions of the Solid Waste Management Act ("SWMA"), 35 P.S. §6018.101 et seq.

2. Sechan Limestone Industries, Inc. ("Sechan") is a Pennsylvania corporation whose principal place of business is R. D. #1, Portersville, PA 16051.

3. Sechan owns and operated a facility located in Muddy Creek Township, Butler County, and Slippery Rock Township, Lawrence County ("facility"), which facility until May 10, 1985 treated and disposed of, inter alia, hazardous wastes by landfilling.

4. The disposal of the solid wastes commenced after September 6, 1979, when the

Department issued Solid Waste Permit No. 300705 for the operation of the facility and the disposal of solid waste pursuant to the Solid Waste Management Act, the Act of July 31, 1968, P.L. 788, 35 P.S. §6001 et seq. ("Act 241").

5. On February 15, 1980, the Department amended Solid Waste Permit No. 300705 to include a 34.2 acre area specifically designated as areas "A" and "C" for the disposal of waste.

6. This appeal involves two discrete areas, the C-1 Cell or Pit ("C-1 Cell") and the C-2 Cell or Pit ("C-2 Cell").

7. The C-Area initially qualified for interim status as a treatment and disposal facility for hazardous waste pursuant to Section 3005 of RCRA, 42 U.S.C. §6925, and also qualified for interim status in accordance with 25 Pa.Code §75.625(z)(3), for Sechan submitted a timely Part A Hazardous Waste Permit Application and notification of hazardous waste activity pursuant to 25 Pa.Code §75.267. The United States Environmental Protection Agency assigned the Facility identification number EPA I.D. PAD002860377.

8. Sechan's Part A application estimated that Sechan landfilled 900,000 tons of chrome bearing sludge ("D007") from steel mills and 50,000 tons of emission control dust sludge from the electroplating of steel ("K061") annually. D007 and K061 are hazardous wastes. The process design capacity of the landfill was indicated to be 800 acre feet. The application also stated that Sechan performed off-site mixing ("T04") of cement baghouse waste with D007 waste for stiffening purposes prior to the transportation to the facility.

9. The Part A application was subsequently amended by Sechan to include additional hazardous wastes.

10. In response to the original Part A application, on October 6, 1981, EPA issued to Sechan a document entitled Conditions of Operation During Interim Status.

The Conditions of Operation were subsequently amended by EPA on four occasions to permit the disposal of additional hazardous wastes. The Conditions of Operation During Interim Status document does not specify groundwater concentrations for hazardous constituents.

11. By letter dated March 17, 1983, Sechan was notified by the Department's Bureau of Solid Waste Management ("BSWM"), pursuant to 25 Pa.Code §75.265(z)(6), to submit a Part B Hazardous Waste Management Permit Application for Area "C" by September 17, 1983.

12. Sechan has not submitted to DER a Part B Hazardous Waste Permit application for area "C".

13. By a letter dated April 24, 1985, the Department notified Sechan that its interim status would be terminated and that its solid waste permit would be suspended as of May 10, 1985. In addition, the letter directed Sechan to cease accepting all solid waste for storage, treatment, processing or disposal purposes as of May 10, 1985.

14. Sechan's appeal of the Department's April 24, 1985 letter has been docketed at EHB Docket No. 85-162-G.

15. On April 29, 1985 the Department issued an order to Sechan directing the immediate cessation of solid waste disposal operations in the C-1 pit.

16. Sechan's appeal of the April 29, 1985 order was docketed at EHB Docket No. 85-180-G and subsequently consolidated with the appeal at 85-162-G.

17. Sechan commenced disposal activities in the 2.47 acre area identified as the C-1 Cell about August, 1981, ceased these activities after the contamination was discovered, and recommenced disposal in the C-1 Cell on April 24, 1985. (See finding of fact 27.).

18. Sechan commenced disposal activities in the C-2 Cell in September, 1983.

19. Sechan terminated the disposal of hazardous and residual wastes in the C-2 Cell on May 10, 1985. Sechan has exceeded the final permitted elevations at the C-2 Cell. (TR. 154-56).

20. The C-1 Cell has not been filled to its original design and permitted capacity.

21. Neither the C-1 Cell nor the C-2 Cell was constructed so as to incorporate a leachate withdrawal system between the waste and the liner.

22. Neither the C-1 Cell nor the C-2 Cell was constructed so as to incorporate a leachate detection zone beneath the liner.

23. Neither the leachate withdrawal system nor the leachate detection zone was required by the Department at the time Sechan's Facility was permitted by the Department. Such design features are, however, now required in order for a hazardous waste facility to obtain a solid waste permit from the Department.

24. Land disposal of hazardous waste is generally considered to be the least favored method of disposal. This is due to the problems associated with constructing adequate disposal facilities. (TR.SS 285).

25. In accordance with the requirements contained in 25 Pa.Code §75.265(n)(1), on or about September 21, 1981, Sechan submitted to the Department a groundwater monitoring program. The original groundwater monitoring wells as approved were wells 9A, 9B, 10, 11, 11A, 12, 13, 15 and 16.

26. Pursuant to 25 Pa.Code §75.265(n)(3-6), Sechan has installed groundwater monitoring wells for the area "C".

27. In the course of reviewing the data from the groundwater monitoring wells, the Department discovered that the groundwater quality had been affected in several of the monitoring wells, and by letter dated July 11, 1983, the Department notified Sechan that it had observed evidence of contamination in elevated levels of sulfate,

specific conductance, chloride, sodium and chromium.

28. By letter dated July 11, 1983, the Department requested that Sechan submit a plan for the assessement and abatement of the groundwater problem at the C-1 Cell at the Sechan Landfill in accordance with 25 Pa.Code §75.265(n)(15).

29. Earthen or clay liners leak, i.e., transmit fluids, as a general rule. (Tr.SS 286, 333, 402-03).

30. The rate at which an earthen liner will transmit fluids is a function of the amount of fluid head on the liner and the permeability of the liner material. (Tr. 351, 407).

31. The greater the fluid head, the greater the rate of flow through the liner will be. (Tr. 353).

32. Sechan's expert, Dr. Bushnell, agrees that the materials of which the liner of the C-1 Cell are constructed transmit liquid at some rate. (Tr.SS 286).

33. Figures obtained via laboratory permeability testing are often much lower than figures obtained in actual field observations of permeability of liners. Field permeabilities are often ten to one thousand times greater than the figures obtained in the laboratory. (Tr. 359, 366).

34. Factors which may influence the permeability of liner material include the lack of uniformity due to the presence of rocks and clods of earth and cracking due to exposure to the elements, e.g., freezing or drying. (Tr. 363-65).

35. For the purpose of estimating the effective field permeability of a liner, there is little likelihood of obtaining a representative sample from a small, e.g., one foot square, sample from the liner as constructed in the field. This is due to the small probability of encountering any of the larger rock fragments, clods of earth and cracks which may be present in the liner as a whole and which can have much higher permeabilities than the rest of the liner. (Tr. 363-65).

36. The reduced likelihood of obtaining a representative sample of a liner by taking a small sample for laboratory analysis is likely to be one of the factors which contributes to the sizable discrepancy between laboratory and field permeability values. (Tr. 363-65).

37. Poor compaction of liner material is another possible cause of increased liner permeability. (Tr. 369-70).

38. Poor compaction may result from improper moisture content of the liner material during construction. Generally, liner material should be placed in the disposal cell in a moist condition. (Tr. 357, 369).

39. Poor compaction may also result from the use of improper equipment for compaction. Equipment which concentrates a great deal of weight on a small area is preferable to equipment which distributes weight over a larger area. (Tr. 369-72).

40. Use of bulldozers may not achieve optimum compaction due to the fact that the treads on the equipment tend to distribute the weight of the machinery over a fairly large area. (Tr. 371).

41. The presence of rocks and clods of earth in liner material may also contribute to poor compaction; their presence causes uneven distribution of the weight of the compacting equipment which can cause increased permeability in the immediate vicinity of the rock or clod. (Tr. 374-76).

42. In the construction of a liner it is generally preferable to place the liner material in the cell in lifts of a few inches in thickness. The thinner the lift, generally the better the compaction will be. (Tr. 371).

43. The C-1 and C-2 cells were constructed in an area of Sechan's property where Sechan previously had conducted limestone mining operations. (Tr.SS 58).

44. Sechan employed blasting to remove overburden and limestone during the course of its surface mining operations. (Tr.SS 499).

45. The C-1 and C-2 cells are constructed with single liners made up of on-site material, i.e., naturally present glacial till and overburden remaining after the mining operations were completed. (Tr.SS 123, 478-80).

46. The liner material contains gravel, sand, silt and clay. In addition, pieces of rock as large as twelve inches across are present in the liner material. (Tr. 183-84; Sechan Ex.6).

47. The liner material was placed in the cell in lifts approximately five or six inches in thickness. (Tr. 430, 476).

48. On at least some occasions the liner material was placed in the cell in a dry condition. (Tr. 433).

49. The liner material was spread in the cell using bulldozers with cleated treads. These treads tear up the material over which they are driven. The bulldozers also were used for the purpose of compacting the liner material. (Tr.SS 472).

50. Final compaction of the liner material was achieved by driving over the lifts with rubber-tired earth-moving equipment. (Tr.SS 163).

51. The thickness of the liner varies between five and twenty feet. (Tr. 482, 513).

52. The C-1 Cell was constructed during 1980 and between May and August of 1981. During the winter of 1980-81 the cell was not covered and remained exposed to the elements. (Tr. 469-70).

53. There is approximately a two-foot drop in elevation from the northeast to the southwest corners of the C-1 Cell. (Tr. 457, 472, 802).

54. The C-1 Cell is not constructed of exactly the same type of material as the C-2 Cell; material for construction of the liners of the two cells came from different areas of Sechan's property. (Tr. 478-80).

55. Field permeability tests were conducted during construction of the liners

in the "C" area. (Tr. 604-08).

56. None of the samples from the "C" area dated May 20, 1980 and August 6, 1980 can be identified as having been obtained from the liner for the C-1 Cell. (Tr. 605, 613-14).

57. Values for permeability were not obtained for the samples of November 11, 1980 identified as possibly having been taken from the C-1 Cell. (Tr. 618-620; Sechan Ex.18).

58. Values for permeability were obtained for two samples which were identified as having been obtained from the C-1 Cell on May 11, 1981. These samples indicate permeabilities of $.63 \times 10^{-7}$ and $.96 \times 10^{-7}$ cm/sec. (Sechan Ex.18).

59. No samples for permeability testing were taken after May of 1981 although construction of the liner did not conclude until late summer of 1981. (Sechan Ex.18; Tr. 622-23).

60. The permeability samples were collected via a procedure which obtained an eighteen by three inch tubular sample from the uppermost portion of the liner. Of this eighteen-inch-long sample, only a four-inch segment actually was tested. The testing was conducted after the moisture content of the sample had been altered, the sample had been compacted, and all rocks greater than one quarter of an inch in size had been removed. (Tr. 591, 597-99, 611).

61. Laboratory permeability values obtained from four inches of the top eighteen inches of two samples of the liner cannot be said to be representative of the permeability of the liner for the entire 2.47-acre C-1 pit area.

62. No field permeability tests were conducted for the C-1 liner.

63. It is doubtful that the true permeability of the C-1 liner material has been determined from the available information. (Tr. 390-92).

64. It is difficult to assuredly conclude that the rate of flow through the C-1

liner is 1 x 10^{-7} cm/sec and it is likely that the liner material does not have a low permeability. (Tr. 390-92).

65. The uppermost aquifer in the vicinity of the C-1 Cell is the Clarion aquifer. (Board Ex.1: Report of Bushnell and Bushnell).

66. The Clarion aquifer flows under the C-1 Cell and toward the west, outcropping at the boundary between Sechan's property and McConnell's Mill State Park, in the vicinity of Slippery Rock Creek. (Sechan Ex.1; Board Ex.1: Report of Bushnell and Bushnell; Tr.SS 275).

67. A plume of contamination from the C-1 Cell has reached the Clarion aquifer. It can be expected to travel in the direction of groundwater flow. (Board Ex.1: NUS Report).

68. The wastes placed in the C-1 Cell are very high in chromium. (Tr. 491).

69. Wastes placed in other disposal cells on Sechan's property, e.g., the C-2 Cell, do not contain levels of chromium as high as those placed in the C-1 Cell. (Tr.SS 491).

70. The plume of contamination contains high levels of chromium, and lies within 2500 feet of Sechan's disposal activities. (Sechan Ex.3a; Board Ex.10).

71. The federal drinking water standard for chromium is 50 µg/l. 25 Pa.Code §75.265, Appendix II.

72. Sechan's expert estimated flow rates in the Clarion aquifer as 6 to 27 ft/day, but DER's expert believes that the flow rates may be lower. (Board Ex.1: Report of Bushnell & Bushnell; Tr. 796).

73. Evidence of chromium contamination of the aquifer was first available in June or July of 1983, when data from Well 16 showed levels of chromium at 880 µg/l. Well 16 is located immediately adjacent to the C-1 Cell. (Sechan Ex.1; Sechan Ex.3a; Tr.SS 78).

74. In February 1984, the first data was collected from Well 14A, which is located approximately due west and downgradient of the C-1 Cell. (Sechan Ex.3a).

75. The average chromium concentration in Well 14A in February, 1984 was 15,600 µg/l. (Sechan Ex.1; Sechan Ex.3a).

76. The level of chromium in Well 14A has dropped significantly since February 1984, but it remains in excess of federal drinking water standards. The average concentration for July 1985--the last date for which data was presented--was 800 µg/l. (Sechan Ex.3a).

77. Wells 14B and 16E likewise continue to show average concentrations far in excess of drinking water standards, i.e., 380 and 590 µg/l respectively for July 1985, two years after the contamination of the aquifer first was detected. (Sechan Ex.3a).

78. In general, the levels of chromium detected in the wells have decreased since mid-1984. (Sechan Ex.3a).

79. This trend has not been uniform, however. Well 14B, for example, which is located several hundred feet to the west of the C-1 Cell in the general direction of groundwater movement, has shown an inconsistent pattern of increasing and decreasing concentrations of chromium over the past two and a half years. (Sechan Ex.3a).

80. Well 16B, which was located immediately adjacent to the C-1 Cell and within the expected path of the plume of contamination, was destroyed during the replacement of a portion of the liner of the C-1 Cell in March of 1985. It was not replaced. Well 16B had shown the highest levels of chromium contamination of any of the wells. (Tr.SS 84, 244).

81. The well farthest from the C-1 Cell in a downgradient direction, Well 19D, has shown levels of chromium in excess of federal drinking water standards on two occasions during the one-year period that it has been monitoried, i.e., 110 µg/l in May 1984, and 170 µg/l in September 1984. (Sechan Ex.3a).

82. The ponds which lie to the southwest of the C-1 Cell have shown levels of chromium well in excess of the federal drinking water standards on several occasions since monitoring of the ponds began in 1980. (Sechan Ex.3a).

83. It is likely that the ponds are recharged by water from the Clarion aquifer and therefore, that the levels of chromium in the pond represent contamination from the C-1 Cell which has migrated through the aquifer. (Board Ex.1: NUS Report; Tr.SS 397).

84. The data from the ponds, from Well 19D and from Well 14C suggest that the extent of the plume of contamination may be considerably greater than that postulated by Sechan's expert, Dr. Bushnell. (Board Ex.1: Maps 1A - 1D).

85. It is not possible to determine the farthest extent of spread of the plume of contamination since there are no monitoring wells downgradient of or between points where chromium in excess of the federal drinking water standards already has been detected. (Tr.SS 448-49; Sechan Ex.1; Sechan Ex.31).

86. The decrease in the levels of chromium in the wells in general can be attributed to Sechan's pumping activities.

87. Pumping causes clean water from other parts of the aquifer to be drawn into the wells producing a diluting effect which contributes to the decrease in chromium levels. (Tr.SS 326-27, 391).

88. This decrease in chromium does not necessarily indicate, however, that the source of the contamination no longer exists.

89. There is insufficient data to determine the rate at which dilution is occurring.

90. Based upon the available data, the most that can be concluded is that the chromium in the groundwater in the vicinity of each well is being removed at a faster rate than it is entering the groundwater in the vicinity of that well.

91. While there appears to be a decrease in the extent of the plume of contamination as monitored by the existing wells, there is a significant possibility that those wells have not been and are not monitoring the entire plume.

92. Pumping of a well within an aquifer will produce a "cone of depression" within the aquifer, i.e., a lowering of the water table in the vicinity of the well. (Tr. 692).

93. Cones of depression are capable of altering the direction of groundwater flow, thereby possibly containing the spread of a plume of contamination. (Tr. 691-92).

94. The evidence concerning cones of depression created by the pumping of the wells at the Sechan site is inconclusive.

95. Dr. Bushnell estimated, based upon the observations made during a draw down test, that the cone of depression for Well 14A was approximately 600 x 1100 feet in area and that for Well 14B it was approximately 300 to 350 feet, i.e., that it extended as far as Well 14C. (Tr.SS 290-92, 305; Tr. 725-26).

96. Dr. Bushnell's estimates of the size of the cones of depression are based upon the assumption that the rate of pumping was constant. (Tr. 726).

97. The rate of pumping of these wells during the day to day operation of the Sechan facility is not constant but varies with the hours the facility is in operation, weather conditions, whether there is enough water in the well to pump, and the failure to the electrical pumping equipment. (Tr.SS 212-13).

98. No data showing the actual rates of pumping per well are available. (Tr.SS 215, 383; Tr. 562).

99. Dr. Bushnell's estimates of the extent of the cones of influence of the wells are based upon his observations during a single draw down test. No other actual testing to determine the extent of the cones of depression has been conducted. (Tr.

724-26).

100. Dr. Bushnell stated that the plume of contamination is coextensive with the cones of depression created by the pumped wells. (Tr.SS 305).

101. It is not possible, based upon the available data, to determine whether the cones of depression created by the pumping of the wells are coextensive with the plume of contamination, since the extent of the plume cannot be determined.

102. Since it is not possible to determine whether the cones of depression are coextensive with the contaminant plume, it is difficult to conclude that the pumping of the wells has completely contained the plume.

103. The levels of chromium in Well 21B have been higher than those in wells closer to the C-1 Cell during the same period of monitoring, despite the fact that some of the wells closer to the C-1 Cell were being pumped. This fact indicates that the pumping is not containing all of the contaminant plume. (Tr.SS 452-53; Sechan Ex.3a).

104. The elevation of the bottom of the C-1 Cell is above the water level in the Clarion aquifer. (Board Ex.1: NUS Report; Sechan Ex.19).

105. The water level in Well 22B, located to the east and upgradient of the C-1 Cell, is substantially above the bottom of the C-1 Cell. (Tr. 389, 440; Board Ex.1: NUS Report).

106. The water level in Well 22B suggests the possibility that the C-1 Cell lies within a saturated zone and that groundwater is entering the cell from the east. (Board Ex.1: NUS Report; Tr. 388).

107. In April of 1985, Well 22C was drilled between Well 22B and the C-1 Cell. (Tr.SS 441, DER Ex.P).

108. The water level in Well 22C is lower than the elevation of the base of the C-1 pit. (Tr.SS 441).

109. Well 22C is approximately four feet deeper than Well 22B (Tr. 732).

110. It is unclear whether the casing in Well 22C is slotted. (Tr. 732-34, 788-89; Board Ex.1: well logs; DER ex.P).

111. It is likewise unclear whether the casing in Well 22B is slotted. (Tr. 732; Sechan Ex.19; Board Ex.1: well logs).

112. If the casing in a well is not slotted, the well measures the water pressure in the strata into which the bottom of the casing has been inserted, and bears no relation to the water content of overlying formations. (Tr. 789).

113. In order to determine whether or not Wells 22B and 22C are picking up the same groundwater, it would be important to know whether the two wells are in fact constructed in the same manner. (Tr. 733).

114. It is not possible to determine, based upon the record before the Board, whether Wells 22B and 22C were constructed in the same manner.

115. It is possible that groundwater is entering the C-1 Cell from the east, in the vicinity of Wells 22B and 22C.

116. Some of the wastes deposited inthe C-1 Cell contain as much as 80 percent water; the waste was pourable or soupy. (Tr. 487-89).

117. There is a well located within the C-1 Cell which has been referred to as the C-1 Well. (Sechan Ex.19).

118. The presently existing C-1 Well is a replacement of an earlier well which was destroyed during replacement of a portion of the liner in the fall of 1984. (Tr. 763).

119. The present C-1 Well penetrates the liner of the C-1 Cell by approximately two feet. (Tr.SS 385).

120. The C-1 Well is not pumped but collects water simply by drainage. (Tr. 750).

121. In January of 1984 ten feet of water was present in the C-1 Well. Tr.SS 385).

122. In April of 1985 two and a half feet of water was present in the C-1 Well. (Tr.SS 385).

123. As of August 1985 there was usually one to two feet of water present in the C-1 Well. This water is removed by bailing on a daily basis. (Tr. 768, Sechan Ex.20).

124. One foot of water in the C-1 Well is equivalent to about one and a half gallons. (Tr. 800).

125. The decrease in the amount of water in the cell can be attributed in part to the placement of an earthen cap on the C-1 Cell. (Tr.SS 394; Tr. 678-80).

126. The earthen cap is approximately two feet thick and is constructed of the same material as the liner of the C-1 Cell. Therefore, it is not impermeable. (Tr. 138, 254-57, 742).

127. The cap on the C-1 Cell has cracks and one-foot-deep erosion gullies on it which are likely to increase the permeability of the cap. (Tr. 130, 137, 799).

128. During the period between May 22, 1985 and May 31, 1985, a rainfall of 2.34 inches occurred in the vicinity of the Sechan facility. During this same period the level of water in the C-1 Well rose by four-tenths of a foot. Much of this water entered the C-1 Cell by penetrating the cap. (Tr. 741-42; Sechan Ex.20: well record for the C-1 Well).

129. The rise of four-tenths of a foot during the period from May 22 to May 31, 1985 could represent the infiltration of several thousand gallons of water across the surface area of the C-1 Cell. (Tr. 804-08).

130. Between May 31, 1985 and July 25, 1985, the level of water in the C-1 Well dropped by approximately one and one half feet.

131. It is likely that the level of water in the C-1 Well represents the amount of fluid head present on the liner across at least a portion of the C-1 Cell. Tr. 757).

132. It is unlikely that the C-1 Well drains the entire C-1 Cell. (Tr. 750, 815-18, 821-26).

133. Removal of a few gallons of water per day from the C-1 Well cannot remove all of the water from the C-1 Cell. (Tr. 809-10, 833).

134. There is a fluid head present on the liner of the C-1 Cell.

135. The liner of the C-1 Cell is saturated (Tr. 802, 441-42).

136. Liquids travel more readily through a liner which is saturated than through one which is not saturated and at a rate proportional to the amount of fluid head. (Tr. 353, 356, 416).

137. The decrease in the water level within the C-1 Cell between May 31, 1985 and July 25, 1985 is attributable to generalized liner leakage.

138. Sechan conducted a truck wash operation in the southwestern corner of the C-1 Cell from August 1981 to June 1983 where Sechan washed down the trucks that were used by Sechan to dispose of hazardous wastes in the C-1 Cell. (Tr.SS 75-76).

139. During the course of the truck wash operation a backhoe was used to dig in the area of the truck wash sump. Sechan believes that these excavation activities may have damaged the C-1 liner, causing the escape of contaminated water to the Clarion aquifer. (Tr.SS 182).

140. Sechan excavated a portion of the liner in the southwest corner of the C-1 Cell in the fall of 1984. The purpose of the excavation was to determine whether the truck wash operations had damaged the liner. (Tr.SS 179-83).

141. No visible damage to the liner of the C-1 Cell was noted during the excavation. (Tr.SS 97).

142. The portion of the C-1 liner which was excavated was not subjected to permeability testing. (Tr.SS 181).

143. The liner in the southwest corner of the C-1 Cell was replaced following the excavation. (Tr. 506, 513).

144. It is likely that the contamination of the Clarion aquifer is the result of generalized leaking of the liner of the C-1 Cell, rather than the result of a discrete breach in the liner caused by, e.g., the truck wash operation.

145. The Department did not approve of Sechan's excavation and replacement of the liner in the southwestern corner of the C-1 Cell. (Tr. 507).

146. Prior to the excavation of the liner, the Department had advised Sechan against doing so. (Tr. 507).

147. The Department gave consideration to the economic consequences of its action. (Tr. 27-28, 112-13).

FACTS

The hazardous waste disposal facility at issue in this appeal consists of two disposal areas, the C-1 and C-2 Cells. Disposal activities in the C-1 Cell began in 1981. In July of 1983 high levels of chromium were detected in the groundwater in the vicinity of the C-1 Cell. As a consequence of this discovery, the Department directed Sechan to formulate an assessment and abatement plan addressing the problem of the groundwater contamination.

Sechan submitted an initial assessment and abatement plan to the Department in August of 1983. The plan also provided that Sechan would resume disposal operations in the C-1 Cell after completion of activities in the C-2 Cell, if monitoring indicated that a substantial clean-up of the contamination had occurred.

After the discovery of the groundwater contamination, Sechan installed several

wells, in addition to those initially present in the vicinity of the C-1 Cell, in an effort to determine or control the spread of the contaminant plume. Some of these wells have been pumped in an attempt to remove the chromium from the groundwater. Sechan contends that its pumping activities have caused a reduction in the concentration of chromium present in the wells and that this fact indicates that both the size and the concentration of the plume have decreased. To a limited extent we agree. The concentrations of chromium have decreased over the past several months. This fact, however, does not necessarily indicate that the groundwater contamination problem has been resolved.

A plume of contamination entering an aquifer may be expected to travel in a generally downgradient direction, consistent with the direction of groundwater flow. In the vicinity of the C-1 Cell, the direction of flow is to the west. Correspondingly, the wells to the west of and adjacent to the C-1 Cell are those which consistently have shown the highest levels of chromium. The difficulty, however, is that it is not possible to determine with a reasonable degree of certainty whether the existing wells in fact are monitoring or containing the entire contaminant plume. Indeed, the available data, though sketchy, suggest the contrary.

Most of the wells to the west of the C-1 Cell are located within two hundred feet of the cell. The majority of these wells have shown levels of chromium in excess of the federal drinking water standard, indicating the presence of a contaminant plume. There are, in addition, three wells farther to the west which on occasion have registered levels in excess of the federal drinking water standard, and the ponds to the southwest of the cell likewise have shown elevated levels of chromium on several occasions. These observations suggest that the plume of contamination may have spread substantially beyond the wells closest to the C-1 Cell. Indeed, Sechan's expert witness, Dr. Bushnell, was willing to agree that a plume of contamination may have

spread as far as 600 to 700 feet from the perimeter of the C-1 Cell, where the plume is defined as levels of chromium in excess of the federal drinking water standard. The data from the westernmost well and from the ponds suggest that the plume may be considerably larger.

In addition, there is an absence of information concerning the possible existence of contamination in the area between the wells which have shown elevated levels of chromium, i.e., Wells 14B, 21B, and 19D. In short, the actual extent of the contaminant plume cannot be clearly determined, but in light of the available data, it is more likely than not that the plume has traveled at least several hundred feet to the west of the C-1 Cell. Without more information, the possibility that it has spread even farther cannot be discounted.

Sechan has argued that the pumping of the wells has controlled the spread of the plume, i.e., that in effect the plume is "caught" by the wells and further migration into the acquifer is prevented. It is undisputed that the effect of the pumping is to draw clean water into the wells, causing dilution of the chromium and thereby a reduction in its concentration. Sechan claims that the pumping also has altered the pattern of groundwater flow in such a manner as to assure that all of the chromium present in the aquifer is being subjected to this dilution treatment. Unfortunately, the record does not support this contention.

The data concerning the effect of the pumping in the vicinity of the C-1 Cell are inconclusive at best. Dr. Bushnell stated that he believed that the cone of depression (or "cone of influence") created by pumping Well 14A was coextensive with the plume of contamination. This conclusion, however, was based upon the assumption that the rate of pumping is constant, which has not been the case. In addition, it was unclear whether Dr. Bushnell meant to describe a plume of contamination defined as levels of chromium in excess of the federal drinking water standard, or defined as

levels 50 times that great, as he suggested in a map which he prepared to indicate the extent of contamination (Map 1C, a part of Board Ex.1). Moreover, his conclusions about the cone of influence of Well 14A were based upon observations made during a single study of that well; no additional studies were conducted on that or any of the other wells. DER's expert, Dale Voykin, believes that a single study of the type conducted by Dr. Bushnell could not accurately reveal the characteristics of an aquifer. Finally, and perhaps most importantly, the testimony concerning the effect of pumping Well 14A appears contradictory. Map 1A (a portion of Board Ex.1) indicates a considerably smaller cone of influence than that which Dr. Bushnell described during the supersedeas hearing. This discrepancy was not clarified and we simply are forced to conclude that the evidence presented concerning the cones of influence is inconclusive.

Significantly, some of the data suggest that the pumping of the wells is not containing the spread of the chromium within the aquifer. Well 21B, located approximately 200 feet to the west of the C-1 Cell, has shown levels of chromium higher than those noted in some of the wells closer to the cell within the same period of time, indicating that a certain amount of chromium is migrating to the west of the cell, unaffected by pumping. The same might be said for the levels of chromium noted in the ponds. In summary, there is a substantial possibility that a portion of the contaminant plume is escaping from the vicinity of the C-1 Cell and moving westward. The possible farthest extent of this westward movement cannot be determined.

There has been no dispute that the source of the chromium contamination is the C-1 Cell. There has been considerable disagreement, however, on the issue of the cause of the contamination, i.e., the mechanism whereby the chromium has been allowed to enter the aquifer. In our judgement, the evidence on this issue favors the view that the liner as a whole is transmitting liquid and that this fact is responsible for

the contamination observed in the aquifer. Dr. Bushnell admitted that the liner of the C-1 Cell was likely to be transmitting liquid. He also agreed that earthen liners, as a general rule, do leak and that for this reason landfilling of hazardous waste is the least favored method of disposal. Sechan's NUS consultant, Dr. Roffman, also agreed that earthen liners will leak. In essence, there can be little question that the line of the C-1 Cell is capable of transmitting liquid to the underlying aquifer.

The evidence concerning the construction of the C-1 liner when examined in light of the testimony of the Department's expert, Dr. Daniel, strongly suggests that the permeability of the liner is such that large amnounts of liquid may be passing through it. Neither the material of which the liner is constructed nor the method of construction were optimal. The liner is made of the naturally occurring glacial till which was present on the site as the result of Sechan's earlier limestone quarrying operations. This material contains some clay, which has recognized adsorptive capacities, but it also contains substantial amounts of sand, gravel and rock, which increase the permeability of the liner. In addition, it is quite clear that the laboratory permeability studies conducted with segments taken from the C-1 liner cannot be said to represent the liner's actual field permeability. Aside from the fact that only two of the samples actually could be identified as having been taken from the C-1 liner, the testimony of Dr. Daniel to the effect that laboratory permeability figures may be ten to one hundred times lower than the actual permeability of the liner <u>in situ</u> suggests that little weight should be given to laboratory permeability figures, particularly where, as here, the weight of the evidence suggests that the liner is transmitting significant amounts of contaminated liquid.

Earthen liners will transmit liquid at a greater rate as the hydraulic head on

the liner is increased. In addition, a saturated liner will transmit fluids more readily than one which is not saturated. The evidence supports the finding that the C-1 liner is saturated and that substantial amounts of water are present within the C-1 Cell creating a sizable head of water on the liner. Water continues to enter the cell through the earthen cap which has been placed on top of it, since the cap, like the liner itself, is not impermeable. In addition, there remains the possibility that groundwater is entering the cell from the east. Given the facts that the cap is expected to be permeable and has sizable surface area, several thousand gallons of water can be expected to infiltrate the cell during a heavy fainfall. The amount of water in the C-1 Cell in fact did increase significantly immediately after a heavy rainfall in the spring of 1985. By mid-summer, however, it had largely dissipated. Since the removal of a few gallons per day from the well within the cell cannot account for the disappearance of this large amount of water, the inevitable conclusion is that the water escaped by passing through the liner.

In contrast with the large amount of evidence offered in support of the theory that the liner as a whole is leaking, there was virtually no credible evidence to support Sechan's contention that the contamination of the aquifer is the result of a discrete breach in the southwest corner of the liner. Mr. Kirshner, Vice-President of Sechan, stated that no indication of such a discrete breach was observed when the southwestern portion of the liner was excavated in an attempt to determine whether the liner had been damaged during the operation of a truck wash in that area of the cell. More importantly, the data regarding the amounts of chromium in the wells do not support Sechan's theory. The decreasing trends have been approximately the same before and after Sechan conducted the excavation and replaced a portion of the liner in the area where the truck wash had existed. Finally, the simple fact that the chromium levels in several of the wells near the C-1 Cell remain very high--16 times

higher than the federal drinking water standard in one case--nine or ten months after the liner was replaced and two years after the contamination first was detected seems more consistent with the theory that there is a continuing source of contamination than with the contention that there had been a single leak which has since been repaired.

In summary, the evidence indicates that the liner of the C-1 Cell as a whole is leaking and will continue to leak so long as there is liquid present within the cell. Substantial amounts of water continue to penetrate the cell despite the placement of an earthen cap; it also is possible that groundwater is entering the cell, contributing to the hydraulic head present on the liner. The liquid leaking from the cell is creating a plume of chromium-contaminated groundwater which is moving in a westerly direction from the area of the C-1 Cell. The extent of migration of this plume cannot be determined from the available data, but it is likely that it has spread at least several hundred feet to the west of the cell. It is not possible to determine whether the pumping of the wells within the contaminated aquifer is effectively containing this plume; certainly there are data which suggest that containment has not been accomplished.

TERMINATION OF INTERIM STATUS

The federal Resource Conservation and Reclamation Act (RCRA), 42 U.S. §6901 et seq., established nationally applicable minimum standards for the design and operation of all hazardous waste management facilities and provided mechanisms for implementing these new requirements. All facilities must submit a permit application for approval which demonstrates how the facility intends to meet the RCRA standards, which are embodied in 40 C.F.R. Part 264. A facility which cannot comply with the Part 264 standards will not be granted a RCRA permit and therefore, lacking authorization to

operate, would be required to cease operations.

Theoretically, the implementation of the RCRA permit requirement would have meant that all hazardous waste management facilities in existence on the effective date of RCRA would have been without the necessary permit and therefore forced to close. Consequently, §6925(e) of RCRA provides for continued operation during the permit review period under "interim status." In order to qualify for interim status an initial permit application containing certain identifying information must be submitted (the Part A application), and certain notification requirements must be met. See 40 C.F.R. §270.13.

In order for a final decision to be made on the permit application, information must be provided demonstrating that the facility will be able to comply with the RCRA requirements, i.e., the Part 264 regulations. This information is to be contained in the Part B application. 40 C.F.R. §270.14. Interim status simply allows an existing facility to continue to operate until a final decision can be made on the permit application.

Pennsylvania has been granted authority to administer the interim status program in lieu of the Environmental Protection Agency. 46 Fed.Reg. 28161 (May 26, 1981).[2] In order to be granted such authorization, the state must demonstrate that its program is "substantially equivalent" to the federal program. Although the state is free to impose more stringent requirements, it cannot relax the federal standards nor can it implement provisions which would conflict with the federal program requirements. 42 U.S.C. §§6926 and 6929.

The Pennsylvania program is administered under the Solid Waste Management Act, 35

[2] Pennsylvania recently has been granted final authorization by EPA to administer its hazardous waste management program in lieu of the federal program, effective January 30, 1986. 51 Fed.Reg. 1791 (January 15, 1986).

P.S. §6018.101 et seq.; the corresponding regulations are contained in 25 Pa.Code Chapter 75. Section 75.265(z)(7), the regulation upon which the Department relied in terminating interim status, provides in pertinent part, that:

> Failure to furnish a requested. . .Part B application on time, or to furnish in full the information required by the. . .Part B application shall be grounds for termination of interim status.

In previous rulings on motions filed in this matter, the Board has raised the issue of whether the language in §75.265(z)(7) is mandatory or discretionary. Appellant believes the language is discretionary and that the Department has abused its discretion in terminating interim status. The Department has urged us not to decide this issue, but rather to apply the law which is in effect at the time of our decision. Doraville Enterprises v. DER, 1980 EHB 489. Section 75.272(d)(2), which became effective on September 14, 1985, would automatically terminate interim status upon failure to timely submit the Part B application. Sechan urges us that any such application of §75.272(d)(2) would be a retroactive application of the regulation in derogation of the tenets of statutory construction. We hold that whichever regulation is applied, the result is identical--the Department must terminate Sechan's interim status.

In construing §75.265(z)(7) the Board must be guided by the Statutory Construction Act, 1 Pa. C.S.A. §1501 et seq. Section 1903(a) of the Statutory Construction Act, 1 Pa. C.S.A. §1903(a) provides that "Words and phrases shall be construed according to rules of grammar and according to their common and approved usage; . . . " The word "shall" is generally interpreted as mandatory in Pennsylvania law. Keystone Chapter v. Thornburgh, ____ Pa.Cmwlth ____, 500 A.2d 211 (1985). However, the real issue in interpreting §75.265(z)(7) is not whether "shall" is directory or mandatory, but whether the commonly ascribed meaning as a result of the

grammatical structure of the sentence imposes any mandatory obligation on the Department. In our view, giving the language of §75.265(z)(7) its plain meaning, it is questionable that a mandatory duty to terminate interim status is imposed on the Department by this language alone, i.e., without reference to related regulations.

The inquiry does not stop here, however, for §75.265(z)(7) must be construed so as to give effect to other regulations relating to interim status. §§1922 and 1932 of the Statutory Construction Act, 1 Pa. C.S. §§1922 and 1932. While the words in any one statutory provision must be given their common, everyday meaning, all of the provisions must be read in pari materia so as to give effect to all of them. Bechtel Power Corp. v. W.C.A.B. (Miller), 70 Pa.Cmwlth 6, 452 A.2d 286 (1982). It is also our view that when the language of §75.265(z)(7) is examined on this basis, namely in its relation to the entire regulatory scheme governing the acquisition and maintenance of interim status, then this language does impose a mandatory duty. Section 75.265(z)(3) provides that:

> A person. . .who owns or operates an existing hazardous waste disposal facility shall be regarded as having interim status provided that:
>
> (i) the facility has a current solid waste permit issued by the Department; and
>
> (ii) The requirements of paragraph (2) are complied with.

Paragraph (2) of that same section states:

> Any person. . .who owns or operates an existing hazardous waste storage or treatment facility shall be regarded as having interim status provided that:
>
> * * * * *
>
> (iii) this section has been complied with.

Among the requirements of "this section" are those of §75.265(z)(6) which require an owner or operator of a hazardous waste disposal facility to submit a Part B application within six months of notification by the Department. Reading §§75.265(z)(2),

75.265(z)(3), and 75.265(z)(7) in pari materia, it is clear that the legislature intended that timely submission of a Part B application be a necessary condition for retaining interim status; in other words, reading the regulations in pari materia, we conclude under §75.265(z)(7) that the Department must terminate interim status if the Part B application is not timely submitted.

Our holding that the Department was mandated to terminate interim status in this case, which we have reached via consideration of §75.265(z)(7), also can be reached via literal application of the newly promulgated §75.272(d)(2) explained supra. Moreover, we reject Sechan's contention, that under the facts of this appeal, termination of Sechan's interim status on the authority of §75.272(d)(2) would be a proscribed retroactive application of that regulation. A statute or regulation is presumed not to operate retroactively unless retroactivity is explicitly stated on its face. §1926 of the Statutory Construction Act, 1 Pa. C.S.A. §1926. Commonwealth Court has defined a retroactive law as one which "relates back to and gives a previous transaction a legal effect different from that which it had under the law in effect when it transpired." Commonwealth, Department of Labor and Industry v. Pennsylvania Engineering Corp., 54 Pa.Cmwlth 376, 421 A.2d 521, 523 (1980). Merely because some facts pertinent to the application of a law came into existence prior to the law's effective date does not automatically result in a retroactive application of the law. Mountain Rest Nursing Home, Inc. v. Commonwealth, Department of Public Welfare, 73 Pa.Cmwlth 42, 457 A.2d 600 (1983). Sechan's past failure to submit a Part B application also is a presently existing condition. Termination of interim status under §75.272(d)(2) in this case results from the operator's continuing, existing failure to submit the Part B application, and, as a result, is not a retroactive application of the newly effective regulation. See Commonwealth v. Barnes and Tucker Company, 455 Pa. 392, 319 A.2d 871 (1974).

CESSATION OF OPERATIONS IN THE C-1 CELL

As the preceding discussion makes clear, operations in the C-1 Cell have created a serious environmental problem. Despite this fact, and despite the fact that the Department had not approved of resuming operations within the cell, Sechan recommenced disposal activities within the cell during April, 1985. It is clear that the problems with the leakage from the cell had not been eliminated at that time. Resumption of disposal within the cell certainly was not likely to improve matters; instead, resumption only was likely to exacerbate the existing condition. Under these circumstances the Department acted appropriately in ordering the cessation of further activities within the cell. Section 602 of the Solid Waste Managemnent Act, 35 P.S. §6018.602 provides that the Department "may issue such orders . . . as it deems necessary to aid in the enforcement of the provisions of this act." The order of April 29, 1985 was well within the Department's discretionary authority under this provision.

SUSPENSION OF THE SOLID WASTE PERMIT

In 1979 the Department issued a solid waste permit to Sechan, under the authority of the Solid Waste Management Act of 1968, Act of July 1, 1968, P.L. 788, No. 241. With the passage of new legislation in 1980, the Solid Waste Management Act of 1980 (SWMA), the previously issued permit was no longer sufficient to conduct hazardous waste disposal operations within Pennsylvania. The 1980 Act, implementing RCRA, required compliance with a more stringent set of standards. It provided, however, that all permits issued under the Solid Waste Management Act of 1968 remained in effect unless and until modified, amended, suspended or revoked. 35 P.S. §6018.1001. This provision enabled existing disposal facilities to continue in

operation for a limited period, in that one of the prerequisites to obtaining interim status is that the facility have an existing solid waste permit. 25 Pa.Code §75.265(z)(3).

There is no regulatory provision which equates termination of interim status with the suspension or revocation of a solid waste permit, however. For this reason, despite the fact that termination of interim status is essentially equivalent to a permit revocation or suspension (in that it withdraws the facility's authorization to operate), we must separately consider the Department's action of suspending Sechan's permit.

Section 503 of SWMA governs suspension and revocation of permits and reads in relevant part as follows:

> (c) In carrying out the provisions of this Act, the department may deny, suspend, modify or revoke any permit or license if it finds that the applicant, permittee or licensee has failed or continues to fail to comply with any provision of this Act, . . . the Clean Streams Law . . . or any other state or federal statute relating to environmental protection or to the protection of the public health, safety or welfare. 35 P.S. §6018.503(c).

The discharge of chromium contamination to the groundwater underlying the C-1 Cell is a violation of section 401 of the Clean Streams Law, 35 P.S. §691.401, as well as of section 610 of SWMA, 35 P.S. §6018.610. Both provisions prohibit the discharge of polluting substances (such as chromium) to the waters of the Commonwealth.

In addition, the discharge presents a significant threat to the public health and the environment. The levels of chromium in the wells in the vicinity of the C-1 Cell remain very high, several times above the federal drinking water standard. At one point within the past year and a half, the level of chromium in the groundwater was measured to be two hundred and sixty-six times higher than the permissible drinking water level. That level, established by the federal government under the

authority of the Safe Drinking Water Act, 42 U.S.C.A. §300 et seq., represents the point above which adverse effects to public health may be anticipated. 42 U.S.C.A. §300g-1. These levels of chromium are present within an aquifer (the Clarion) which discharges in the immediate vicinity of Slippery Rock Creek. The Creek forms the boundary line between Sechan's property and McConnell's Mill State Park. It is clear that the plume would move in the general direction of the discharge point. It is far from clear that Sechan's activities are effectively preventing this movement from occurring; certainly there is evidence to the contrary, as we have stated earlier. In light of this on-going problem, suspension of Sechan's permit was appropriate. We note that the Department had available to it the harsher sanction of permit revocation but declined to invoke it. Suspension was reasonable and appropriate under the circumstances. Commonwealth, DER v. Mill Service, Inc., 21 Pa.Cmwlth 642, 347 A.2d 503 (1975).

CONSIDERATION OF ECONOMIC EFFECTS

We have previously held that the Department is bound to consider the economic effects of its discretionary actions where there are alternatives among which it may choose in attempting to obtain compliance with the Commonwealth's environmental laws. Armond Wazelle v. DER, EHB Docket No. 83-063-G (Adjudication, July 30, 1985). In so holding we relied upon, inter alia, the Commonwealth Court's decisions in Einsig v. Pennsylvania Mines Corp., 69 Pa.Cmwlth 351, 452 A.2d 558 (1982), and East Pennsboro Township v. Commonwealth, DER, 18 Pa.Cmwlth 58, 334 A.2d 798 (1975). The Department has urged us to reconsider this Wazelle holding, but we see no need to do so in the context of the instant appeal. In particular, since we have ruled that the Department's action in terminating interim status was mandatory, the Department was not required to consider the economic impact of that action. Rochez Brothers, Inc. v.

Department of Environmental Resources, 18 Pa.Cmwlth 137, 149, 334 A.2d 790, 797 (1975). Also--even under our holding in Wazelle--the Department was not required to give any significant weight to the economic effects of its decision to cease operations in the C-area of Sechan's facility. In order to achieve the necessary result, i.e., minimization of any further environmental damage, the only alternative open to the Department was to require that operations at the facility cease. Continued operation was only likely to exacerbate an already serious environmental problem. As we stated in Wazelle, the Department cannot forego the necessary enforcement action because of possibly adverse economic consequences. If no other alternative is reasonably likely to achieve the desired environmental result, then the Department must take the necessary action, regardless of the economic consequences. After all, the Department's primary responsibility is the protection of the environment and public health. And, in any event, the evidence demonstrates that the Department did consider the economic effect of its actions in this matter. (Finding of Fact 147).

DEPARTMENT ACTIONS AT ANOTHER DISPOSAL FACILITY

Sechan has urged us to review the actions taken by the Department at another waste disposal facility which allegedly also is contaminating groundwater. Sechan argues that the Department has allowed the other facility to continue to operate while closing Sechan's operation and that for this reason Sechan's appeal should be sustained. This argument simply lacks merit.

We are called upon here to review the Department's actions directed at the Sechan facility. What the Department may have done under another set of facts concerning another set of parties is irrelevant to this matter. It may be the case that the Department has acted improperly in another context; this fact would not imply anything with regard to the instant appeal.

In any event, we have no inclination to determine the propriety of the Department's actions at another facility in the present context. We have no jurisdiction over Department actions other than Sechan's in this appeal, and hesitate to examine the factual circumstances of another facility's operations, even for the purpose of comparison, without representation of that facility in the proceeding before us. Moreover, even supposing it would be found that the Department had condoned pollution at another site, mere laxity of enforcement does not make out a case of discriminatory enforcement of the law. Kroger Co. v. O'Hara Township, 243 Pa.Super. 479, 366 A.2d 254, 256 (1976); Philadelphia Chewing Gum Corp. v. Commonwealth, DER, 35 Pa.Cmwlth 443, 387 A.2d 142, 152 (1978).

CONCLUSION

We conclude that the Department acted entirely properly in terminating Sechan's interim status, suspending its solid waste permit, and ordering the cessation of operations in the C-1 Cell.

CONCLUSIONS OF LAW

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

2. The Appellant bears the burden of proof (i.e., of production and of persuasion) with regard to any affirmative defenses it intends to raise. Under 35 P.S. §6018.611, it must meet this burden by clear and convincing evidence.

3. The federal Resource Conservation and Reclamation Act, 42 U.S.C. §6901 et seq. does not preempt the Department's authority to terminate Sechan's interim status.

4. 25 Pa.Code §75.265(z)(7) mandates the Department to terminate interim status following a failure to submit the Part B application within the required time.

5. Application of §75.272(d)(2) to Sechan would not result in a retroactive application of that regulation.

6. The Department acted properly in issuing the cessation order to Sechan directing it to cease further disposal activities in the C-1 Cell.

7. The Department acted properly in deciding to suspend Sechan's solid waste permit. The act was reasonable and appropriate under the circumstances.

8. Where only one alternative appears likely to achieve compliance with the environmental laws, the Department must elect that alternative, regardless of the economic consequences.

9. Since the Department's action in terminating interim status was mandatory, the Department was not required to consider the economic effects of that action.

10. Actions of the Department at another waste disposal facility have no bearing upon the issues before the Board in this appeal.

ORDER

WHEREFORE, this 21st day of February, 1986, it is ordered that the consolidated appeal of Sechan Limestone Industries is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: February 21, 1986

cc: Bureau of Litigation
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YELLOW RUN ENERGY COMPANY :

:

: Docket No. 84-423-G

: Issued: February 25, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

Synopsis

DER's Motion for Summary Judgment in this appeal of the forfeiture of two bonds posted in connection with surface mining operations is granted; the appeal is dismissed. The bond language controls the obligations of the parties to the bond agreement. The language provides that liability is conditioned upon compliance with the requirements of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq., the Clean Streams Law, 35 P.S. §691.1 et seq., the rules and regulations of the Department of Environmental Resources, and the terms and conditions of the mining permits issued to appellant. It is established that appellant has failed to carry out its obligation under the bond terms. Where the bond provides that liability shall accrue in proportion to the acreage affected by the mining operations and it is established that the mine operator has not complied with its obligations under the bond, the Department is entitled to forfeit the portion of the bond

which corresponds to the per acre liability amount multiplied by the number of acres affected. Where the bond does not provide that liability shall accrue in proportion to the acreage affected, and it is established that the operator has not complied with its obligations under the bond, the Department is entitled to forfeiture of the entire amount of the bond.

OPINION

This is an appeal of the forfeiture of two bonds by the Department of Environmental Resources (DER) pursuant to the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. The bonds were posted by appellant in conjunction with the issuance of two mining permits, Nos. 1201-3 and 1201-4, for sites located in Adams Township, Cambria County, Pennsylvania. Both sites are covered by Mine Drainage Permit No. 4274SM8.

DER has moved for summary judgment. Appellant has filed no response to the DER Motion. The motion relies in large part upon DER's requests for admissions, to which appellant never has responded. Under Pa.R.C.P. 4014, therefore, we are entitled to deem admitted all matters for which an admission was requested.

Pa.R.C.P. 1035 provides that summary judgment will be rendered where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The sole reason stated by appellant for taking this appeal is that appellant has the intent to comply. This statement is contained in appellant's Notice of Appeal. No further explanation is provided. Appellant failed to file its pre-hearing memorandum, as ordered by the Board. Pursuant to paragraph 4 of the Board's Pre-hearing Order No. 1, a party may be deemed to have waived

all contentions of law or fact not set forth in its pre-hearing memorandum. We therefore conclude that appellant has waived any defense it may have intended to present via its claim that it intends to comply.

Appellant posted the bonds at issue as a condition to obtaining permits authorizing surface mining operations. Both the Clean Streams Law, 35 P.S. §691.315, and the Surface Mining Conservation and Reclamation Act (Act 418), 52 P.S. §1396.4, provide for such bonding and require that the bonds be conditioned upon faithful compliance with the requirements of the two statutes.

It is a well established proposition that the language of the bond instrument controls the obligations of the parties. Coal Hill Contracting Co. v. DER, 1984 EHB 374 (Adjudication dated August 6, 1984); 12 Am.Jur.2d,Bonds, §25. The language of both bonds at issue here provides:

> NOW THE CONDITION OF THIS OBLIGATION is such that if the said surface mine operator [appellant] shall faithfully perform all of the requirements of (1) Act 418, (2) the Act of Assembly approved June 22, 1937, as amended, known as "the Clean Streams Law" (Act 394), (3) the applicable rules and regulations promulgated thereunder, and (4) the provisions and conditions of the permits issued thereunder and designated in this bond (all of which are hereafter referred to as "law"), then this obligation shall be null and void, otherwise to be and remain in full force and effect in accordance with the provisions of the law.

The two bonds differ in that one of them provides that liability shall accrue at a specified rate per acre of land affected while the other has no such "per acre liability" provision. In King Coal Company v. DER, EHB Docket No. 83-112-G (Adjudication issued March 18, 1985 and reconsidered July 25, 1985), the Board stated that where the bond provides that liability shall accrue in proportion to the acreage affected by the mining operation,

and a violation of the bond conditions is established, DER is entitled to forfeit that portion of the bond which corresponds to the acreage affected multiplied by the per acre liability specified in the bond terms. Where, however, there is no per acre liability specified, DER is entitled to forfeiture of the entire bond amount, upon a showing that the mine operator has failed to comply with its obligations under the bond.

The bond posted in conjunction with mining permit No. 1201-3 is a collateral bond consisting of two certificates of deposit totalling $21,275. Appellant's failure to respond to DER's request for admissions establishes that under the terms of the mining and reclamation plan, which is a portion of the mining permit, appellant was obligated to retain topsoil for later replacement on the backfilled portions of the site, operate and maintain erosion and sedimentation controls, and backfill and revegetate the site after completion of mining. Appellant has failed to carry out any of the foregoing obligations. In addition, the mining permit required that the site be restored to approximate original contour (AOC); appellant also has failed to fulfill this obligation. There is no question that appellant's failure to perform the aforesaid duties constitutes a violation of the terms of its permit and, therefore, triggers liability under the bond. (See language of the bond, quoted supra). Since this bond contains no provision specifying that liability shall accrue in proportion to the acreage affected, under King Coal we are constrained to conclude that DER is entitled to forfeiture of the entire bond amount, i.e. $21,275.

The bond posted in conjunction with mining permit No. 1201-4 is a surety bond in the amount of $13,333.[1] (Bond No.BND 468739). Under the terms

[1] DER's notice of forfeiture states that the surety has been notified of the bond forfeiture via certified mail. No appearance has been entered on behalf of the surety in this matter, however, nor has the surety filed a separate appeal of the forfeiture.

of permit No. 1201-4, appellant was obligated to restore the mining site to AOC. Appellant has failed to do so. Therefore, it is clear that liability under the terms of the bond has been triggered. Bond No. 468739 is a proportional bond; that is, it specifies that liability shall accrue "in proportion to the area of land affected by surface mining at the rate of one thousand ($1000) per acre or part thereof." The total acreage covered by permit No. 1201-4 is 13.33 acres, all of which was affected by appellant's mining operations. Therefore, under our holding in King Coal, since a violation on a portion of the permit area has been established and the entire permit area has been affected, DER is entitled to forfeiture of the entire bond amount.

O R D E R

WHEREFORE, this 25th day of February, 1986, in light of the foregoing it is ordered that:

1. DER's Motion for Summary Judgment is granted; the appeal is dismissed.

2. DER's forfeiture of the bond posted on Mine Permit No. 1201-3 is upheld for the amount of $21,275.

3. DER's forfeiture of bond No. 468739, posted on Mine Permit No. 1201-4 is upheld for the amount of $13,333.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, Chairman

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: February 25, 1986

cc: Bureau of Litigation
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MAXINE WOELFLING, CHAIRMAN
EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

RAYMARK INDUSTRIES, INC.	:	
	:	
v.	:	**EHB Docket No. 86-075-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued February 26, 1986

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

Synopsis

Appellant's petition for supersedeas is denied because the Board does not have the authority to grant the relief requested. The Board has no power to enjoin the Department of Environmental Resources ("Department") from pursuing civil and criminal remedies for alleged violations of the Air Pollution Control Act, the Act of January 8, 1960, P.L.(1959) 2119, as amended, 35 P.S. §4001 et seq. ("Air Pollution Control Act") or to compel the Department to allow the operation of an air contaminant source without a permit in violation of the Air Pollution Control Act.

OPINION

This matter was initiated by the filing of a Notice of Appeal by appellant Raymark Industries, Inc. ("Raymark") on February 11, 1986. The action of the Department of which Raymark was seeking review was the Department's refusal to issue an operating permit pursuant to the Air Pollution Control Act for a production line

for the manufacture of sheet gasket material. A Petition for Supersedeas accompanying the Notice of Appeal requested that the Board stay the Department's refusal to grant the operating permit, temporarily and permanently enjoin the Department from seeking civil and criminal penalties under the Air Pollution Control Act for the operation of the sheet gasket production line, and/or compel the Department to permit the operation of the line. A hearing on the supersedeas petition was scheduled on February 14, 1986, and, prior to the hearing, a motion to dismiss the appeal was filed by the Department. The Motion to Dismiss contended that the Board has no jurisdiction to hear this appeal because the Department decision complained of was not an appealable action and, even if it were, the notice of appeal from it was not timely filed.

At the beginning of the supersedeas hearing, the Department moved to dismiss the supersedeas petition, arguing, inter alia, that the Board had no power to grant the relief requested by Raymark. After hearing argument on the Department's motion, the Board, per the undersigned Member, denied Raymark's request for a supersedeas. This Opinion and Order is written confirmation of that denial.

Section 1921-A(d) of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21(d), empowers this Board to grant a supersedeas of a Department decision. Neither that subsection nor any other subsection of §1921-A confers general judicial power upon the Board. Rather, the Board is authorized by §1921-A(a) to "hold hearings and issue adjudications under the provisions of the Act of June 4, 1945 (P.L.1388) known as the 'Administrative Agency Law,' on any order, permit, license, or decision of the Department of Environmental Resources." Raymark's request for the Board to enjoin the Department from instituting civil or criminal penalties actions related to the operation of the sheet

gasket line is a request for equitable relief which is clearly outside the Board's scope of authority under the Administrative Code. The Board cannot exercise any powers which have not been specifically conferred upon it by statute. DER v. Butler County Mushroom Farm, 499 Pa. 507, 454 A.2d 1 (1982); Eva E. Varos et al. v. DER, EHB Docket No. 85-105-W (Opinion and Order, November 27, 1985).

Raymark has also petitioned the Board to supersede the Department's permit denial, and, as alternative relief to enjoining civil and criminal enforcement actions, to compel the Department to allow the operation of the sheet gasket production line. While the precise nature of the Department action challenged in this appeal is at issue in the motion to dismiss before the Board, if it is, in fact, a permit denial, the Board cannot supersede it because to do so would result in the alteration of the lawful status quo. Jack Sable v. DER, EHB Docket No. 77-125-W (Opinion and Order, December 29, 1977). Regarding the request by Raymark to compel the Department to permit the operation of the sheet gasket production line, the Board cannot compel the Department to permit the operation of an air contaminant source in violation of the permitting requirements of the Air Pollution Control Act. The Board is bound by the laws of the Commonwealth like any other person.

ORDER

AND NOW, this 26th day of February, 1986, the Board's oral order of February 14, 1986, is confirmed for the foregoing reasons.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: February 26, 1986

cc: Bureau of Litigation
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CONCERNED CITIZENS OF JEFFERSON TOWNSHIP :

:

Docket No. 83-269-G

:

Issued March 5, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and GRINDSTONE COAL COMPANY, Permittee

ADJUDICATION

By Edward Gerjuoy, Member

Syllabus

Under the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.3a(d), a permit applicant shall be denied a permit if it has a partner, associate, officer, parent corporation, subsidiary corporation, contractor or subcontractor which has engaged in unlawful conduct, as defined in section 18.6 of the Act, 52 P.S. §1396.24. 25 Pa.Code §86.37(a)(8) provides that a permit applicant must demonstrate to the satisfaction of the Department that any mining related violation by such a related party has been or is in the process of being corrected. The Board construes 52 P.S. §1396.3a(d) and 25 Pa.Code §86.37(a)(8) to require an applicant to list persons who are expected to carry out the duties normally associated with an officer, partner, etc., whether or not the person has officially been designated as such. The intent of the Surface Mining Act provision is to ensure that persons who will have significant

responsibility for surface mining operations under the permit be identified in the permit application. However, appellants herein failed to meet their burden of proof on this issue. In addition, appellants failed to meet their burden of proof on the remaining issues presented in this appeal, i.e., those dealing with alleged violations of regulations directed explicitly toward environmental protection and issues dealing with alleged environmental degradation. Therefore, the appeal is dismissed.

FINDINGS OF FACT

1. Appellant Concerned Citizens of Jefferson Township ("Citizens") is an unincorporated association of individuals who live in or near Grindstone, Jefferson Township, Fayette County, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), which is the agency of the Commonwealth empowered to administer and enforce the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. ("SMCRA"), the Clean Streams Law, 35 P.S. §691.1 et seq. ("CSL"), and the rules and regulations promulgated thereunder.

3. Permittee Grindstone Coal Company, Inc. ("Grindstone") is a Pennsylvania corporation, whose business address is P. O. Box 169, Donegal, Pa. 15628.

4. The permittee is engaged in the surface mining of coal.

5. On November 10, 1983, DER issued Surface Mining Permit 26820130 to Grindstone (the "permit").

6. The Citizens have timely appealed this permit grant.

7. At the time the permit was issued, the officers of Grindstone were: Joy A. Firestone, President-Treasurer, and Ronald Clark Coleman, Jr., Secretary.

8. Joy Firestone still is an officer of Grindstone.

9. The permit application's list of corporate officials included only the names of Joy Firestone and Ronald Clark Coleman, Jr.

10. The permit application nowhere mentioned Thomas Firestone.

11. Thomas Firestone is Joy Firestone's father.

12. Thomas Firestone worked on the construction of Grindstone Coal's access roads.

13. A U.S. Department of Labor Mine Safety and Health Administration "Legal Identity Report" filed by Grindstone listed Thomas Firestone as the "Person in charge of Health and Safety."

14. Grindstone has admitted that Thomas Firestone was acting as Grindstone's Foreman when DER's inspector Mark Frederick inspected the site on March 15, 1984.

15. There is no evidence that Thomas Firestone has been formally designated as an officer, partner, parent corporation, subsidiary corporation, contractor, subcontractor or affiliate of Grindstone's, or a person by or under common control with Grindstone.

16. DER's surface mine conservation inspector Mark Frederick visited Grindstone's surface mining site on October 19, 1983 at Thomas Firestone's request, for the purpose of discussing conditions on the site.

17. Mr. Frederick again visited the site on March 15, 1984, when he again discussed conditions on the site with Thomas Firestone.

18. On March 15, 1984, Mr. Frederick filled out an inspection report (Ex 11)[1] stating that violations had been observed, and issued a compliance order to Grindstone (Ex 6c).

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[1] Designates Citizens' Exhibit 11; the parties other than the Citizens did not introduce any Exhibits of their own. Two maps were accepted into evidence as Joint Exhibits 1 and 2, but these joint exhibits are not referred to in this Adjudication.

19. The inspection report was signed by Thomas Firestone on a line labeled "Operator".

20. The compliance order was signed by Thomas Firestone on a line labeled "Operator/Representative".

21. The only Grindstone representative whom Mr. Frederick ever encountered on the site was Thomas Firestone (Tr. 55).[2]

22. Thomas Firestone represented himself to Mr. Frederick as Grindstone's foreman and/or superintendent (Tr. 44).

23. James Ansell is a Waterways Conservation Officer for the Pennsylvania Fish Commission.

24. Mr. Ansell inspected the Grindstone site on December 12, 1982, in connection with his duties for the Fish Commission.

25. The inspection trip was arranged during a phone call to Grindstone initiated by Mr. Ansell.

26. The Grindstone representative who met Mr. Ansell at the site was Thomas Firestone, who also was the person who had answered Mr. Ansell's telephone call.

27. Thomas Firestone has been a vice president of Firestone Coal, Inc. and has been the Secretary of Wingrove Mining Company (Tr. 321-2).

28. Firestone Coal, Inc. has performed surface mining work as a subcontractor for Clarksburg Coal, Inc. (Tr. 322).

29. Mr. Frederick recalled meeting with Thomas Firestone in connection with the activities of Firestone Coal, Clarksburg Coal and Wingrove Coal (Tr. 39).

30. Mr. Ansell had numerous conversations with Thomas Firestone concerning the operations of Clarksburg Coal (Tr. 90).

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[2] Denotes page 55 of the Transcript.

31. There is nothing on the record to show that Joy Firestone and Clark Coleman, Jr. had the qualifications and experience to meet the normally anticipated responsibilities of Grindstone's principal officers.

32. There is nothing on the record to show that Joy Firestone and Clark Coleman, Jr. did not have the qualifications and experience to meet the normally anticipated responsibilities of Grindstone's principal officers.

33. Grindstone did not call either Joy Firestone or Clark Coleman, Jr. as witnesses.

34. The Citizens' Amended Pre-Hearing Memorandum, filed July 30, 1984, alleged that "neither Joy Firestone nor Clark Coleman, Jr. have any qualifications or expertise with regards to surface mining other than their family backgrounds."

35. There was no evidence that either Joy Firestone or Clark Coleman, Jr. had not been exercising the powers normally accruing to their respective corporate offices of President-Treasurer and Secretary.

36. Evidence about Thomas Firestone's compliance history as an officer of mining companies with which he had been associated was put into the record.

37. The Citizens' claims--that granting the application was in violation of regulations explicitly concerned with protecting the environment, or that operations under the permit would degrade the environment--are based solely on the testimony of their expert Eberhard Werner.

38. Mr. Werner's testimony was highly qualitative and primarily speculative.

39. DER agrees that an ordinary foreman/superintendent employee of Grindstone need not be listed on the permit application (Tr. 324).

DISCUSSION

This matter was initiated by the Citizens' appeal of the Surface Mining Permit 26820130 issued to Grindstone. Initially the Citizens objected to the permit on a wide variety of grounds, detailed in their pre-hearing memorandum,

including, e.g., that the permit had been issued in violation of Pennsylvania Constitution Article One, Section 27 and of 25 Pa.Code §87.69 (protection of hydrologic balance). Testimony was heard on a number of these objections at the two-day hearing on the merits of this appeal, but the only issues addressed in the Citizens post-hearing brief involve the relationship of Thomas Firestone to Grindstone. In particular, the Citizens argue that the permit issuance should be reversed because the information about Grindstone's principals, officers and associates in the permit application failed to list Thomas Firestone, whose known past conduct would have precluded issuance of the permit under the requirements of the SMCRA, the CSL and 25 Pa.Code §86.37(a)(8).

Therefore this Adjudication will be concerned solely with Thomas Firestone's relationship to Grindstone and the implications thereof. All other issues raised in the Citizens' pre-hearing memorandum are deemed waived. We particularly note that we deem the Citizens to have waived any claims to the effect that the permit was issued in violation of 25 Pa.Code §86.37(a)(3) [requiring that the application demonstrate there is no presumptive evidence of potential pollution of the waters of the Commonwealth] and that operations under the permit would be expected to harm the environment. After the Citizens had completed their direct testimony, the hearing examiner orally granted Grindstone's motion for (in essence) a compulsory nonsuit on the Citizens' claims that issuance of the permit was an abuse of DER's discretion because DER had insufficient reason to believe that operations under the permit would not degrade the environment.[3] The hearing

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[3] In so ruling we recognized and continue to recognize that all pertinent regulations, including 25 Pa.Code §86.37(a)(8) whose alleged violation by Grindstone is discussed infra, presumably were promulgated by the EQB with the ultimate intention of preventing degradation of the environment. Our oral ruling was not concerned with allegations such as failure to comply with 25 Pa.Code §86.37(a)(8), however, which nowhere explicitly refers to the environment; §86.37(a)(8) is concerned solely with presenting categories of persons whose satisfactory compliance histories must be set forth in the permit application. Our oral ruling does pertain to alleged violations of any regulations whose language explicitly is concerned with preventing environmental degradation, e.g., 25 Pa.Code §86.37(a)(3).

examiner explained that under the Board's rules, 25 Pa.Code §21.86(a), the oral ruling in favor of Grindstone on these issues of environmental degradation could not be final until affirmed by a majority of the Board. Our Findings of Fact 37 and 38, supra, substantiate the hearing examiner's aforesaid oral ruling, which we herewith affirm. These environmental degradation claims of the Citizens will not be discussed further in this Adjudication, however, because they have not been renewed in the Citizens' post-hearing brief.

We now turn to the main subjects of this Adjudication, namely the relationship of Thomas Firestone to Grindstone and the implications thereof. The SMCRA, 52 P.S. §1396.3a(d), reads:

> (d) The department shall not issue any surface mining permit or renew or amend any permit if it finds, after investigation and an opportunity for an informal hearing, that (1) the applicant has failed and continues to fail to comply with any provisions of this act or of any of the acts repealed or amended hereby or (2) the applicant has shown a lack of ability or intention to comply with any provision of this act or of any of the acts repealed or amended hereby as indicated by past or continuing violations. Any person, partnership, association or corporation which has engaged in unlawful conduct as defined in section 18.6 or which has a partner, associate, officer, parent corporation, subsidiary corporation, contractor or subcontractor which has engaged in such unlawful conduct 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.

This §1396.3a(d) was enacted on October 12, 1984, after issuance of the permit. However, the just-quoted language of §1396.3a(d) is taken verbatim from the former §1396.3a(b), which was in effect when the permit was issued. It is clear, therefore, that DER was required to take into account the above-quoted language before issuing the permit. The SMCRA statutory language has been implemented by 25 Pa.Code §86.37(a)(8), which is presently effective and has been effective since at least November 1982. §86.37(a)(8) states that:

> (a) No permit or revised permit application shall be approved, unless the application affirmatively demonstrates and the Department finds, in writing, on the basis of the information set forth in the application or from information otherwise available, which is documented in the approval, and made available to the applicant, that all of the following exist:
>
> . . .
>
> (8) The applicant has submitted proof that any violation related to the mining of coal by the applicant or by any related party of any of the acts, rule, regulation, permit, or license of the Department has been corrected or is in the process of being corrected to the satisfaction of the Department, whether or not the violation relates to any adjudicated proceeding, agreement, consent order, or decree, or which resulted in a cease order or civil penalty assessment. For purposes of this subsection, a related party is any partner, associate, officer, parent corporation, subsidiary corporation, affiliate, or person by or under common control with the applicant, contractor or subcontractor.

Grindstone's application did not make any reference to Thomas Firestone. The Citizens maintain that Grindstone should have listed Thomas Firestone as a "related party", and imply that Grindstone--in failing to list Thomas Firestone--withheld information that would have caused DER to deny the permit. The Citizens are not maintaining that Joy Firestone and Ronald Clark Coleman, Jr., the application's listed officers of Grindstone, were undeserving of a permit because they had "failed . . . to comply with any provisions of the act" or had "shown a lack of ability or intention to comply" [language of 52 P.S. §1396.3a(d) quoted supra]. In other words, the Citizens are not really claiming an abuse of discretion by DER; rather, the Citizens are claiming that DER was not given the information needed to make an informed decision about the permit application.

The Board's scope of review is to determine whether DER committed an abuse of discretion or an arbitrary exercise of its duties or functions. Warren

Sand and Gravel Company, Inc. v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). Warren also empowers the Board to substitute its discretion for that of DER. Normally, however, we do not substitute our discretion for DER's unless we first have concluded that DER had abused its discretion. Pennsylvania Mines Corporation v. DER, 1982 EHB 407; Wilmington Township v. DER, 1981 EHB 459. But when, as in the present appeal, an appellant claims that at the time the permit was issued crucial facts were withheld from DER, and that it would have been an abuse of DER's discretion to issue a permit in the light of all the evidence introduced in our de novo hearing, we see no reason not to evaluate the de novo evidence before us as if standing in DER's shoes, and to overturn the permit if we do agree with the appellant's just-stated claim. This Adjudication is based on this understanding of our authority.

There is no evidence that Thomas Firestone has been formally designated as a partner, associate, officer, parent corporation, etc. (see Finding of Fact 15) of Grindstone. The issue, however, is whether this lack of formal designation should shield Grindstone from having to list Thomas Firestone in its permit application if Thomas Firestone's actual working relationship with Grindstone--as contemplated by Grindstone when Grindstone submitted its application--was to be that of a partner, or associate, or officer, or parent corporation, etc. We believe the intent of the SMCRA is that surface mining permits not be issued to persons who have shown an inability or unwillingness to comply with the SMCRA; correspondingly, the information requested in the permit application seeks to ensure that no such persons will have significant responsibility for surface mining operations under the rubric of a permit issued to another "person, partnership, association or corporation" who has not engaged in unlawful conduct. In short, if the facts show that Thomas Firestone in effect was expected to be a

partner, associate, etc. of Grindstone (i.e., if Grindstone expected Firestone to carry out the functions normally carried out by a partner, associate, etc.), then Thomas Firestone should have been listed in the application even though he had not been formally designated as a partner, associate, etc. To rule otherwise would be to invite persons with established violation histories to make surface mining permit applications via, e.g., corporations headed by officers in name only, who would have no actual voice whatsoever in the conduct of mining operations under the permit.

In fact, the Citizens' allegations in this appeal amount to the claim that Grindstone is a corporation of precisely the sort just described, with corporate officers Joy A. Firestone and Ronald Clark Coleman, Jr., who serve in name only, while the normal functions of Grindstone's corporate officers actually are carried out by (perhaps inter alia) Thomas Firestone. Unfortunately for the Citizens, however, but fortunately for Grindstone, the Citizens have not met their burden of proving this claim, although they came close. To be specific, the total evidence the Citizens presented in support of this claim can be summarized as follows.

DER's surface mine conservation inspector, Mark Frederick, testified that on October 19, 1983 he went to the site at Thomas Firestone's request, for the purpose of discussing conditions on the site. On March 15, 1984 Mr. Frederick again visited the site, and again discussed conditions on the site with Thomas Firestone. At this time he filled out an inspection report stating that violations had been observed, and thereupon issued a compliance order to Grindstone. The inspection report and compliance order were signed by Thomas Firestone, on lines labeled "Operator" (the inspection report) and "Operator/Representative" (the compliance order). Mr. Frederick further testified that the only representative of Grindstone he ever met on the site was Thomas Firestone, and that Thomas

Firestone had represented himself to Mr. Frederick as Grindstone's foreman and/or superintendent.

James Ansell, a Waterways Conservation Officer for the Pennsylvania Fish Commission, testified that he inspected the Grindstone site on December 12, 1982, in connection with his duties for the Fish Commission. He telephoned Grindstone, and arranged a meeting at the site with the person who answered the phone; the Grindstone representative whom Mr. Ansell met at the site was Thomas Firestone, who also was the person who had talked to Mr. Ansell on the phone. In other words, Mr. Ansell's dealings with Grindstone consistently were through Thomas Firestone.

The foregoing testimony is supplemented by a number of admissions filed by Grindstone in response to the Citizens' requests for admissions; these admissions have been paraphrased as Findings of Fact 11-14, and need not be repeated here. On these admissions and the foregoing testimony, we can conclude that even if his title was no more than Foreman/Superintendent, Thomas Firestone has been very intimately involved with the administration of Grindstone's mining operation. There was no testimony that either of the two officers identified in the permit application ever were seen at the mine site or were otherwise involved in Grindstone's affairs beyond their listings as officers. It is apparent that Mr. Firestone was responsible for the day-to-day operation of the site, for arranging meetings with Commonwealth inspectors, etc. But we do not see that the aforesaid evidence stretches to the level of showing that Mr. Firestone was more than a Foreman/Superintendent with considerable autonomous authority. In particular, as we see it, the evidence simply does not show that Thomas Firestone was in effect an unnamed officer or associate of Grindstone (the other possibilities listed in 52 P.S. §1396.3a(d) or 25 Pa.

Code §86.37(a)(8), e.g. partner, parent corporation, etc., can be ruled out immediately as not germane). Especially noteworthy is the Citizens' failure to produce evidence showing that Joy Firestone and Clark Coleman, Jr. were not carrying out the respective functions normally expected of a corporate President-Treasurer and Secretary (Finding of Fact 7). Although the Citizens tried to convince us that Joy Firestone and Clark Coleman, Jr. did not have the experience required to fill their respective corporate posts (see Finding of Fact 34), in the absence of further evidence this alleged lack of experience remains consistent with Joy Firestone's and Clark Coleman, Jr.'s actual, albeit possibly inefficient, exercise of their respective corporate powers.

We conclude there has been no showing that Thomas Firestone was in effect an unnamed officer of Grindstone. Whether Thomas Firestone might be an unnamed associate of Grindstone is a bit more difficult to decide, mainly because neither the SMCRA nor the regulations define the term "associate". The language of §1396.3a(d), wherein the sequence "partner, associate, officer, parent corporation, etc." appears immediately after the sequence "person, partnership, association or corporation", suggests that the SMCRA regards an "associate" as a member of an association. Since Grindstone is a corporation, not an association, this construction of "associate" obviously would make §1396.3a(d) inapplicable to Thomas Firestone's role in Grindstone. We also may give the term "associate" its common meaning, in accordance with the provision of the Statutory Construction Act. 1 Pa.C.S.A. §§1901 et seq. 1 Pa.Code §1.7. Webster's New Collegiate Dictionary (G. & C. Merriam Co., 1974) gives definitions of the noun "associate": (1) a fellow worker, in the sense of "partner" or "colleague"; (2) a "companion" or "comrade". In the context of the present appeal, neither of these definitions of "associate" seem any more applicable than the construction ruled out immediately supra. We conclude that Thomas Firestone cannot be regarded as an unnamed associate of Grindstone.

CONCLUSIONS OF LAW

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

2. The appellants failed to meet their burden of proof on the issue of environmental degradation alleged to result from mining under the terms of the permit.

3. Appellants failed to meet their burden of proof on the issue of violations of regulations explicitly concerned with protection of the environment.

4. Under 52 P.S. §1396.3a(d) and 25 Pa.Code §86.37(a)(8), persons who have significant responsibility for the conduct of surface mining operations under a permit, such that their authority is similar to that of an officer, partner, associate, parent or subsidiary corporation, contractor or subcontractor, must be listed on the permit application.

5. The appellants failed to meet their burden of proof on the issue of whether Thomas Firestone should have been listed on the permit application under 52 P.S. §1396.3a(d) and 25 Pa.Code §86.37(a)(8).

O R D E R

WHEREFORE, this 5th day of March, 1986, the appeal of the Concerned Citizens of Jefferson Township is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Chairman

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: March 5, 1986

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COMMONWEALTH OF PENNSYLVANIA

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COLTRANE, INC.,
Appellant :

:

: Docket No. 85-134-G
: Issued March 6, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Appellee

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

Synopsis

DER's Motion for Summary Judgment in this bond forfeiture proceeding is denied. Although it has been established, via appellant's failure to respond to DER's requests for admissions, that violations exist on the mine site for which the instant bond was posted, the record before the Board does not document the terms of the bond itself. It is axiomatic that the rights and obligations of the parties are governed by the language of the bond. Pa.R.C.P. 1035 authorizes the entry of summary judgment where there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Without first having established the conditions of the bond, the Board cannot conclude that DER is entitled to judgment as a matter of law. DER is free to renew its motion at a later date if accompanied by documentation establishing the terms of the bond at issue.

OPINION

This is an appeal of the forfeiture of a single bond by the Department of Environmental Resources pursuant to section 4 of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4. The bond was posted by appellant in connection with the issuance of a surface mining permit, No.102378-26810201(T)-01-0, for a mine site located in South Union Township, Fayette County. The site is covered by Mine Drainage Permit No.26810201(T).

Appellant is appearing pro se. As a consequence of his failure to comply with the Board's order directing him to file a pre-hearing memorandum, the Board, by order dated August 29, 1985, imposed sanctions upon appellant pursuant to 25 Pa.Code §21.124, precluding him from presenting his case in chief at the hearing on the merits of this appeal, if and when held. The Board's August 29, 1985 order also permitted DER to engage in limited discovery, i.e., DER was authorized to serve requests for admissions upon appellant. DER has done so. Appellant has failed to respond to the requests, however, thereby establishing for the purposes of the present appeal, the truth of all matters to which the requests were directed. Pa.R.C.P. 4014(d). DER has relied upon appellant's failure to respond to the requests for admission as the basis for its motion for summary judgment, with which this opinion is concerned. Appellant has not responded to the DER motion. Pa.R.C.P. 1035 provides that summary judgment shall be rendered where there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

We note initially that appellant has raised no defenses to the bond forfeiture. The notice of appeal simply stated that the purpose of the appeal was to obtain a "continuance" of the forfeiture pending disposition of litigation

in federal court, which appellant apparently believes is related to the instant matter. The Board advised appellant shortly after the appeal was filed that it would not automatically grant such relief but that appellant was free to request a continuance of the filing of his memorandum if he felt it necessary. Otherwise, appellant was informed, the Board would expect this appeal to take its normal course. No continuance was requested; indeed, the Board has received no further communication from appellant since the filing of the notice of appeal.

Appellant's failure to respond to DER's requests for admissions has established that violations exist at the mine site covered by permit No. 102378-26810201(T)-01-0. For example, it has been established, inter alia, that appellant has not backfilled and regraded the site to approximate original contour and that no reclamation work has been done since August of 1984. 25 Pa. Code §87.141(a) requires that "all disturbed areas shall be returned to their approximate original contour." In addition, it is established that appellant removed backfilling equipment from the site sometime prior to November, 1984 and did not return it prior to the bond forfeiture. 25 Pa.Code §87.141(d) provides that backfilling equipment needed to complete the restoration shall not be removed from the operation until all backfilling and leveling has been completed and approved in writing by the Department."

It is axiomatic that the obligations and rights of the parties to the bond are determined by the language of the bond. Coal Hill Contracting v. DER, 1984 EHB 374 (Adjudication dated August 6, 1984); C.J.S., Bonds, §40. The record before the Board here does not include the bond itself nor have the bond terms been established via DER's request for admissions. Therefore, we are unable to

ascertain the amount of liability, if any, which has accrued under the bond, in light of the established violations described supra. In addition, DER alleges that the bond identified in its forfeiture notice is not in fact the bond with which we are here concerned. Apparently, the bond described in the notice--which consisted of two certificates of deposit, Nos. Y39612 and Y39620,--was released in 1983 as a consequence of the transfer of responsibility for the site from another operator to the appellant. Appellant subsequently provided DER with a cashier's check, No. 2567, in the amount of $13,800, drawn on the First National Bank of Carmichaels and dated June 17, 1983. DER alleges that it is this cashiers check which has been declared forfeit by DER and which is at issue herein. As far as the Board is aware, no amended notice of forfeiture has been sent to the appellant.

DER has appended to its motion for summary judgment copies of the bond agreement executed in connection with mine permit No. 102378-26810201(T)-01-0, and cashier's check No. 2567. DER's motion was unaccompanied by any affidavits, however. Under this circumstance, we cannot consider documents merely appended to a motion to be part of the record in this proceeding, in the absence of an admission by appellant or other documentation sufficient under rule 1035 to permit us to rely upon the documents in rendering our decision of DER's motion. Irrerra v. Southeastern Pa. Transportation Authority, 231 Pa.Super. 508, 331 A.2d 705 (1974). Laspino v. Rizzo, 40 Cmwlth Ct. 625, 398 A.2d 1069 (1979). This is particularly crucial with regard to the bond instrument itself, since our ruling on appellant's liability under the bond must be determined by reference to the bond conditions in the record before us. Accordingly, we cannot grant summary judgment in favor of DER at this time. The Order which follows leaves DER free to renew

its motion in a form which will establish its entitlement to summary judgment, e.g., by including appellant's admission of the "genuineness, authenticity, correctness" etc. of the bond instrument, as specifically provided by Pa.R.C.P. 4014(a).

Appellant's failure to respond to DER's motion likewise does not permit us to enter summary judgment. If the moving party's papers do not support summary judgment, the adverse party need not file any response to the motion. Goodrich Amram, §1035(b)(9); Ritmanich v. Jonnell Enterprises, Inc., 219 Pa.Super.198, 280 A.2d 570 (1971). The burden is on DER, as the moving party, to establish that it is entitled to judgment as a matter of law. Without the bond agreement, which controls the rights and obligations of the parties, we cannot make such a determination.

O R D E R

WHEREFORE, in light of the foregoing, it is ordered that DER's motion for summary judgment is denied. DER is free to renew its motion at a later date.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy, Member

DATED: March 6, 1986

cc: Bureau of Litigation
For Appellant:
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For the Commonwealth, DER:
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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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MICHAEL KUHAR,
Appellant :

:

: Docket No. 85-144-G
: Issued March 7, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Appellee

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

Synopsis

Partial summary judgment is granted in favor of the Department of Environmental Resources. Through discovery it has been established that appellant has failed to comply with the terms of his mining permits and with applicable department regulations. Answers to interrogatories which contain statements to the contrary are superseded, for the purposes of the summary judgment motion, by appellant's failure to respond to DER's requests for admissions. Matters established via requests for admissions are not subject to further dispute and summary judgment can be rendered on the basis of such established facts.

Where a causal connection is established between environmental violations off the permit area and violations on the permit area, the off-permit violations are the equivalent of a direct violation of the bond conditions. Financial inability is not a defense to a bond forfeiture proceeding. The

rights and obligations of the parties to the bond are determined by the bond language. Where the bond provides that liability shall accrue in proportion to the acreage affected by mining and the permittee has failed to comply with its obligations under the bond, DER is entitled to forfeit that portion of the bond that corresponds to the acreage affected by the mining activity multiplied by the per acre liability specified in the bond terms.

In the instant case, the Board upholds forfeiture of $5,000.00 of the bond posted in connection with one surface mining permit, on the basis that the minimum liability provision of the bond has been triggered. With regard to the remaining permit sites, however, only partial summary judgment can be rendered. It is established that violations exist on the remaining permit sites and that, therefore, some liability under the bond has been effected. However, the Board does not have before it the language of the bonds posted in connection with these other permits. Therefore, it cannot determine the amount of liability. DER is free to renew its motion for summary judgment on these remaining issues after the language of the bonds has been placed on the record before the Board.

OPINION

This appeal concerns the forfeiture of several bonds by the Department of Environmental Resources (DER) pursuant to section 4 of the Surface Mining Conservation and Reclamation Act (SMCRA), 52 P.S. §1396.4. The bonds were posted by appellant in connection with the issuance of four surface mining permits, Nos. 942-1, 942-1(A), 942-1(A2), and 942-1(A3). All four mining permits are

within mine drainage permit No. 3272SM9 for a site in Fallowfield Township, Washington County.

DER has moved for summary judgment, relying upon appellant's pre-hearing memorandum, his notice of appeal, answers to interrogatories and appellant's failure to respond to DER's request for admissions. Appellant has not responded to the DER motion.

Pa.R.C.P. 1035 provides that summary judgment may be rendered where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In ruling upon a motion for summary judgment, we must resolve all doubts in favor of the party opposing the motion. Toth v. Philadelphia, 213 Pa. Super. 282, 247 A.2d 629 (1968); Goodrich Amram §1035(b):3.

It is axiomatic that the rights and obligations of the parties to a bond are determined by the bond language. Coal Hill Contracting Co. v. DER, 1984 EHB 374 (adjudication dated August 6, 1984). C.J.S., Bonds §40. Appellant's failure to respond to DER's request for admissions establishes that the condition of appellant's obligation on the bond posted for mine permit 942-1(A3) was that appellant shall faithfully perform all of the requirements of (1) Act 418 (SMCRA), (2) . . . The Clean Streams Law, (3) the applicable rules and regulations promulgated thereunder, and (4) the provisions and conditions of the permits issued thereunder.

Appellant's answers to DER's interrogatories as well as his failure to respond to DER's requests for admissions have established that there are violations of the applicable regulations and the permit conditions on the area

covered by mining permit 942-1(A3). For example, the permit requires that the site be returned to approximate original contour (AOC) after mining operations have ceased. Appellant has not returned the site to AOC: backfilling remains to be completed. Appellant has conducted no backfilling activity at the site since 1979. In addition, he admits that there are two pits, in which water accumulations exist, on the site. One of these pits was created when appellant mined off the area covered by permit No. 941-1(A3). Where a causal connection exists between violations off the permit area and violations on the permit area, the off-permit conditions constitute the legal equivalent of a direct violation of the bond conditions. Commonwealth of Pa. DER v. Ogden, 501 A.2d 311 (Pa. Comwlth. 1985); King Coal Company v. DER, EHB Docket No. 83-112-G (Adjudication dated March 18, 1985 and reconsidered July 25, 1985). The failure to backfill to AOC and the existence of the pits on the site constitute violations of 25 Pa. Code §87.141, in addition to violations of the permit conditions. In sum, there is no dispute that, with regard to permit No. 942-1(A3), appellant has failed to comply with his obligations under the bond.

Appellant has raised a single legal argument against the bond forfeiture, in both his notice of appeal and his pre-hearing memorandum. He contends that many of the conditions existing on the site covered by the four mining permits are a consequence of his filing for bankruptcy in 1979. He alleges that his equipment was repossessed as a consequence of the bankruptcy proceeding and that further reclamation activities became impossible. This argument is insufficient to preclude the entry of summary judgment against the appellant, however, where there are no material facts in dispute. Financial

inability of an operator to reclaim is no defense to a bond forfeiture action. Melvin Reiner v. DER, 1982 EHB 183 (Adjudication dated July 28, 1982). Therefore, since there is no dispute that violations exist on mine permit 942-1(A3), liability under the terms of the bond has been effected.

It has been established, via DER's unanswered requests for admissions, that liability on the bond posted in connection with permit No. 942-1(A3) accrues in proportion to the acreage affected by surface mining "at the rate of five hundred seventy-five ($575) dollars per acre of part thereof, but in no case shall such liability be for an amount less than five thousand ($5,000) dollars." It is also established that appellant affected five of the ten acres covered by permit No. 942-1(A3).

In King Coal, supra, the Board held that where the bond provides that liability shall accrue in proportion to the acreage affected by the mining operation and the permittee has failed to comply with its obligations under the bond, DER is entitled to forfeit that portion of the bond that corresponds to the acreage affected multiplied by the per acre liability specified in the bond terms. Under this holding, DER would be entitled to forfeit $2,875 of the bond posted for permit No. 942-1(A3). Since the bond contains a minimum liability of $5,000, however, DER is entitled to forfeiture of that amount, i.e., $5,000.

Appellant's answers to DER's interrogatories and his failure to respond to DER's requests for admissions also establish that he affected all of the acres included under the other three permits Nos. 942-1(A2), 942-1(A) and 942-1, and that there are violations of the applicable regulations and permit conditions on each of these three sites.

On permit No. 942-1(A2) appellant admits that there remains considerable backfilling to be done, i.e., three to four acres of the ten affected acres have not been backfilled. On permit Nos. 942-1(A) and 942-1, appellant's answers to DER's interrogatories stated that reclamation had been entirely completed. However, appellant's failure to respond to DER's request for admissions establishes for the purposes of this proceeding[1] that violations do exist on these permit sites, i.e., that backfilling has not been accomplished. The truth of matters established via requests for admissions is "conclusively established and is not subject to further dispute." Goodrich Amram, Admissions, §4014(d)(2). Indeed, the fact that appellant's response to previous discovery requests contains statements which apparently contradict the matters established via the requests for admissions does not preclude the grant of summary judgment against him on the basis of those admissions. Innovate, Inc. v. United Parcel Service, Inc., 275 Pa.Super. 276, 418 A.2d 720 (1980). In other words, the admissions dispose of all issues of material fact in this proceeding. Appellant has failed to comply with the terms of his permits and with applicable regulations.

Given the aforesaid violations on mining permits 942-1, 942-1(A) and 942-1(A2), it is clear that forfeiture of some amount of the bonds posted in conjunction with those permits is appropriate. The precise amount to which DER is entitled must, of course, be determined by reference to the language on the bonds themselves. Coal Hill, supra.

1. A matter established via a failure to respond to a request for admission cannot be used against the party in any other proceeding. See Rule 4014(d) and Comment (8) to the rule.

Unfortunately, the language of these bonds has not been established via the request for admissions, the answers to interrogatories or any other part of the record presently before the Board. The parties have attached to their pre-hearing memoranda copies of the bonds posted in association with mining permits Nos. 942-1, 942-1(A) and 942-1(A2). Such documents, however, are not properly before us. Irrerra v. Southeastern Pa. Transportation Authority, 231 Pa.Super. 508, 331 A.2d 705(1974). DER is, of course, free to request appellant to admit the "genuineness, authenticity, correctness," etc. of the bond document as expressly permitted by Rule 4014(a), or to establish the bond language in some other fashion, and then to renew its motion for summary judgment.

We cannot use appellant's failure to reply to the summary judgment motion as a sufficient basis to render judgment against him where the language of the bond agreements is not before us. Appellant is under no obligation to respond to the motion. If the moving party's papers do not support summary judgment, the adverse party need file no affidavits or opposing papers and his failure to do so will not entitle the moving party to summary judgment. Goodrich Amram §1035(b):9; Ritmanich v. Jonnel Enterprises, Inc. 219 Pa.Super. 198, 280 A.2d 570 (1971). The burden is on DER, as the moving party, to establish that it is entitled to judgment as a matter of law. Without the bond agreements which control the rights and obligations of DER and appellant, we cannot make such a determination. Accordingly, we render partial summary judgment only, as detailed in the accompanying order.

O R D E R

WHEREFORE, in light of the foregoing, it is ordered that:

1. DER's motion for summary judgment is granted with regard to the forfeiture of certificates of deposit Nos. 69411 and 69412, which were posted as bonds under mining permit 942-1(A3) in the amount of $5,000.

2. It is established that appellant has failed to comply with the terms of his permits and applicable DER regulations, specifically 25 Pa.Code §87.141, on the sites covered by mining permits 942-1, 942-1(A) and 942-1(A2).

3. It is established that appellant affected all of the acreage included under each of mining permits Nos. 942-1, 942-1(A) and 942-1(A2), i.e., appellant affected ten acres under each of the aforesaid three permits.

4. DER is free to renew its motion for summary judgment with regard to the issues remaining in this appeal, i.e., the amount of the forfeiture to which DER is entitled under mining permits Nos. 942-1, 942-1(A), and 942-1(A2), given the established facts set forth in paragraphs 2 and 3 supra.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

DATED: March 7, 1986

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For Commonwealth, DER
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COMMONWEALTH OF PENNSYLVANIA

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MICHAEL KUHAR,
Appellant :

:

Docket No. 85-143-G

Issued: March 12, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

Synopsis

DER's Motion for Summary Judgment is granted; DER's forfeiture of appellant's surface mining bond, posted pursuant to the Surface Mining Act, 52 P.S. §1396.1 et seq., is upheld for the minimum amount of liability under the bond terms.

The obligations of the Commonwealth and the mine operator under the bond are controlled by the language of the bond. Appellant has failed to comply with its obligations under the mining laws and thus, under the bond, in that he has failed to return the site to approximate original contour and revegetate it. Appellant's claim that he contracted with other parties to perform these duties, and that he cannot be held liable for their failure to carry out the same, fails to state a valid defense to the bond forfeiture. A permittee cannot by private agreement delegate duties imposed upon him by statute.

As a general rule, in the absence of provisions to the contrary, where a bond is given to a public body and is conditioned upon compliance with a statute, the full penalty of the bond may be recovered in the event of a breach of the bond conditions. However, where as here, the bond provides that liability shall accrue in proportion to the acreage affected by the mining operations, DER is entitled to forfeit only that portion of the bond which corresponds to the number of acres affected multiplied by the per acre liability specified in the bond. Here there is a minimum liability provision which is triggered since the per acre liability would amount to less than $5,000. Accordingly, forfeiture in the amount of $5,000 is upheld.

OPINION

This is an appeal of the forfeiture of a single bond by the Department of Environmental Resources (DER) pursuant to the Surface Mining Conservation and Reclamation Act, ("Surface Mining Act") 52 P.S. §1396.1 et seq. The bonds were posted by appellant in connection with the issuance of mining permit #942-2, for a mine site located in Stewart Township, Fayette County. The site is covered by Mine Drainage Permit 3375SM73.

DER has moved for summary judgment. Appellant has filed no response to the DER motion. The motion relies in large part upon DER's requests for admissions to which appellant has not responded. Under Pa.R.C.P. 4014, we therefore are entitled to deem admitted all matters of which an admission was requested. Pa.R.C.P.1035 provides that summary judgment will be rendered where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. We conclude that this

standard has been met in the instant appeal.

It is well established that the obligations of the obligor and obligee on a bond are determined by the bond language. Coal Hill Contracting, Inc. v. DER, 1984 EHB 374 (Adjudication dated August 6, 1984). 12 Am.Jur.2d, Bonds, §25. The condition of the operator's liability under the bonds at issue herein is as follows:

> NOW THE CONDITION OF THIS OBLIGATION is such that if the said surface mine operator shall faithfully perform all of the requirements of (1) Act 418, [The Surface Mining Act], (2) the Act of Assembly approved June 22, 1937, as amended, known as "The Clean Streams Law" (Act 394), (3) the applicable rules and regulations promulgated thereunder, and (4) the provisions and conditions of the permits issued thereunder and designated in this bond (all of which are hereafter referred to as "law"), then this obligation shall be null and void, otherwise to be and remain in full force and effect in accordance with the provisions of the law.

Appellant's permit required that the mine site be returned to approximate original contour (AOC) and that it be revegetated, inter alia. Although appellant in his pre-hearing memorandum and notice of appeal denies that he has failed to perform these duties, his failure to respond to DER's request for admissions establishes that the site is not returned to AOC and that revegetation has not been accomplished. Therefore, it is established that appellant has failed to comply with the terms of his permit, and thus, of the bond.

Appellant also argues that, even if it is true that the site has not been returned to AOC or revegetated, he cannot be held liable for these failures since he contracted with other parties to perform these duties and cannot be responsible if they failed to do so. Appellant misapprehends the law. The permit requirements, that the site be returned to AOC and revegetated, derive from DER regulations promulgated pursuant to the Surface Mining Act and the Clean Streams Law, 35 P.S.

§691.1 et seq. 25 Pa. Code §87.141(a); 25 Pa. Code §87.147 and §87.148. The Commonwealth Court has held that a permittee cannot, by private agreement, delegate duties and obligations imposed upon him by statute. Morcoal Company v. DER, 74 Pa.Cmwlth 108, 459 A.2d 1303 (1983); Middletown Township Municipal Authority v. DER, 7 Pa.Cmwlth 545, 300 A.2d 515 (1973). Appellant cannot expect to be relieved of his responsibility under the Clean Streams Law and the Surface Mining Act simply by pointing his finger at someone else.

The foregoing establishes that appellant has triggered the liability provisions of the bond. The DER letter notifying appellant of the forfeiture declared forfeit the entire amount of the bond, $8,700. In its motion, however, DER recognizes that it is entitled to only $5,000, despite the violations described supra, under the facts of this case.

As a general rule, and in the absence of provisions to the contrary, where a bond is given to a public body and is conditioned upon compliance with a specific statute, the full penalty of the bond may be recovered in the event of the breach. Morcoal Company v. DER, 74 Pa. Cmwlth 108, 459 A.2d 1303 (1983). The bond in this case, however, does have "provisions to the contrary." It states:

> Liability on this bond shall accrue in proportion to the acres of land affected by surface mining at the rate of Five Hundred Seventy Five Dollars ($575) per acre of part thereof, but in no case shall such liability be for an amount less than Five Thousand Dollars . . .

In King Coal Company v. DER, EHB Docket No. 83-112-G (Adjudication dated March 18, 1985 and reconsidered July 25, 1985), the Board stated that where the bond provides that liability shall accrue in proportion to the acreage affected by mining operation and the permittee has failed to comply with its requirements under the bond,

DER is entitled to forfeit that portion of the bond that corresponds to the acreage affected by the mining operation multiplied by the per acre liability specified in the bond terms.

The facts here, as established through DER's requests for admissions, are that only five of the fifteen acres covered by the bond were affected by mining activities. Therefore, since the liability accrued under the amount per acre provision would total less than five thousand dollars, appellant is liable for the minimum amount, $5,000.

O R D E R

The Commonwealth of Pennsylvania, Department of Environmental Resources' ("DER") Motion for Summary Judgment is granted. DER's forfeiture of Certificate of Deposit No. 69421 up to an amount of $5,000.00 is sustained. This matter is remanded to DER for action consistent with this opinion.

BY THE BOARD

Maxine Woelfling

Maxine Woelfling, Chairman

Edward Gerjuoy

Edward Gerjuoy, Member

DATED: March 12, 1986
cc: Bureau of Litigation
For Appellant:
Edwin W. Robey, Esq., Washington, PA
For the Commonwealth, DER:
Dennis W. Strain, Esq.

COMMONWEALTH OF PENNSYLVANIA

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TOWNSHIP OF DERRY :

:

: Docket No. 85-175-G
: 85-207-G

Issued March 13, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and Borough of Hummelstown, Intervenor (85-175-G)

OPINION AND ORDER

Synopsis

DER's Motion to Limit issues is denied; however, the Board rules that the hearings on the merits of these appeals will be limited to evidence bearing upon whether appellant has satisfied the first of three prongs of the Payne v. Kassab test, (11 Pa.Cmwlth 14, 312 A.2d 86 (1973)) i.e., whether appellant's permit applications complied with all applicable statutes and regulations. Evidence bearing upon the second and third prongs of the Payne test will be permitted only if appellant submits to DER (if it has not already done so) the information necessary to determine whether the permits properly can be issued under those prongs. Such information must be submitted to DER early enough for evaluation well before the hearings on the merits. If a permit application does not comply with applicable law, DER cannot issue the permit; under such circumstances there is no need to address the second and third prongs of the Payne analysis.

OPINION

At Docket No. 85-175-G, the Township of Derry ("Derry") has appealed DER's denial of Derry's application for construction of a new sanitary landfill. At Docket No. 85-207-G, Derry has appealed DER's denial of Derry's application for modification of an existing landfill. Derry has filed a motion to consolidate the two appeals; because of DER's objection, this motion has not been granted. However, the Board, with the concurrence of the parties, has ordered that the appeals be heard in tandem, beginning with No. 85-207-G, in the belief that some of the evidence in 85-207-G could be incorporated into the immediately subsequent 85-175-G hearing. In the meantime, DER has filed a motion to limit the issues in these appeals, to which Derry has responded. DER's motion, and Derry's response, are couched as if the issues in the two appeals are the same or very similar, a presumption which is not obvious to this Board. Nevertheless, we cannot but take this motion and response as we find them, and therefore will proceed herein as if the issues in the two appeals really are essentially the same for the purposes of this Order.

DER has moved the Board to:

> limit the issues on appeal to determining what information was required to be submitted in Derry's permit application by either regulation or the Department, and whether Derry submitted the required information.

By way of elaboration on the above-quoted request, DER explicitly asks the Board to preclude the submission of evidence on the following specific issues.

1. Any information intended to prove whether and to what extent the Department's refusal to issue the subject permits had an adverse economic impact on Derry.

2. Any information intended to prove that the Department failed to apply the second and third prongs of the Payne v. Kassab standard to Derry's permit applications.

3. Any technical information that has not been submitted to the Department for review as part of Derry's permit application, and which is not intended to explain information previously submitted to the Department.

In support of its motion DER argues primarily that "the Board lacks jurisdiction to hear evidence not previously submitted to the Department" as part of Derry's permit application. The Board rejects this argument, as well as DER's related subordinate arguments, e.g., that DER's "refusal to approve Derry's permit application constitutes a non-discretionary act which limits this Board's scope of review." In fact, we find it difficult to believe DER is offering such arguments seriously. In the appeal docketed at 85-175-G, the denial letter from DER to Derry read as follows:

> A review of the application for the above referenced landfill has been completed. Your application fails to demonstrate that the proposed sanitary landfill will not degrade the waters of the Commonwealth, and that its operation will comply with the provisions of the Solid Waste Management Act, 35 P.S. §6018.101 et. seq, The Clean Streams Law, 35 P.S. §691.1 et. seq., and the Rules and Regulations promulgated thereunder. Therefore, your application is denied.
>
> The particular reasons for denial include the following:
>
> A. The application does not adequately define the limits of groundwater recharge, discharge or lateral flow.
>
> B. The application does not provide a three dimensional hydraulic gradient or flow net.
>
> C. The efficiency of the leachate interceptor has not been adequately addressed.
>
> D. The hydraulic conductivity, extent and overall significance of the permeable soils in which the leachate interceptor is proposed to be located has not been adequately addressed.
>
> E. The fracture flow at the site has not been adequately addressed.
>
> F. The application does not adequately determine the conclusive soil, geology, and groundwater conditions at the site.

G. The application does not adequately address the relationship between the location of the treatment settling basins and the water table.

H. The application does not adequately address the deficiencies outlined in the Department's letters dated December 27, 1982 and August 22, 1983.

The denial letter in the appeal at 85-207-G began with the identical first paragraph as in the denial letter just quoted. The 85-207-G denial letter then went on to say:

The particular reasons for denial include the following:

A. The application does not adequately demonstrate that sufficient suitable soils exist to renovate the leachate from the final proposed depth of waste. In the alternative, the application does not address the ability to collect and treat leachate generated by the proposed expansion.

B. The proposed final grades exceed the maximum allowable 15% slope.

C. Spray irrigation has been proposed for disposal of leachate. Design details have not been provided. The proposed spray field has not been evaluated for soils suitable to renovate leachate.

D. The application does not adequately demonstrate that cover material descriptions meet required textural classifications.

E. The proposal for a leachate interceptor trench does not adequately address the volume of water to be collected or the effect that this additional volume of water will have on the leachate collecting ponds. This additional volume of water may cause unauthorized discharges to the stream from the leachate collecting ponds.

Terming denial actions based on such reasons as "non-discretionary" insults the Board's intelligence. As for the Board's jurisdiction, it is specified by 71 P.S. §510.21 and the Board's rules and regulations, notably 25 Pa.Code §21.52, as DER well knows. Nowhere in these specifications of the Board's jurisdiction is there any suggestion that such jurisdiction is limited by the information an appellant has or has not submitted to DER. Moreover, as DER's brief in support of its motion recognizes, under the authority of

Warren Sand & Gravel, Inc. v. DER 341 A.2d 556 (Pa. Cmwlth. 1975), the Board's adjudication of an appeal generally involves a de novo hearing. The Board consistently has ruled that in the de novo hearing the Board is entitled to review all relevant evidence, including evidence which was developed after the date of the appealed-from DER action. For example, in Pennsylvania Game Commission v. DER, Docket No. 82-284-G (Adjudication, January 17, 1985), one of the issues was whether DER -- in granting a solid waste permit -- had adequate justification for deciding, under 25 Pa.Code §75.38(b)(2), that the requirements of §75.38(c)(5) were not necessarily applicable. The evidence suggested that this justification may have been inadequate at the time the permit originally was granted. At the hearing, however, the Board accepted evidence (on which the Board's adjudication relied) that DER could provide adequate justification for its decision about the requirements of §75.38(c)(5), based on a thorough review of the application after the appeal was filed. Evidence developed after the appealed-from DER action has been admitted also in e.g., Pennsylvania Environmental Management Services v DER, Docket No. 79-153-M (Adjudication, May 29, 1984), 1984 EHB 94, and Robert Kwalwasser v. DER, Docket No. 84-108-G (Adjudication, January 24, 1986).

Therefore, for all the reasons explained in the preceding paragraph, we will not grant DER's motion, as quoted supra. Correspondingly, the Board rejects DER's explicit request that the Board preclude the submission of evidence described by the paragraph numbered 3, also quoted supra. We stress, however, that in so ruling we are not implying that any evidence Derry intends to submit

which has not previously been submitted to DER for review will be automatically admissible at the hearings on the merits of these appeals. Such evidence must be relevant, and DER must have received proper notice of the evidence as required by the Board's Pre-Hearing Order No. 1 and the Pa. Rules of Civil Procedure discovery rules.

We now turn to the paragraphs 1 and 2 quoted supra, whose merits have not been reached by the foregoing discussion. Derry's pre-hearing memoranda on these appeals contend that before denying the permits DER was required to consider the economic impacts of the denials, and was required to balance social and economic considerations against the potential harm. As authority for these assertions, Derry cites East Pennsboro Township Authority v. DER, 18 Pa.Cmwlth. 58, 334 A.2d 798 (1975) and Article I §27 of the Pennsylvania Constitution. The aforementioned DER paragraphs 1 and 2 obviously respond and reject these just-stated contentions of Derry's. DER's brief in support of its motion to limit issues correctly points out that the Board previously has analysed the implications of East Pennsboro, supra, and has ruled that East Pennsboro does not require DER to consider economic impact in setting effluent limits on the discharge from a deep coal mine. Mathies Coal Company v. DER, Docket No. 82-212-G. (Jan. 13, 1984), 1984 EHB 524. Although Mathies was not concerned with sanitary landfill permit applications, nevertheless under the logic of Mathies DER did not have to consider the economic impacts of its decisions to deny Derry's permit applications, once DER had concluded that those permit applications did not comply with the applicable statutes and regulations. Very recently, however, the Commonwealth Court has ruled that Article I §27 of the Pennsylvania Constitution may require DER to balance

social and economic benefits against threatened environmental harm before denying a solid waste landfill permit application. Pennsylvania Environmental Management Services, Inc. v. DER, 503 A.2d 477 (Pa.Cmwlth 1986). To be precise, the PEMS opinion held that under the third prong of the test for application of Article I §27 -- enunciated in Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), aff'd 468 Pa. 226, 361 A.2d 263 (1976) -- DER must perform the above-described balancing and must grant the permit if the benefits clearly outweigh the harm.

Evidently PEMS is very much on point for the instant appeals. But it must be recognized that in PEMS the Commonwealth Court addressed only DER's application of the third prong of the Payne test. The PEMS opinion quoted, without any qualification, the first prong of the test, namely "Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?" Thus the PEMS opinion does not overrule Mathies, supra, or affect the conclusion we have drawn from its logic, namely that DER did not have to perform any balancing of social and economic benefits against threatened environmental harm, once DER had concluded that those permit applications did not comply with the applicable statutes and regulations.

Returning now to the quoted paragraphs 1 and 2 from DER's motion, we rule as follows in the light of the above discussion. DER's determinations that Derry's permit applications failed to comply with applicable statutes and regulations were discretionary. However, if these determinations were within DER's discretion, i.e., if the Board should sustain these determinations, then DER's subsequent decision to deny the permits was mandatory. DER is not required to balance social and economic considerations against economic harm unless there first has been an initial showing, under Payne prong one, that there has been compliance with applicable statutes and regulations. Correspondingly, in the instant appeals,

evidence pertaining to economic impacts on Derry, or to DER's applications of the second and third prongs of the Payne test are irrelevant to this appeal unless:

(i) The Board first concludes that DER abused its discretion in determining that the permit applications did not comply with the applicable statutes and regulations; and

(ii) DER asserts that the permits cannot be issued under the second and third Payne prongs, even if the Board concludes the first prong is satisfied.

The following Order is consistent with the foregoing discussion.

O R D E R

AND NOW, this 13th day of March, 1986, it is ordered as follows:

1. DER's motion to limit the issues in these above-captioned appeals in the form stated by DER, is denied.

2. Nevertheless, at present the Board intends to limit the hearings on the merits of these appeals to evidence bearing on whether or not Derry's permit applications complied with applicable statutes and regulations.

3. However, in the interests of judicial economy and to prevent further delay in the processing of Derry's permit applications should the Board agree that Derry's applications did comply with applicable statutory and regulatory requirements, the Board will allow evidence pertinent to application of the second and third prongs of the Payne test if, not later than three months before hearings on the merits begin, DER has decided that the permits cannot be issued

because the Payne second and third prongs are not satisfied.

4. If Derry wishes the Board to hear evidence pertinent to the second and third prongs of the Payne test, then Derry (unless it already has done so) must promptly submit whatever information DER requires to decide whether the permits can be issued under those prongs.

5. If Derry has submitted or promptly submits the information described in paragraph 4, and if DER reasonably could have evaluated this information before the three months deadline specified in paragraph 3, DER's failure to evaluate will not be a reason for rejecting evidence pertinent to the second and third prongs at the hearing on the merits.

6. Irrespective of any preceding paragraphs of this Order, any evidence offered by any party at the hearings on the merits of these appeals must have been adequately noticed to other parties, as required by the Board's Pre-Hearing Order No. 1 and the Pennsylvania Rules of Civil Procedure discovery rules.

7. Except possibly for evidence concerning the balancing required under the third Payne prong, there is no reason to hear these appeals in tandem, or to incorporate evidence from one appeal into the record of the other appeal.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy
Member

DATED: March 13, 1986
cc: Bureau of Litigation
For Appellant:
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For Commonwealth, DER
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DEL-AWARE, UNLIMITED, INC., Appellant :

:

Docket No. 84-361-G

: Issued March 14, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES, Appellee
and PHILADELPHIA ELECTRIC COMPANY, Permittee

OPINION AND ORDER

Synopsis

Appellant is granted standing to pursue its claim relating to alleged DER misapplication of regulations used to establish effluent limitations in the NPDES permit at issue in this appeal. The Board previously has ruled that appellant has a substantial interest in preventing degradation of the Schuylkill River which could adversely affect the uses which appellant's members make of the river. Appellant's allegations concerning the misapplication of the effluent limitation regulations also suffice to establish a direct and immediate interest in this matter.

Appellant, however, is not granted standing to litigate any of the other allegations it has raised concerning either alleged violations of applicable statutes and regulations by DER or the alleged inadequacy of regulations and statutes to protect the Schuylkill in this case. Appellant has failed to state its legal contentions with sufficient particularity to enable the Board to determine whether

it has a direct and immediate interest in the matters to which these allegations relate.

In light of the fact that resolution of the issue which appellant does have standing to raise will turn on certain factors relating to the issuance of another NPDES permit, this appeal is continued until such time as these additional factors are established or DER takes action on the instant NPDES permit which moots this appeal.

OPINION

This is our third attempt to resolve the issue of Del-Aware's standing to pursue this appeal (see our Opinions and Orders of May 13, 1985 and November 21, 1985 at this docket number). On November 21, 1985 we ruled:

> Del-Aware's interest in preventing any degradation of the Schuylkill River which could adversely affect Del-Aware's members' uses of the Schuylkill for rowing, sailing, fishing, drinking, etc., meets the "substantial interest" prong of the William Penn test.

We also ruled, however, that on the record to November 21, 1985, the Board was unable to determine whether Del-Aware had met the "immediate" and direct interest prongs of the William Penn test. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). In particular, we were unable to determine whether Del-Aware is alleging that the permit had been granted in violation of applicable statutes and regulations, or whether Del-Aware was alleging that operations under the permit, though in compliance with applicable statutes and regulations, nevertheless would result in harm to Del-Aware's substantial interests via a causal chain meeting the aforesaid "immediate" and "direct" William Penn prongs. Therefore, on November 21, 1985, Del-Aware was ordered to state, "with particularity.":

6a. The regulations--intended to protect the Schuylkill from the degradation Del-Aware fears--which Del-Aware alleges DER violated in issuing the appealed-from permit.

6b. The allegations which (Del-Aware believes) will meet the William Penn "immediate" and "direct" causation prongs for standing to appeal, even if Del-Aware ultimately is unable to prove any DER failure to comply with regulations intended to protect the Schuylkill from the degradation Del-Aware fears.

Del-Aware now has responded to this order. Del-Aware alleges that the permit was issued in violation of applicable statutes and regulations pertaining to:

1. Toxic waste and heavy metals in the discharge.

2. The temperature of the discharge.

3. Radioactivity in the discharge.

Philadelphia Electric Company ("PECO") and DER now have replied to Del-Aware's allegations concerning the subjects 1-3 supra; these parties thoroughly disagree with Del-Aware on almost all factual and legal aspects of Del-Aware's arguments in favor of its standing to pursue this appeal. Evidently, the time is overripe for us to rule finally on Del-Aware's standing. Therefore, we proceed to do so, discussing each of the subjects 1-3 in turn.

1. Toxic Waste and Heavy Metals

Much of the water reaching the Schuylkill in the discharge allowed under the instant appealed-from permit has originated in the Delaware River, as has been thoroughly discussed by this Board in an adjudication of a previous dispute concerning the Limerick nuclear power facility. Del-Aware Unlimited, Inc. v. DER, EHB Docket Nos. 82-177-H and 82-219-H (Adjudication, June 18, 1984), 1984 EHB 178 (henceforth "Del-Aware I"). Del-Aware now argues that the presence of Delaware River water in the discharge will result in violation of water quality standards

in 25 Pa. Code Chapter 93, notably §§93.7 and 93.9. In the alternative, Del-Aware also argues, DER has not complied with 25 Pa. Code §95.2(c), which -- Del-Aware asserts -- requires the use of "best practicable control technology currently available" ("BPCT"). Del-Aware further argues that the permit violates the requirements of 25 Pa. Code §92.31. Finally, with regard to toxic waste and heavy metals, Del-Aware also states:

> If however, the Board construes the permit as not violating the regulations and not violating the regulation incorporating the Federal standards, then it is submitted that the permit is in violation of both the Clean Streams Law and the Federal Water Pollution Control Act. Both those statutes preclude toxic discharges in amounts inimicable to the quality of the stream.

We will begin our discussion of Del-Aware's toxic waste and heavy metals claims to standing by dealing with this Del-Aware statement immediately supra. At this point in these proceedings, a year and a half after the appeal was filed, and after many attempts by the Board to elicit from Del-Aware the basis for its claimed standing (see our Opinions and Orders of May 13 and November 21, 1985), a bald allegation by Del-Aware that the permit violates "both the Clean Streams Law and the Federal Water Pollution Control Act", without any supporting details whatsoever, is not sufficient to earn standing to prosecute this appeal. We have given Del-Aware every chance to delineate, with reasonable specificity, a basis on which the Board could hold that Del-Aware does have standing. We do not believe Del-Aware should have any additional chances. The statement supra is rejected as a basis for standing. If Del-Aware does deserve standing to pursue its allegations concerning toxic waste and heavy metals in the discharge, such standing must be based on the other Del-Aware claims we have summarized.

Del-Aware's allegations that 25 Pa. Code §§93.7 and 93.9 are violated by the permit's issuance seemingly are stated with sufficient particularity to meet the letter of the Board's Order of November 21, 1985 (see paragraph 6a. quoted supra). On closer examination, however, it is clear that these allegations of Del-Aware's are subordinate to -- and rest entirely on -- a primary allegation that DER has incorrectly applied the regulations governing the issuance of NPDES permits, notably 25 Pa. Code §92.31. This allegation in turn rests on the claim that the concentrations of various pollutants, e.g., copper, in the water arriving at the Limerick plant will be higher than DER has assumed, so that DER's failure to set explicit discharge limits (on, e.g., copper) in the NPDES permit will allow PECO to discharge from the Limerick facility in violation of applicable water quality standards in §§93.7 and 93.9.

Del-Aware argues that pollutant concentrations reaching the Limerick plant will be higher than DER assumes because (according to Del-Aware) the East Branch Perkiomen Creek -- whose waters will be taken in and ultimately discharged by the Limerick facility -- will be contaminated by Delaware River water. The possibility of such contamination was the basis of our ruling, in Del-Aware I, than an NPDES permit would be required for the diversion of Delaware River water into the East Branch of the Perkiomen. DER argues that the Delaware River diversion NPDES permit will ensure that East Perkiomen pollutant levels before intake by the Limerick facility will not be higher than the levels presently encountered in the East Perkiomen; the Limerick facility NPDES effluent limitations which are the subject of the instant appeal were set using present East Perkiomen pollutant concentrations. PECO, though making much the same arguments as does

DER, admits that it has appealed to Commonwealth Court the Board's Del-Aware I requirement that there be an NPDES permit for the Delaware River diversion into the East Perkiomen. Moreover, the NPDES permit for the Delaware River diversion, and therefore the parameters for discharge of the Delaware River into the East Perkiomen, have not yet been issued. If PECO is successful in its appeal of Del-Aware I, then the East Perkiomen well may be significantly contaminated by Delaware River water, even at the Limerick facility intake far downstream on the Perkiomen from the point where Delaware River water enters the East Perkiomen. Therefore, even disregarding the fact that the Delaware River diversion NPDES permit has not yet been issued, although we do not believe Del-Aware's concerns about the pollutant levels in the East Perkiomen at the Limerick intake are convincingly supported by Del-Aware's arguments, at this time we cannot say that those concerns are so unfounded as not to merit standing under the criteria set forth in William Penn, supra, as interpreted by our November 21, 1985 Opinion and Order. On the other hand, there is no point litigating the correctness of the specific pollutant levels set in the instant Limerick facility NPDES permit until the pollutant levels in the East Perkiomen after it has received the Delaware River diversion can be regarded as established, whether by an NPDES permit for that diversion which is no longer appealable or by other means.

Del-Aware's remaining claim, re toxic waste and heavy metals in the discharge, is that under 25 Pa. Code §95.2(c) the permit should have required treatment of the discharge by BPCT, a term defined supra. It seems, however, that Del-Aware has misread §95.2(c). This section does not require the use of BPCT; rather, §95.2(c) requires that the treated discharge meet effluent limitations achievable by BPCT. Del-Aware has made no claims that the pollutant

concentrations allowed under the permit will exceed effluent limitations achievable by BPCT. Therefore, Del-Aware's claim that §95.2(c) has been violated does not merit a grant of standing to Del-Aware.

In sum, Del-Aware has not demonstrated standing to pursue its claims that the permit was issued in violation of statutes and regulations pertaining to toxic waste and heavy metals in the discharge, except for Del-Aware's allegation that DER, in relying on present pollutant concentrations in the East Perkiomen, has incorrectly applied the regulations, notably 25 Pa. Code §92.31, governing the issuance of NPDES permits. Del-Aware does have standing to pursue this allegation, but the merits of Del-Aware's claim in this regard cannot be litigated fruitfully until there is less uncertainty about the effects the Delaware River diversion will produce in the East Perkiomen.

2. The Discharge Temperature

The permit expresses the following requirement "with respect to the thermal impact of the discharges upon the Schuylkill River":

> The discharge shall not cause a rise of stream temperature when the ambient stream temperature is 87°F or above; nor cause more than a 5°F rise above ambient temperature until stream temperature reaches 87°F; nor cause a change of stream temperature by more than 2°F during any one-hour period.

Del-Aware's Memorandum in Opposition to PECO's Second Motion to Dismiss the Appeal, filed April 17, 1985, states (at 27):

> For present purposes, appellant concedes, arguendo, the tracing of the standards through Chapter 93, so that applied literally and without consideration, a 5° F increase for warm water fishery protection would be allowable.

Del-Aware's response to our November 21, 1985 Order does not disavow this just-quoted statement from its April 17, 1985 Memorandum; indeed Del-Aware's response acknowledges that the quote supra from the permit is consistent with the discharge temperature limitations imposed by 25 Pa. Code §97.82(a). Del-Aware also

contends, however, that the discharge temperature limitations specified in the permit violate 25 Pa. Code §97.81, because these temperature limitations would cause reduced dissolved oxygen concentrations violating 25 Pa. Code §§93.7 and 93.9. 25 Pa. Code §97.81 reads as follows:

> §97.81 Prohibition.
>
> The temperature of the waters of this Commonwealth shall not be increased artificially in amounts which shall be inimical or injurious to the public health or to animal or aquatic life, which shall prevent the use of water for domestic, industrial, or recreational purposes or which shall stimulate the production of aquatic plants or animals to the point where they interfere with these uses.

Evidently this regulation does no more than assert that water temperature must not be allowed to rise to an injurious level. We do not believe our November 21, 1985 Opinion can be fairly read to mean that merely alleging a violation of this broad prohibition §97.81 is sufficient to earn standing, without any further showing that the William Penn "immediate" and "direct" causation requirements have been met. In promulgating §97.82(a), the Environmental Quality Board determined that temperature rises less than $5^{\circ}F$ would not cause the injuries §97.81 prohibits. Del-Aware has conceded that the permit is consistent with §97.82(a). Del-Aware has not furnished any satisfactory reasons for believing that the $5^{\circ}F$ temperature rise limit of §97.82(a) is inadequate to meet the requirements of §97.81. Certainly, Del-Aware has not come close to stating "with particularity" allegations which -- for temperature rises in the Schuylkill attributable to the discharge -- could meet the William Penn causation prongs under the facts of this appeal, in the conceded circumstance that the permit does not violate §97.82(a); such allegations were called for by our November 21, 1985 Order's paragraph 6b, quoted supra.

We conclude that Del-Aware's allegations concerning the temperature

of the discharge are insufficient to merit standing.

3. Radioactivity in the Discharge

Del-Aware's response to our November 21, 1985 Order states:

> Although scientifically a subset of toxic pollution, radiological pollution is dealt with separately inasmuch as it is subject to special NRC considerations. Nevertheless, DER has water quality standards for radioactivity, see Pa. Code §§93.7 and 93.9, and it is contended that these will or may be violated by the discharge if permitted.

The above quote is absolutely all Del-Aware has to say about radiological pollution. None of Del-Aware's previously filed statements in support of its appeal, namely its Notice of Appeal, its pre-hearing memorandum, and its response to PECO's Second Motion to Dismiss, mention radioactivity or radiological pollution. The Board's Opinion and Order of November 21, 1985, wherein we attempted to delineate for Del-Aware the showing it would have to make to gain standing, was written without any expectation that Del-Aware would seek to apply our November 21, 1985 Order to an utterly new claim -- that the permitted discharge violates DER's regulations concerning allowable radioactivity concentrations in Commonwealth waters -- put forth in a single brief paragraph without any factual support. As was stated earlier in our discussion of Del-Aware's toxic waste and heavy metals claim to standing, at this point in the proceedings a bald (and totally new) allegation by Del-Aware that the permit violates water quality standards for radioactivity, without any supporting details whatsoever, is not sufficient to earn standing to pursue this appeal. We make this ruling without reference to PECO's probably correct argument (but on which we need not and do not rule) that DER regulation of the radioactivity in the discharge from the Limerick plant is

preempted by federal law.

Paralipomena

Del-Aware's response to our November 21, 1985 Order asserts, "To the extent that the regulations are interpreted [by this Board] as allowing the permits, however, Del-Aware challenges the regulations." Del-Aware's alleged reasons for challenging the regulations appear to be:

> (i) applicable water quality regulations are inconsistent with the Clean Streams Law and the Federal Water Pollution Control Act, as well as with other applicable DER regulations; and
>
> (ii) the discharge temperature limitations in, e.g., 25 Pa. Code §97.82 are inconsistent "with the statutory requirements, and with their own stated and intended purpose."

Once again, these unadorned conclusory allegations of Del-Aware's about the regulations, at this stage of these proceedings, are insufficient to earn standing. Del-Aware does not have standing to challenge the legality of the regulations DER has employed in setting the permit's effluent limits.

The gravamen of Del-Aware's complaint is that the issued NPDES permit does not set specific discharge limits on all water quality criteria, e.g., the criteria in 25 Pa. Code §93.7 Table 4, which are supposed to be controlled in the receiving Schuylkill waters under 25 Pa. Code §93.9. Copper, on which Del-Aware dwells at length, is an example of a pollutant which is not specifically mentioned in the permit, but which is listed in the water quality criteria of §93.7 Table 4. DER argues that it is not required to set effluent limits for pollutants whose concentrations in the intake to the Limerick facility are so low that effluent limits obviously are not necessary. We do not rule on this DER argument at this time, because it goes to the heart of the merits of this controversy.

We do remark, however, that this litigation could be largely or perhaps entirely mooted, were DER simply to set discharge effluent limits for all water quality criteria required for the Schuylkill under §§93.7 and 93.9, even if DER feels that many of these criteria cannot possibly be violated.

Before concluding we point out that in granting Del-Aware standing to pursue its allegation that DER has misapplied the NPDES regulations we have taken a very expansive view of Pennsylvania standing law, as PECO's reply to Del-Aware's response to our November 21, 1985 Order bitterly complains.[1] In allowing such standing, we are tacitly agreeing that this misapplication -- at a point on the Schuylkill approximately fifty miles upstream of the points where Del-Aware's members' uses of the Schuylkill have established Del-Aware's "substantial" interest under William Penn, supra -- per se satisfies the "immediate" and "direct" prongs of the William Penn test for that substantial interest. So stated, our grant of standing may seem outside any legitimately expansive interpretation of Pennsylvania standing law. Nevertheless, we believe our grant of standing to Del-Aware on this basis is correct, as a "prudential" policy decision that, to ensure fulfillment of the Legislature's and the EQB's intentions to protect recreational uses of the Schuylkill, any such users should be able to challenge DER's failure to correctly apply the regulations designed to prevent pollutional discharges into the Schuylkill. On the other hand, as paragraph 8 of our November 21, 1985 Order

1. In fairness to PECO, we wish to make it perfectly clear that PECO never has conceded that Del-Aware has any standing to pursue this appeal. To the contrary, PECO has taken every opportunity to object to Del-Aware's standing. Thus PECO's objections to Del-Aware's standing unquestionably have been preserved for appeal.

implied, we do not believe it would be good policy to allow Del-Aware to use this very liberal grant of standing as an excuse to litigate complaints about the permit which bear no relation whatsoever to the allegation which has earned Del-Aware its standing, thereby very likely unduly and unwarrantedly prolonging the duration and expense of hearing and adjudicating the actual merits of this appeal.

O R D E R

WHEREFORE, this 14th day of March, 1986, it is ordered that:

1. Del-Aware has standing to litigate its allegation that DER has misapplied the regulations used to set the effluent discharge limits in the appealed-from permit, because DER allegedly has incorrectly assumed the intake pollutant concentrations to the Limerick facility will be the same as present concentrations in the East Branch of the Perkiomen.

2. Del-Aware does not have standing to litigate -- and therefore will not be allowed to present testimony which bears on -- any Del-Aware complaints about the permit other than the complaint for which standing was granted in paragraph 1, supra.

3. The above-captioned matter is continued indefinitely until such time as:

a. The pollutant levels in the East Perkiomen after receiving the Delaware River diversion can be regarded as established, whether by a no longer appealable NPDES permit for that diversion or by other means; or

b. DER, by appropriate amendment of the permit, moots this appeal, in toto or in part.

4. At any future time, any party believing the conditions of paragraphs 3a and/or 3b have been met may petition this Board to dissolve the continuance and proceed to a hearing on the merits, or may file any other appropriate petition or motion, e.g., for summary judgment; in this connection the parties are reminded of paragraph 4 of the Board's Pre-Hearing Order No. 2.

5. If there has been no action pursuant to paragraph 4 supra within a year from the date of this Order, then at that time each party shall file a brief report on the status of this appeal and of the Delaware River diversion NPDES permit, along with a recommendation as to whether the continuance ordered in paragraph 3, supra, should be dissolved.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy, Member

DATED: March 14, 1986
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JOHN E. KAITES, et al. :

:

Docket No. 84-104-G

:

Issued: March 14, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR MOTION
FOR SUMMARY JUDGMENT
AND PETITION TO REOPEN

Synopsis

Appellants' petition to reopen, which is essentially a petition for reconsideration governed by 25 Pa.Code §21.122, is rejected. The Board's previous opinion in this appeal established that a corporation and its officer may be held jointly and severally liable for violations of the applicable law. The Board herein affirms and further explains its earlier holding.

The Department's motion for summary judgment is granted. DER acted properly in suspending appellants' industrial waste and refuse disposal permits. 35 P.S. §691.610; 52 P.S. §30.59. The appeal is dismissed.

OPINION

In an earlier opinion and order entered at this docket number, John E. Kaites et al. v. Commonwealth, DER, August 7, 1985, the Board granted

partial summary judgment in favor of the Department of Environmental Resources (DER) on the issues of appellants' responsibility for abating pollutional conditions existing at the Bear Run mining complex, and the personal liability of appellant Kaites, the president, chief executive officer and sole shareholder of Johnstown Coal and Coke. We declined to rule upon the propriety of DER's suspension of Johnstown's coal refuse disposal and industrial wastes permits, since the DER motion did not address that subject. DER now has moved for summary judgment on the permit suspension issue. In addition, appellants have petitioned to have the record reopened for the submission of evidence which they argue bears upon the determination of Kaites' personal liability. DER has filed a response to appellants' petition; however, appellants have not responded to the DER motion for summary judgment, although the twenty day time period for submitting such a response has lapsed.

The sole issue to which appellants' petition to reopen is addressed is our earlier holding that John Kaites is individually responsible for complying with the terms of the order which is at issue herein. Appellants contend that the Board misapprehended and misapplied the applicable law in reaching this conclusion and that, in any event, there are insufficient facts upon the record to support the Board's finding of Kaites' liability. DER's response does not address these contentions of appellants', but merely argues that appellants' Petition is in essence an untimely request for reconsideration under 25 Pa.Code §21.122. The Petition was filed December 26, 1985, long after the 20-day time limit specified by §21.122(a) had expired.

The time limit of §21.122(a) is " within 20 days after a decision has been rendered." Neither the Board's rules and regulations, 25 Pa.Code Chapter 21, nor the General Rules of Administration Procedure, 1 Pa.Code §31.3, define "decision". However, 25 Pa.Code §21.122(b) indicates that §21.122(a) is intended to supersede 1 Pa.Code §35.241; §35.241 is applicable to petitions for rehearing or reconsideration "after the issuance of any adjudication or other final order." Even though our August 7, 1985 Order may have been interlocutory for purposes of appeal to Commonwealth Court [see Goodrich Amram §1035 [(b):10], the Order signed by a majority of the Board was a final adjudication by the Board of the issues addressed in that Order, as explicated in the accompanying August 7, 1985 Opinion. We agree with DER that the Petition is in essence a request for reconsideration under §21.122. We conclude, therefore, that DER has correctly argued that appellant's Petition was untimely and must be dismissed.

Nevertheless, we shall address the Petition on its merits, because we also agree with the appellants' contention that our August 7, 1985 Opinion could use clarification. A corporate officer may be held personally liable for violations of a permit granted to the corporation if the corporate veil shielding the officer can be pierced, or if the officer had an explicit or implicit duty to carry out the obligations imposed on the corporation by the permit. The officer's duty may be established by his own acts, or by virtue of public policy.

Much of our discussion of Kaites' liability in our August 7, 1985 Opinion rested on the belief that the facts on the record in this appeal justified piercing the corporate veil. Although we are not convinced this belief was incorrect, we are inclined to agree with the appellant that our August 7, 1985

conclusion that "the prerequisites for reaching beyond the corporate veil are present" was hasty. As appellant correctly point out in their petition, liability under the corporate veil theory generally is premised upon findings concerning the validity of the corporation itself, e.g., undercapitalization, use of the corporate form for the personal benefit of the officer, etc. See Ashley v. Ashley, 482 Pa. 228, 393 A.2d 637 (1978); College Watercolor Group v. Newbauer, 468 Pa. 103, 360 A.2d 200 (1976); Zubik v. Zubik, 384 F.2d 267 (3rd Cir. 1967). There was no evidence on such issues. The hastiness of our previous conclusion is inconsequential, however, because our August 7, 1985 Opinion also rested on the belief (sufficient of itself to impose liability in Kaites) that Kaites had "assumed the duty of assuring that the Bear Run mining complex be operated in conformity with the terms and conditions of its permits." On reexamination of the record, we find that the facts fully support this belief. Consequently, for reasons amplified infra, we reject the Petition on its merits, irrespective of our holding that the Petition is untimely.

A corporate officer may be held personally responsible for violations of law despite the fact that the corporation also may be found liable. Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 470 A.2d 86 (1983); Amabile v. Auto Kleen Car Wash, 249 Pa.Super. 240, 376 A.2d 247 (1977); Donsco, Inc. v. Casper Corp., 587 F.2d 602 (3rd. Cir.1978); Donner v. Tams-Witmark Music Library, Inc., 480 F. Supp.1229 (E.D.Pa.1979). Under generally accepted principles of tort law, which of course are applicable here only by analogy, a corporate officer cannot escape liability on the ground that in committing a violation of law he was

acting as an officer of the corporation or on the ground that the corporation also is liable. C.J.S. Corporation, §845; Donsco, supra. This same rule has been applied in cases where the unlawful conduct is not tortious but rather is a violation of a statutorily created duty. U.S. v. Park, 421 U.S. 1903 (1975); Universal Athletic Sales Co. v. American Gym, 480 F.Supp. 408 (W.D.Pa.1979); Donner, supra; Marcus v. Hess, 41 F.Supp. 197 (W.D.Pa.1941).

A corporate officer, however, is not liable for violations of law attributed to the corporation merely by virtue of his position as an officer. The rule as stated in Pennsylvania, in cases at common law, is that an officer cannot be held liable for nonfeasance; he must participate in a wrongful act. Chester-Cambridge Bank and Trust Co. v. Rhodes, 346 Pa. 427, 31 A.2d 138 (1943). However, a decision to pursue a chosen course of conduct, accompanied by an order carrying that decision into effect,can be sufficient "participation" to subject the officer to personal liability. The officer need not be the person who actually takes the actions causing the harm. Wicks v. Milzoco Builders, Inc., supra. The Wicks holding is consistent with the generally accepted rule outside Pennsylvania, that an officer may be held personally liable even where he has not personally participated in an unlawful act if he authorized or directed it or had any knowledge of and gave consent to it. Liability has been imposed even if the officer has merely acquiesced in the unlawful conduct when he either knew or should have known of it and failed to take steps to prevent it. C.J.S. Corporations, §845.

In cases where the matter at issue is a violation of a statutorily created duty, rather than a common law action as in Chester-Cambridge and Wicks, supra, there may be less justification for requiring a showing of a participatory act

on the part of the officer. In such cases the statute must form the starting point for analysis, since it is what gives rise to the duty. In this context the United States Supreme Court has held that the normal rule of active participation need not always apply. In U.S. v. Park, 421 U.S. 658 (1975), for example, the Court held that a corporate officer could be held individually liable for criminal violations of a federal statute if it were demonstrated that the officer "had a responsible relation to the situation" and "by virtue of his position had authority and responsibility to deal with the situation." The statute at issue in Park, the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §331(k), like the Clean Streams Law and the Coal Refuse Disposal Act at issue here, is a statute enacted under the government's general police power to protect the public health, safety and welfare. The Court emphasized that the existence of the statute distinguished the case from those involving duties derived from common law; where the statute itself dispenses with the requirement that there be "consciousness of wrongdoing, an omission by failure to act [is] a sufficient basis for a responsible corporate [officer's] liability. It [is] enough . . . that by virtue of the relationship he bore to the corporation, the [officer] had the power to prevent the act complained of. [citing cases]."[1] Park, 421 U.S. at 671.

1. It is worthwhile noting that the Supreme Court was willing to impose criminal liability upon the corporate officer without a showing of affirmative misconduct on his part. A fortiori, where -- as here -- the officer's liability is civil the same standard should apply.

Our earlier opinion on the liability of the appellants herein established that violations of the Clean Streams Law and the Coal Refuse Disposal Act are present at the Bear Run Mining Complex. Liability in such circumstances, of course, is not dependent upon a showing of negligence, foreseeability, or the like. As our Supreme Court has stated in discussing liability under the Clean Streams Law:

> In criminal law, of course, inquiry into a defendant's "culpability" is at the core of guilt determination and punishment. In the field of tort law, the notion of "fault" is not an inappropriate limitation on liability because, among other reasons, the beneficiary of tort compensation, like the tortfeasor, is a private party. The notion of fault is least functional,however, when balancing the interests of a property owner against the interests of a state in the exercise of its police power, because the beneficiary is not an individual, but the community.

National Wood Preservers, Inc. v. Commonwealth, DER, 489 Pa.221, 414 A.2d 37, 46 (1980). See also Commonwealth v. Barnes and Tucker Company, 455 Pa. 392, 319 A.2d 871, 883 (1974). In so writing, the Pennsylvania Supreme Court (by which we are bound) obviously has expressed much the same views about the importance of protecting the public health, safety and welfare via the police power as did the U.S. Supreme Court in Park, supra. (by which we are not bound because Park involves federal law.)

Given the foregoing, we conclude that appellant Kaites is individually liable for the violations existing at the Bear Run mining complex. Although we are not convinced that an affirmative act on the part of Kaites is a necessary prerequisite to our finding of his liability, under the rationale of Park and National Wood, supra, the facts as established by the parties' stipulation are

sufficient, in any event, to establish the type of "participation" envisioned by the Pennsylvania Supreme Court in Wicks v. Milzoco Builders, Inc., supra. In other words, even assuming that the law of this Commonwealth requires more than mere nonfeasance to hold an officer jointly and severally liable with the corporation where the statute at issue itself makes nonfeasance unlawful, Kaites has admitted that since 1972 he "has been and is responsible for making all management decisions for Johnstown concerning the disposition and operation of the Bear Run mining complex" and that "as president and CEO of Johnstown, Kaites' management decisions include dealing with DER and the resolution of compliance orders." (Stipulation of facts, Nos. 49, 50 and 53. Emphasis supplied). Under the rationale of the Park decision, these facts would be sufficient to establish Kaites' personal liability for the violations of the Clean Streams Law and Coal Refuse Disposal Act that have been committed by Johnstown Coal and Coke at the Bear Run mining complex. More importantly, these facts are also sufficient under Wicks, supra, to establish Kaites' personal liability for these violations. In Wicks, personal liability was premised upon a finding that the responsible corporate officer had decided to go ahead with conduct which he had reason to know presented an unreasonable risk of harm, and had given an order to carry this decision into effect. As we stated in our earlier opinion:

> The record established here indicates large scale problems which have persisted over a long period of time at the Bear Run mining complex. The person admittedly responsible for making the decisions necessary to assure that these problems would be resolved is Mr. Kaites. He, and no other, assumed the responsibility for assuring that Johnstown Coal and Coke would operate in conformity with the requirements of the Commonwealth's environmental

> laws. It is apparent that the numerous violations presently existing at the site must be attributed to whatever choices and decisions he has elected to make over the years that he has been in control of Johnstown Coal and Coke.

John E. Kaites et al. v. Commonwealth, DER, Docket No. 84-104-G (August 7, 1985) at 15. This statement is central to our finding of personal liability on the part of Kaites. Moreover, Kaites can be presumed to know that the statutes and regulations governing the operations of surface mines are designed to prevent environmental harm, and that operation of the mine in violation of these statutes and regulations threatens environmental harm. We conclude that Kaites is a person who has permitted the discharge of industrial wastes to the waters of the Commonwealth without a permit authorizing the same, 35 P.S. §691.307(a), a person who has allowed a discharge from a mine to the waters of the Commonwealth, without a permit authorizing the same, 35 P.S.§691.315(a), and a person who has established, operated and maintained a coal refuse disposal area in a manner which fails to comply with DER requirements. 52 P.S. §40.57.[2]

We now address the remaining issue in this appeal, raised in DER's second motion for summary judgment, i.e. the propriety of DER's order suspending appellants' coal refuse and industrial waste permits. As noted above, appellants have not responded to DER's motion. Pa.R.C.P. 1035, governing summary judgment, provides that when a motion for summary judgment is made, and supported as provided in the rule, the adverse party may not rest upon the mere allegations and denials of his pleading, but his response, by affidavits or otherwise, must set forth specific facts showing there is a material issue for trial. In light of the record established in this appeal to date, and appellant's failure to respond to DER's motion, we conclude that there are no material facts remaining in dispute in this matter and that DER is entitled to full judgment as a matter of law.

2. These findings, of course, are equally applicable to Johnstown Coal and Coke. Under both statutes a "person" is defined to include a corporation. 35 P.S. §691.1. 52 P.S. §30.53.

As we have already stated, there are numerous violations of both the Clean Streams Law and the Coal Refuse Disposal Act existing at the Bear Run mining complex. Appellants are responsible for the creation of those conditions, and for the continuing failure to abate the same. In suspending appellants' permits DER relied upon section 9 of the Coal Refuse Disposal Act, 52 P.S. §30.59, and section 610 of the Clean Streams Law, 35 P.S. §691.610, both of which provide that "the department may issue such orders as are necessary to aid in the enforcement of the provisions of this act." As a general principle the standard which we are to apply in determining whether a DER permit suspension or revocation constitutes a proper exercise of discretion is that set forth in Commonwealth, DER v. Mill Service, Inc., 21 Pa.Cmwlth 642, 347 A.2d 503 (1975):

> Although [section 610] gives the Department wide discretion in issuing orders to enforce the Act, such orders must be "necessary to aid" that enforcement. Accordingly, section 610 must be interpreted to require the Department to select from those remedies available to it, one that is reasonable and appropriate under the circumstances. 347 A.2d at 505.

Given the longstanding and extensive nature of the violations existing at the Bear Run complex, we have no difficulty concluding that DER's suspension of appellants' permit was reasonable and appropriate, i.e., a proper exercise of DER's discretion. Permit suspension, at a minimum, is justified to prevent the conditions at the site from worsening. We note that DER also had available the alternative of revoking appellants' permits, a considerably harsher sanction, but chose not to invoke it. See 35 P.S. §691.610; 52 P.S. §30.59.

O R D E R

WHEREFORE, on this 14th day of March, 1986, it is ordered that DER's Motion for Summary Judgment is granted. Appellant's petition to reopen the record is denied. The appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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DATED: March 14, 1986

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QUAKER STATE OIL REFINING CORPORATION,
Appellant :

:

Docket No. 85-520-G

: Issued: March 14, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Appellee

OPINION AND ORDER

Synopsis

This appeal is dismissed as untimely filed, pursuant to 25 Pa.Code §21.52(a), which requires that appeals be filed with the Board within thirty days of receipt of notice of the action of the Department of Environmental Resources. Appellant received the NPDES permit at issue more than thirty days prior to the filing of this appeal. The Department is under no obligation to inform a party of its appeal rights, if there is a duly promulgated appeal procedure. Appellant has constructive notice of all duly promulgated regulations concerning the appealability of agency actions. 45Pa.C.S. §904; 1 Pa.Code §5.4. In addition, appellant need not be aware of the reasons for the Department's action in order to initiate the thirty day period of 25 Pa.Code §21.52(a). The permit which the Department issued established specific parameters and conditions which the allowed discharge would have to meet.

If appellant objected to these limitations, it should have appealed. The reasons underlying these limitations are expected to be obtained through discovery. Finally, this appeal cannot be allowed nunc pro tunc, since there is no indication of any breakdown in the Board's procedures which would excuse the untimely filing date.

OPINION

Appellant has appealed a National Pollutant Discharge Elimination System ("NPDES") permit issued to appellant by DER on September 30, 1985, authorizing a discharge from appellant's McKean County plant. The Notice of Appeal was received by the Board on November 29, 1985. Appellant alleges that DER mistakenly mailed the permit to appellant's headquarters in Oil City, Pennsylvania, rather than to the McKean plant; thus the permit had to be sent from Oil City to McKean County, where it allegedly first was received on October 7, 1985. We are not convinced that DER erred in mailing the permit to appellant's headquarters, but even granting that appellant did not receive the permit until October 7, 1985, the appeal filed on November 29, 1985 appears to be obviously untimely under our 30-day appeal period rule. 25 Pa.Code §21.52(a).

Appellant recognizes this fact, but argues that appellant really did not receive the notice required by §21.52(a) on October 7, 1985. Appellant offers two distinct arguments in support of this thesis: (1) appellant claims there was no notice because the permit was not accompanied by a statement notifying appellant that issuance of the permit was an appealable DER action under 71 P.S. §510-21(c) and 25 Pa.Code §21.2(a), with an appeal period specified by 25 Pa.Code §21.52(a). Appellant argues that in the absence of such a statement, notice

to appellant satisfying the requirements of §21.52(a) cannot be presumed from the mere fact that the permit was received by the McKean plant. (2) Appellant claims that the received permit was not accompained by a "Fact Sheet" or other information explaining how DER arrived at the NPDES parameters and conditions specified in the permit; therefore, appellant argues, it was not possible for appellant to know that an appeal was necessary until such information was received from DER, which receipt did not occur until November 22, 1985. If the November 22, 1985 date were to be accepted as the date of notice to appellant under §21.52(a), the November 29, 1985 appeal filing would be timely, of course.

We are not persuaded by either of the arguments (1) and (2), supra. The courts of this Commonwealth have ruled on numerous occasions that an agency does not have the duty to accompany its actions (e.g., grant of a permit) with a formal statement to the permittee of its rights to appeal under applicable statutes and regulations. For example, the Commonwealth Court has stated:

> So long as an administrative agency of the legislature has provided a duly published procedure for a hearing or appeal after such an order, it is not a requirement that it must also extend additional notice of such rights.

Commonwealth of Pa. v. Derry Township, 10 Pa. Cmwlth. 619, 314 A.2d 868 (1973), Reversed in part for other reasons, 466 Pa.31, 351 A.2d 606 (1976). This quote from Derry Township frequently has been cited approvingly. Walker v. Pa. Unemployment Compensation Board of Review, 33 Pa. Cmwlth 438; 381 A.2d 1353 (1978); DiIenno v. Pa. Unemployment Compensation Board of Review, 59 Pa. Cmwlth 496; 429 A.2d 1288 (1981). Moreover, the Commonwealth Documents Law, which has been incorporated into the Pennsylvania Code, implies that all persons, including the appellant, had constructive notice of all duly promulgated regulations — such as

the above-cited regulations 25 Pa.Code §§21.2(a) and 21.52(a) -- concerning the appealability of agency actions. 45 Pa.C.S. §904; 1 Pa.Code §5.4. Appellant has cited no legal authority in support of its thesis that receipt of the permit did not initiate the 30-day appeal period of §21.52(a). Although we sympathize with appellant's argument that the "morass of administrative regulations that constitutes EPA's and the Department's NPDES programs are not easily understood or remembered", and although we agree with appellant that it would be preferable for DER to follow the federal practice of including explicit notice of the right to appeal in the covering letter accompanying a permit grant, we are bound by Derry Township, supra, and the Commonwealth Documents Law until unbound by a higher tribunal than this Board. Therefore appellant's argument (1), supra, is rejected.

As for appellant's argument (2), once again it is accompanied by no citations to legal authority. When appellant received the permit, it was informed of the parameters and conditions its allowed discharge would have to meet. If appellant felt these parameters and conditions were inappropriate, it was free to appeal forthwith, and should have done so. 25 Pa.Code §21.51(e), concerning the contents of the Notice of Appeal, makes it clear that an appellant is not expected to wait to file its appeal until the appellant learns from DER the basis for DER's action; this information is to be learned through discovery after the appeal is filed, as §21.51(e) implicitly (indeed almost explicitly) asserts. We see no reason to rule that this or any other appellant may prolong the time for initiation of the 30-day appeal period until the appellant has learned the reasons for DER's complained of action. Appellant's argument (2) also is rejected.

We conclude that appellant received notice of DER's action, requisite to satisfy the requirements of 25 Pa.Code §21.52(a), no later than October 7, 1985. Consequently the November 29, 1985 filing of the appeal was untimely. Timely filing is a jurisdictional requirement, which this Board cannot and does not ignore. Rostosky v. DER, 26 Pa.Cmwlth 478,314 A.2d 761 (1976); Fuel Transportation Co., Inc. v DER, Docket No. 85-360-M (Opinion and Order, November 13, 1985); Mid-Continent Insurance Co. v. DER, Docket No. 85-334-G (Opinion and Order, December 11, 1985).

It follows that this appeal must be dismissed unless (as appellant has requested in the alternative) we accept this appeal nunc pro tunc, under 25 Pa. Code §21.53. The Board has frequently ruled, however, on the authority of well established Pennsylvania case law, that an appeal nunc pro tunc can be accepted only if the later (after 30 days) filing can be ascribed to breakdown of the Board's own operations. Rostosky v. DER, supra; Soberdash Coal Company v. DER, Docket No. 83-030-G, 1983 EHA 323; Fuel Transportation, supra. Evidently the late filing in the present appeal was not caused by any action of this Board. Therefore the request to file this appeal nunc pro tune must be denied.

O R D E R

WHEREFORE, this 14th day of March, 1986, the above captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

Maxine Woelfling,
Chairman

Edward Gerjuoy

Edward Gerjuoy
Member

DATED: March 14, 1986

cc: Bureau of Litigation
For Appellant:
Dean A. Calland, Esq.
For the Commonwealth, DER:
Zelda Curtiss, Esq.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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WEST FREEDOM MINING CORPORATION :

:

Docket No. 84-229-G

: Issued: March 14, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Edward Gerjuoy, Member

Syllabus

This appeal of a compliance order issued to appellant under the authority of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396. 1 et seq., is dismissed. DER did not abuse its discretion in issuing the order. The DER order cited appellant for failure to comply with the terms of a previously executed consent order and agreement. Since appellant failed to appeal the consent order and agreement, its terms became final, and could not be challenged in this proceeding. The sole issue for consideration herein, therefore, is whether appellant had failed to comply with its terms. The facts establish that appellant did not comply nor did appellant make a good faith effort to comply. Appellant has waived the right to present the additional defenses it raised in its Notice of Appeal and its Pre-hearing Memorandum.

FINDINGS OF FACT

1. The Appellant is West Freedom Mining Corporation.

2. West Freedom Mining Corporation's ("West Freedom") mailing address is Box 169, Kittanning, Pennsylvania 16201.

3. The appellee is the Commonwealth of Pennsylvania Department of Environmental Resources ("DER"), the agency of the Commonwealth authorized to administer and enforce the provisions of the Clean Streams Law, 35 P.S. §691.1 et seq. and the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq.

4. West Freedom is the permittee, under Mine Drainage Permit No. 3570BSM30 and Mining Permit No. 68-23 and amendments, of a mine known as the Logan No. 2 Mine located in West Franklin Township, Armstrong County, (Tr. 26; DER Ex. A and DER Ex. C.)

5. West Freedom and DER signed a Second Amendment to Consent Order and Agreement ("Second Amendment") on May 22, 1984 (DER Ex. A; Tr. 122).

6. West Freedom filed no appeal from the Second Amendment.

7. The Second Amendment specifies a time frame for completion of West Freedom's reclamation obligations as to the Logan No. 2 Mine and defines what reclamation shall consist of at a minimum, (DER Ex. A.)

8. Under the terms of the Second Amendment, an area of the permit was required to be backfilled, returned to final grade and planted by "Spring, 1984." (DER Ex. B; Tr. 37-8).

9. DER interpreted Spring of 1984 to mean the end of the spring Planting Season which is May thirtieth (30th) according to 25 Pa. Code §87.148, (Tr. 52-4).

10. After execution of the Second Amendment, James Rupert, on behalf of West Freedom, told DER that he interpreted Spring of 1984 to mean the last day of Spring in 1984, i.e., June 20, 1984. (Tr. 52-3).

11. DER, recognizing its position on the compliance date for reclamation of this portion of the Logan No. 2 Mine differed from that of West Freedom, decided to conduct its inspection for compliance with the Second Amendment at the later (West Freedom) compliance date.

12. On June 21, 1984 Mine Conservation Inspector Andrew Bussard ("Bussard") inspected the Logan No. 2 Mine area which is the subject of these proceedings. (Tr. 133-34; DER Ex. C.)

13. Bussard's inspection revealed that West Freedom was still backfilling the site on June 21, 1984 (Tr 135, 146).

14. Final grading of the mine site was not completed on June 21, 1984 (Tr. 139).

15. The mine site was not revegetated as of June 21, 1984 (Tr. 139-40).

16. Out of 50.3 acres to be reclaimed by "Spring 1984", approximately 40 acres still had to be finished on June 21, 1984 (Tr. 142-43).

17. Backfilling of the mine site was still occurring when DER inspected the site in October of 1984 (Tr 172).

18. Backfilling of the site was completed in November of 1984 (Tr. 171).

19. The site was backfilled and rough graded by West Freedom within five months of West Freedom starting this work (Tr. 159-63).

20. From November of 1983 to May 30, 1984 there was no backfilling equipment on the mine site and no reclamation work was done (Tr. 159-60).

21. Bussard believes that with the mining equipment West Freedom brought to the mine site, the work could have been completed within three months (Tr 163).

DISCUSSION

This is an appeal of a compliance order issued to West Freedom Mining (West Freedom) by the Pennsylvania Department of Environmental Resources (DER) on June 21, 1984. The order cites West Freedom for having violated section 18.6 of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.24, which provides that it shall be unlawful to fail to comply with any order of DER. The order which DER claims West Freedom Mining has violated is a Second Amended Consent Order and Agreement entered into by DER and West Freedom on May 22, 1984 (Second Amendment). Paragraph 8 of the Second Amendment provides:

> The terms and provisions of this second Amendment to Consent Order and Agreement shall have the force and effect of an Order of the Department issued pursuant to the Department's authority under . . . the Surface Mining Conservation and Reclamation Act. . . . West Freedom Mining hereby . . . waive(s) (its) rights to appeal from the issuance of this Order.

As indicated by the latter portion of the just quoted provision, West Freedom filed no appeal of the Second Amendment. Accordingly, as a general rule, any attack upon either the content or the validity of the second amendment in this proceeding is foreclosed by principles of administrative finality. Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 473 Pa. 432, 375 A.2d 320 (1977); Commonwealth v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976).

West Freedom has not filed a post-hearing brief, although it was given the opportunity to do so. No witnesses were called on West Freedom's behalf at the hearing on the merits of this appeal. As a consequence, the factual issues presented for our consideration here are quite limited. For different, though related reasons, the legal issues we are called upon to address have been circumscribed. In its Notice of Appeal and Pre-hearing Memorandum West Freedom raised

the contention that compliance with the terms and conditions of the Second Amendment had been rendered impossible due to Acts of God. In addition, West Freedom contended that the Consent Order itself was unenforceable as being fraudulent in the inducement. After a conference call with counsel for the parties the Board ordered West Freedom to provide a memorandum of law on these two issues. Despite repeated warnings by the Board that failure to file the memorandum would be treated as a waiver of the opportunity to raise these claims once the appeal reached the hearing on the merits, West Freedom failed to file the memorandum as ordered. Consequently, by order dated June 20, 1985 the Board held that West Freedom was deemed to have waived its defenses based upon fraud in the inducement and acts of God. After the conclusion of the hearings in this appeal, West Freedom petitioned the Board to reopen the record to take evidence on these two issues. This petition was denied, by order dated September 19, 1985; the Board concluded that West Freedom had failed to demonstrate any facts which would justify reconsideration of the Board's previous decision to prohibit testimony on these issues. In any event, given West Freedom's failure to file a post-hearing brief, it is clear that it has waived its opportunity to present the issues to the Board in this matter. Hence, we have no occasion to determine whether fraud in the inducement or Acts of God may be raised as valid defenses to an admittedly final DER order.

West Freedom's Notice of Appeal and Pre-hearing Memorandum raised one additional legal contention; i.e., that West Freedom had made a good faith effort to comply with the Second Amendment. This claim is properly before the Board for consideration. However, the facts — as set forth in the foregoing findings of fact — do not support this contention.

Even granting West Freedom's apparent claim that it interpreted the terms of the Second Amendment to require that reclamation be completed by June 21, 1984, rather than the May 30, 1984 date upon which DER relies[1], West Freedom made no effort to begin reclamation until May 30, 1984, a mere three weeks prior to the June 21st date. The unrebutted evidence taken at the hearing establishes that a minimum of three months would have been necessary to accomplish the reclamation, given the resources which West Freedom had available to it at the time, and indeed, it in fact required not less than five months for West Freedom to simply accomplish the backfilling and rough grading it had committed itself to doing under the terms of the Second Amendment. Reclamation, under the terms of the agreement, also was to include planting. Accordingly, we cannot conclude that West Freedom made a good faith effort to comply. Therefore, we need not address the issue of whether a good faith effort would be sufficient to overturn the issuance of a DER compliance order. It is clear in this case that West Freedom did not comply with the Second Amendment. Issuance of the compliance order was a proper exercise of DER's discretion under the Surface Mining Act, which we therefore uphold.
Warren Sand and Gravel v. Commonwealth, DER, 20 Pa.Cmwlth 186, 341 A.2d 556 (1975).

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this appeal.
2. DER bears the burden of proof herein pursuant to 25 Pa.Code §21.101(b).
3. Appellant has failed to comply with the terms of the Second Amended Consent Order and Agreement executed by the parties on May 22, 1984.
4. The Second Amendment is an order of the Department of Environmental Resources.

1. 25 Pa.Code §87.148 indicates that the spring planting season terminates on May 30th of any given year.

5. Failure to comply with an order of the Department of Environmental Resources is a violation of, inter alia, 52 P.S. §1396.24.

6. Appellant has failed to comply with an order of the Department of Environmental Resources.

7. DER did not abuse its discretion is issuing the compliance order which is the subject matter of this appeal.

O R D E R

WHEREFORE, in light of the foregoing, it is ordered that this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

Maxine Woelfling
Chairman

Edward Gerjuoy

Edward Gerjuoy
Member

DATED: March 14, 1986
cc: Bureau of Litigation
For Appellant:
Robert O. Lampl, Pittsburgh
James A. Ashton, Pittsburgh
For Commonwealth, DER:
Timothy Bergere

COMMONWEALTH OF PENNSYLVANIA

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MAC-MAR, INC.,
Appellant :

:

Docket No. 85-038-G

:

Issued March 17, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Appellee

OPINION AND ORDER SUR MOTION
FOR SUMMARY JUDGMENT

Synopsis

The Department's Motion for summary judgment is denied, Summary judgment may be rendered where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035. There are material facts remaining in dispute in this appeal; although appellant's counsel had stated in a request for an extension of time directed to the Board, that appellant did not intend to actively contest the fact of its liability under the bond in this proceeding, appellant's response to the Department's motion establishes that appellant does contest its liability. Therefore, summary judgment cannot be rendered.

OPINION

This is an appeal of the forfeiture of a performance bond posted by the appellant, MAC-MAR, Inc., in connection with a surface mining permit issued

under the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. ("SMCRA"). DER forfeited the bond in a letter dated December 31, 1984, citing several violations of the SMCRA and the associated regulations. DER now has moved for summary judgment, arguing that appellant has admitted liability and that therefore, the forfeiture should be upheld. DER points to a letter from appellant's counsel dated June 5, 1985 to the Board, requesting an extension of the filing date for appellant's pre-hearing memorandum, wherein counsel stated that the appellant did not "intend to actively deny liability in this case".

Pennsylvania Rule of Civil Procedure 1035 provides that summary judgment may be rendered where the pleadings, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In relying upon a motion for summary judgment we are required to resolve all doubts in the favor of the non-moving party. Toth v. Philadelphia, 213 Pa. Super 282, 247 A.2d 629 (1968). The standard of Rule 1035 has not been met here; counsel's statement, supra, is insufficient to dispose of all issues concerning appellant's liability under the bond.

Appellant's response to the DER motion for summary judgment specifically raises the issue of whether the reclamation of the site is in accordance with the rules and regulations of DER. In addition, we note that appellant's pre-hearing memorandum raises the issue of the proper amount of the bond to be forfeited, since appellant alleges that not all of the land covered by the bond has been forfeited. If the language of the bond provides that liability shall accrue in proportion to the acreage affected by mining, DER is entitled to forfeit the

portion of the bond that corresponds to the acreage affected multiplied by the amount of liability per acre specified in the bond terms, if there is a violation established. King Coal v. DER, EHB Docket No. 83-112-G (Adjudication dated March 18, 1985 and reconsidered July 25, 1985). Thus, even if appellant were willing to admit liability in the sense that violations exist on the site covered by the bond, the issue of the amount of liability under the bond terms could remain in dispute.

ORDER

WHEREFORE, in light of the foregoing, it is ordered that DER's motion for summary judgment is denied; all material facts remain in dispute in this proceeding.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

DATED: March 17, 1986
cc: Bureau of Litigation
For the Appellant:
Myron H. Tomb, Jr., Esq.
For the Commonwealth, DER
Joseph K. Reinhart, Esq.

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MAXINE WOELFLING, CHAIRMAN
EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

WAREHOUSE 81 LIMITED PARTNERSHIP, INC.	:	
	:	
v.	:	**EHB Docket No. 85-442-W**
	:	**85-462-W**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER

Synopsis:

Appellant has moved the Board to stay the proceedings in two appeals pertaining to remedial actions at the same hazardous waste site--one from effluent limitations in a National Pollution Discharge Elimination System (NPDES) permit, and the other from the denial of a landfill permit--pending the outcome of studies by the United States Environmental Protection Agency (EPA), allegedly being conducted pursuant to the EPA's placement of the hazardous waste site on the National Priorities List (NPL) pursuant to the Comprehensive Environmental Response Compensation and Liability Act. 42 U.S.C.A. §§9601, et seq. (CERCLA) The Board has determined the site in question has not been placed on the NPL, and that even if it were, CERCLA does not pre-empt the state from taking action under state law. Accordingly, appellant's Motion to Stay Proceedings is denied.

OPINION

Warehouse 81 Limited Partnership, appellant, is the owner of a parcel of land at Legislative Route #47024, Valley Township, Montour County (hereinafter "Warehouse 81 site"). The Warehouse 81 site was formerly owned or leased by the M. W. Manufacturing Corporation, which operated a metal wire recovery operation to remove insulation from wire by the use of solvents and other chemical means. These operations produced waste solvents, industrial waste sludges, discarded chemical products, and wire insulating material, known as "fluff," which contains residual copper and other material. The fluff is piled on the Warehouse 81 site. On September 3, 1982, the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), issued an order to appellant directing, inter alia, the removal of the copper fluff wastes from the Warehouse 81 site, and the submission of a hydrogeology report, which was to include a proposal for the recovery and treatment of contaminated ground water on the site.

To comply with DER's September 3, 1982 order, appellant proposed on-site landfilling of the copper fluff wastes, and submitted to DER an application for a permit to construct and operate a residual waste landfill. By letter dated September 20, 1985, DER returned and, therefore, denied appellant's residual waste landfill permit application. Appellant appealed the denial of its residual waste landfill permit application to this Board on October 21, 1985, and this appeal is docketed at 85-442-W.

Also, to comply with DER's September 3, 1982 order, appellant submitted to DER on or about March 14, 1983, a hydrogeologic report. Following discussions between appellant and DER, appellant agreed to implement a groundwater recovery and treatment program, which was to include a discharge

into a tributary of Mauses Creek. Appellant then submitted to DER an application for a National Pollutant Discharge Elimination System (NPDES) permit authorizing a discharge into the tributary of Mauses Creek, and by letter dated September 27, 1985, DER issued NPDES permit No. PA0112674 to appellant. Appellant objects to the effluent limitations in the NPDES permit, and therefore, appealed the issuance of the permit to this Board on October 29, 1985. This appeal is docketed at 85-462-W.

On January 2, 1986, appellant filed a Motion for Stay of Proceedings in both of the above-captioned appeals. In support of its Motion for Stay of Proceedings, appellant asserts that on October 15, 1984, the United States Environmental Protection Agency (hereinafter "EPA") listed the Warehouse 81 site on the National Priorities List (hereinafter "NPL") pursuant to the provisions of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§9601, et seq. In connection with an NPL listing, the EPA would conduct a Remedial Investigation and Feasibility Study, (hereinafter "RI/FS"), which would result in recommendations for a remedial plan for the Warehouse 81 site. Because of the possibility that the EPA's recommendations for the Warehouse 81 site will be inconsistent with the alternatives that DER chose in its September 3, 1982 order or the alternatives that appellant proposed in its Groundwater Contamination Study and landfill permit application, appellant argues that these appeals should be stayed pending the EPA's publication of the results of the RI/FS. But, as DER points out in its Response in Opposition to Appellant's Motion for Stay of Proceedings, the Warehouse 81 site was not placed on the NPL, but was proposed for placement on the NPL on October 15, 1984. 49 Fed.Reg. 40328. The Board has reviewed all of the amendments to the NPL since the proposed inclusion of the Warehouse 81 site and, at this point, the Warehouse 81 site has still not been

placed on the NPL. Therefore, appellant's arguments about the effect, on these appeals, of the placement of the Warehouse 81 site on the NPL are merely speculative.

Even if the Warehouse 81 site was on the NPL, the Board questions whether recommendations of the EPA based upon studies conducted pursuant to the NPL listing would impact on this Board's review of the propriety of DER's denial of a landfill application under the Pennsylvania Solid Waste Management Act, 35 P.S. §§6018.101-6018.1003, and DER's imposition of certain effluent limitations in an NPDES permit pursuant to the Clean Streams Law, 35 P.S. §§691.1-691.1001. DER has independent authority under state law to take remedial actions at hazardous waste sites, and CERCLA expressly does not preempt DER's authority to take action under state laws. 42 U.S.C.A. §9614(a). Moreover, this Board sees no reason to stay the proceedings in these appeals pending EPA's recommendations for the Warehouse 81 site, when the EPA, at this point, has not even placed the site on the NPL.

ORDER

AND NOW, this 17th day of March, 1986, Warehouse 81 Limited Partnership's Motion for Stay of Proceedings of the above-captioned appeals is hereby denied. The parties are ordered to file pre-hearing memoranda in the above-captioned appeals pursuant to the schedule set forth in the order issued by the Board on February 6, 1986.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

cc: Bureau of Litigation
Harrisburg, PA

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DATED: March 17, 1986

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MAXINE WOELFLING, CHAIRMAN
EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

THOMAS FITZSIMMONS :
:
v. : EHB Docket No. 85-073-W
:
COMMONWEALTH OF PENNSYLVANIA : Issued: March 17, 1986
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER
SUR DEPARTMENT'S
MOTION FOR SUMMARY JUDGMENT

Synopsis

The Department of Environmental Resources ("Department") is granted partial summary judgment in the appeal of a civil penalties assessment. Appellant's responses to the Department's interrogatories and requests for admissions establish that he mined coal without a license in violation of §3.1(a) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended ("SMCRA"); that he mined coal without a permit in violation of §4(a) of SMCRA and §315(a) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315(a) ("CSL"); and that he mined coal without installing erosion and sediment controls in violation of SMCRA and the CSL and the rules and regulations adopted thereunder at 25 Pa.Code §§87.106, 102.4 and 102.5. The Department is denied summary judgment as to the amount of the civil penalties assessment because the CSL and SMCRA require a consideration of factors such as seriousness, damage, and cost of restoration, and the Board could not, based on the responses of the appellant, rule that the Department was entitled to summary judgment on the amount of the penalty.

OPINION

This matter arises from the appeal of a civil penalties assessment issued to appellant Thomas Fitzsimmons ("Fitzsimmons") by the Department of Environmental Resources ("Department") pursuant to §18.4 of SMCRA, 52 P.S. §1396.22 and §605(b) of the CSL, 35 P.A. §691.605(B). The assessment stemmed from a cease and desist order issued to Fitzsimmons by the Department on January 31, 1984. The total penalty assessment was $10,500, with $5000 assessed for mining without a license, $3500 assessed for mining without a permit, and $2000 assessed for mining without erosion and sediment controls. The Department issued the assessment on February 8, 1985, and it was received by Fitzsimmons on February 13, 1985. A timely notice of appeal was filed with the Board on March 11, 1985. After prehearing memoranda were filed and discovery conducted, the Department filed a motion for summary judgment.

The Board has the authority to grant summary judgment when "the pleadings, depositions, answers to interrogatories 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." Summerhill Borough v. DER, 34 Pa.Cmwlth 574, 383 A.2d 1320, 1322 (1978). A decision to render summary judgment must be made by the entire Board. Mathies Coal Company v. DER, 1984 EHB 524, 527.

In its responses to the Department's interrogatories and requests for admissions, Fitzsimmons has stated that clay was removed from an old mine site owned by him for analysis to determine whether mining the clay was commercially feasible. In the process of removing the clay for testing, a coal seam was exposed and coal was removed by Fitzsimmons' employees between December 23, 1983, and January 4, 1984. A pit 90 feet long by 60 feet wide by five to 25 feet deep was created and less than two acres was disturbed.

Although Fitzsimmons is not sure of the exact tonnage of coal removed, he states that 40 tons was delivered to REM Coal Company, Inc. and 50 tons was used for house coal. Some reclamation was performed after the coal and clay were removed. Fitzsimmons admits that he had neither a license authorizing him to mine coal nor a permit authorizing him to remove coal from this site during the time coal was removed from this site. He also admits that he had no erosion and sediment control plan for the site.

Fitzsimmons contends that the Department is not entitled to summary judgment as a matter of law because he was exempt from licensing and permitting requirements because of exemptions contained in state and federal mining statutes. He claims that federal law exempts him from these requirements where less than two acres of land is affected by coal mining activities or less than 250 tons of coal is extracted annually. Fitzsimmons also claims that he is exempt from licensing and permitting requirements because the total amount of coal removed was less than 16 2/3% of the amount of clay intended to be removed.

In ruling on whether the Department is entitled to summary judgment the Board must examine whether Fitzsimmons committed the alleged violations of SMCRA and the CSL and, if so, whether the penalty assessed by the Department was an abuse of discretion. Our inquiry must begin with an examination of the applicable law at the time of Fitzsimmons' alleged violations.

Section 3.1(a) of SMCRA, 52 P.S. §1396.3(a), prohibits anyone from conducting surface coal mining unless that person has obtained an operator's license from the Department. Section 4(a) of SMCRA, 52 P.S. §1396.4(a) and §315(a) of the CSL, 35 P.S. §691.315(a), prohibit any person from conducting surface mining on a site unless that person has first obtained a permit

authorizing the surface mining on the site. Anyone conducting surface mining must also comply with the rules and regulations governing surface mining which are adopted pursuant to SMCRA and the CSL. These include performance standards set forth at, inter alia, 25 Pa.Code §§87.106, 102.4 and 102.5 (relating to erosion and sediment control).

The appellant believes he is not subject to these regulatory requirements despite clear language to the contrary because of certain provisions in the federal Surface Mining Control and Reclamation Act, 30 U.S.C. §1201 et seq. ("federal SMCRA") and the rules and regulations adopted thereunder at 30 CFR Pts 700-950 (Chapter VII). The various exemptions in the federal statute are summarized at 30 CFR §700.11, which, in salient part, provides that

> (a) Except as provided in paragraph(b) of this section, this chapter[1] applies to all coal exploration and surface coal mining and reclamation operations, except:
>
> * * * * *
>
> (2) The extraction of 250 tons of coal or less by a person conducting a surface coal mining and reclamation operation. A person who intends to remove more than 250 tons is not exempted;
>
> * * * * *
>
> (4) The extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 percent of the mineral tonnage removed for commercial use or sale;
>
> * * * * *
>
> (b) This chapter does not apply to the extraction of coal for commercial purposes where the surface coal mining and reclamation operation, together with any related operations, has or will have an affected area of two acres or less.
>
> * * * * *

These are the exemptions variously cited by Fitzsimmons as insulating him

---

1 Chapter VII.

from liability in this matter.

The Board has recently examined a similar contention by an operator that he was exempt from state permitting requirements for underground coal mines because of the two acre exemption. We held in Ralph Bloom, Jr. v. DER, EHB Docket No. 84-145-G (issued February 20, 1985) that the Commonwealth was free under federal law to impose more stringent permitting requirements for mining activities than provided for in federal SMCRA and that state law made no provision for special exemptions from permitting requirements for small operators. See also Black Fox Mining and Development Corp. v. DER, 1984 EHB 799. The same legal analysis applies to the exemptions claimed by Fitzsimmons. We do note the existence of an exemption under state permitting requirements analogous to that in 30 CFR §700.11(2)(4), which is commonly referred to as the "incidental extraction" exemption. But, this exemption, which is codified at 25 Pa.Code §86.5, does not apply to the violations allegedly committed by Fitzsimmons because, as the Department correctly notes, that regulation did not become effective until August 4, 1984 (14 Pa.B. 2860), seven months after the mining activity occurred.

Since Fitzsimmons has admitted that he extracted coal between December 23, 1983, and January 4, 1984, that he had neither a permit nor a license authorizing the coal extraction, and that he had no erosion and sediment controls, there are no disputes as to the material facts regarding the activities for which penalties were assessed. Furthermore, the Department's right to summary judgment on the issue of liability is clear because there is no doubt that the applicable law required Fitzsimmons to secure a license and permit before extracting coal by surface mining and to

implement erosion and sediment control measures.[2] Therefore, the Department will be granted summary judgment on the issue of liability for the violations for which penalties were assessed.

Regarding the amount of penalty assessed, the Department contends that it is entitled to summary judgment because of the application of various statutes and regulations to the violations committed by Fitzsimmons and because Fitzsimmons "never contested. . .the appropriateness of the amount of the civil penalty assessment." This proceeding is certainly evidence that Fitzsimmons is contesting the appropriateness of the penalty. Sections 18.4 of SMCRA and 605(b) of the CSL both require a consideration of the wilfulness of a violation, damage, cost of restoration, and other relevant factors. The same considerations are set forth in 25 Pa.Code §86.19. Both statutes impose a mandatory civil penalty of $750 per day where there has been a failure to correct a violation in accordance with a Department order. Mandatory penalty assessments are also set forth in various regulations. But, we are not dealing with such mandatory assessments in this case.

Rather, we are reviewing assessments which required an assessment of those various factors, either under §18.4 of SMCRA, §605 of the CSL, or 25 Pa.Code §86.194. We cannot determine, based on Fitzsimmons' responses to the Department's interrogatories and requests for admissions whether the Department committed an abuse of discretion in arriving at the $10,500 assessment or whether there is any dispute concerning the material facts in evaluating the considerations for determining the assessment amount.

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2 The Department has not alleged that Fitzsimmons' failure to timely challenge the underlying compliance order precludes him from challenging the violations, so we do not address this issue.

Consequently, we cannot rule as a matter of law that the Department is entitled to summary judgment on the amount of the penalty. See DER v. K International, Inc. and Frank P. Kowalski, Sr., EHB Docket No. 84-159-CP-G (issued August 7, 1985).

ORDER

WHEREFORE, this 17th day of March, 1986, it is ordered that the Department is granted summary judgment on the following issues:

1) Fitszimmons' mining coal without a license in violation of §3.1(a) of SMCRA;

2) Fitzsimmons' mining coal without a permit in violation of §315(a) of SMCRA and §315(a) of the CSL; and

3) Fitzsimmons' mining coal without erosion and sediment controls in violation of 25 Pa.Code §§87.106, 102.4 and 102.5.

Summary judgment as to the appropriateness of the amount of the penalty assessment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: March 17, 1986

cc: Bureau of Litigation
Harrisburg, PA

For the Commonwealth, DER:
Joseph K. Reinhart, Esq.
Western Region

For Appellant:
Robert M. Hanak, Esq.
Reynoldsville, PA

bl

OLIVIA M. BELL, et al	:	
	:	
v.	:	**Docket No. 84-128-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 21, 1986

OPINION AND ORDER

Synopsis

This is an appeal by a water quality management permittee from an order of the Department of Environmental Resources directing remedial actions to be taken at a landfill to abate violations of the Clean Streams Law, 35 P.S. §§691.1-691.1001, the Solid Waste Management Act, 35 P.S. §§6018.101-6018.1003, and the terms and conditions of permits issued thereunder. Appellant contests only her liability under the order,alleging that she is not the permittee under the water quality management permit. DER has filed a Motion for Summary Judgment.

DER's Motion for Summary Judgment is granted as to appellant's liability as a permittee under the water quality management permit. Since this is the only issue in this appeal, the appeal is dismissed.

The water quality management permit was issued to a business entity with a fictitious name. The fictitious name was registered with the Commonwealth of Pennsylvania under the Fictitious Names Act, 54 Pa. C.S.A. §§101,

et seq., and appellant is a registered owner. Therefore, appellant is a permittee under the water quality management permit, and, as a permittee, is liable, as a matter of law, for the terms of the permit.

OPINION

On March 9, 1984, the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) issued an order to the Estate of Herbert M. Bell, Jr., Olivia Bell, Administratrix, and to Olivia M. Bell, individually. The order directed that remedial actions be taken to abate violations of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S. §§6018.101-6018.1003, and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.1-691.1001, at two landfills situated on property in Terry Township, Bradford County, Pennsylvania.

On April 11, 1984, Olivia M. Bell filed an appeal in her individual capacity, which was docketed at EHB Docket No. 84-128-M. Also, on April 11, 1984 the Estate of Herbert M. Bell, Jr., Olivia M. Bell, Administratrix, filed an appeal, which was docketed at EHB Docket No. 84-129-M. On May 23, 1984, David and Dianne Masters, Donald Gilbert, and Ruth Messersmith, individuals who own and reside on property bordering the landfills that are the subject of these appeals, filed a Petition to Intervene, which this Board granted by order dated June 22, 1984. The Board, by order dated July 19, 1984, consolidated the above-cited separate appeals at EHB Docket No. 84-128-M.

On May 23, 1985, DER filed a Motion for Summary Judgment, with an accompanying Memorandum of Law, in which motion the Intervenors joined. On June 13, 1985, the Appellants filed their Answer and New Matter to the Motion for Summary Judgment.

Then, on June 17, 1985, the Estate of Herbert M. Bell, Jr., Olivia M.

Bell, Administratrix, filed a Praecipe for Discontinuance, withdrawing its appeal. Because of the withdrawal, the liability of the Estate of Herbert M. Bell, Jr., Olivia M. Bell, Administratrix, is no longer before the Board. Thus, the only matter now before the Board in this appeal is the liability of Olivia M. Bell, in her individual capacity, under the order of DER dated March 9, 1984.

The circumstances that gave rise to DER's March 9, 1984 order that is the subject of this appeal are as follows. Herbert M. Bell, Jr. (hereinafter "Mr. Bell") owned property in Terry Township, Bradford County (hereinafter "Bell property"), on which there are two landfills. Mr. Bell died on or about October 16, 1980, and the Bell property is part of Mr. Bell's estate. Olivia M. Bell (hereinafter "Mrs. Bell") is the administratrix of Mr. Bell's estate. No distribution of the estate has taken place.

Approximately two acres of the eastern portion of the Bell property have been used as a solid waste disposal facility or landfill (hereinafter "east end landfill"). The east end landfill never had a permit from DER, but active operation of the east end landfill ceased prior to Mr. Bell's death in 1980.

Approximately five acres of the western portion of the Bell property have been used as a solid waste disposal facility (hereinafter "west end landfill"). The west end landfill was permitted under Solid Waste Permit No. 101018, which DER issued to Herbert Bell d.b.a. Bell's Sanitary Landfill on September 5, 1975. A leachate collection tank was installed at the west end landfill pursuant to Water Quality Management Permit No. 0877202, which DER issued on January 23, 1978 to O. M. Bell Trucking and Landfill c/o Herbert and Olivia Bell.

The only portion of DER's March 9, 1984 order that was directed to Mrs.

Bell in her individual capacity is the following:

> It is further ORDERED that Olivia M. Bell, individually, shall:
> 5. Upon receipt of this Order, cease and desist all discharge of industrial waste (landfill leachate) from the west end landfill to the surface of the ground or to the waters of the Commonwealth. Upon receipt of this Order and continuing thereafter, all landfill leachate generated from the west end landfill shall be collected and disposed of in accordance with the provisions of The Clean Streams Law and Water Quality Management Permit No. 0877202.

Thus, DER did not order Mrs. Bell, in her individual capacity, to take any action in regard to the east end landfill, but only ordered her to take action at the west end landfill in accordance with Water Quality Management Permit No. 0877202. Since the only issue now before the Board is the liability of Olivia Bell, in her individual capacity, under DER's March 9, 1984 order, the only portion of that order which the Board will review, is the above-quoted portion, which is the only portion directed to Mrs. Bell in her individual capacity.

In its Motion for Summary Judgment, DER argues, in essence, that Mrs. Bell was an applicant for the water quality management permit, and is a named permittee under the water quality management permit, and thus, as a matter of law, she is liable for any violations of the water quality management permit. DER also maintains that a number of admissions made by Mrs. Bell, as well as certain documents DER appended to its Motion for Summary Judgment, make it clear that Mrs. Bell was either the sole proprietor or a partner in the business encompassing the solid waste disposal operation conducted on the Bell property. Mrs. Bell, however, argues that the water quality management permit was issued to O. M. Bell Trucking and Landfill, and that she is not a permittee under the water quality management permit. Mrs. Bell also argues that there is considerable evidence that counters DER's evidence that she was

either a partner or the sole proprietor of the solid waste disposal operation on the Bell property.

DER has put forth two theories under which to hold Mrs. Bell liable. The first is that she is liable as a permittee under the water management quality permit. This theory is based on both the presence of Mrs. Bell's name on the permit, and also on Mrs. Bell's ownership of O. M. Bell Trucking and Landfill, the entity to which DER issued the permit. Under this theory of liability, Mrs. Bell could only be held accountable for the terms of the water quality management permit issued for the west end landfill, and not for any of the other alleged violations on the Bell property. The other theory that DER has propounded is that Mrs. Bell is liable as an owner or operator of the entire solid waste disposal business that has been conducted on the Bell property. This theory is based upon DER's belief that a number of admissions made by Mrs. Bell, as well as certain documents DER appended to its Motion for Summary Judgment, prove that as a matter of law, Mrs. Bell was an owner or operator of the entire solid waste disposal business conducted on the Bell property. The Board agrees with Mrs. Bell that there is a genuine factual dispute as to DER's theory that Mrs. Bell was either an owner or operator of the entire solid waste disposal business on the Bell property, and will not grant summary judgment on this question. Moreover, the portion of the March 9, 1984 order that was directed to Mrs. Bell in her individual capacity was not based on Mrs. Bell's status as an owner or operator of the entire solid waste disposal business, but rather, was based on her status as a permittee under the water quality management permit. Thus, even if DER could prove that Mrs. Bell was an owner or operator of the entire solid waste disposal business, this would not be relevant because the only issue now before the Board is simply the question of whether, as a matter of law, Mrs. Bell is a

permittee under water quality management permit No. 0877202.

On the application for the water quality management permit, which was dated September 14, 1977, in the box designated "Applicant Name," was the following:

Herbert & Oliva Bell
DBA
O.M. BELL TRUCKING and LANDFILL

The application was signed by Herbert M. Bell. Based on this application, DER then issued a permit on January 23, 1978, and on the permit, in the box designated "Permittee" was the following:

O. M. Bell Trucking & Landfill
c/o Herbert & Olivia Bell
R. D. #2
Towanda, PA 18848

Mrs. Bell maintains that she did not apply for the water quality management permit, and notes that her signature is not on the application. Her name, however, is on both the application and the permit. The permit was issued in care of both Mr. Bell and Mrs. Bell, and sent to the address at which Mrs. Bell resides. Nevertheless, Mrs. Bell argues that, although the permit was issued c/o Herbert and Olivia Bell, the named permittee is O. M. Bell Trucking & Landfill.

O. M. Bell Trucking & Landfill is a fictitious name of a business, registered with the Commonwealth of Pennsylvania, under the Fictitious Names Act, 54 Pa. C.S.A. §§101 et seq. According to the application filed in the Department of State, pursuant to which O. M. Bell Trucking and Landfill was registered as a fictitious name, the owners of the business are both Herbert and Olivia Bell, and the nature of the business is, "the collection of refuse, trucking of commodities, depository and deposing of refuse and other waste." Both Mr. and Mrs. Bell signed this application. Mrs. Bell, however,

argues that O. M. Bell Trucking & Landfill comprises two distinct businesses, a trucking business and a landfill business. Mrs. Bell maintains that she only owns the trucking business, and that Mr. Bell owned the landfill business. Although O. M. Bell Trucking & Landfill may have conducted various activities, the clear import of the registration with the Department of State is that it is one business, owned by Mr. and Mrs. Bell.

The purpose of the Fictitious Names Act is to protect those who deal with persons carrying on a business under an assumed name, and to enable them to know with whom they do business. Rowland v. Canuso, 329 Pa. 72, 196 A. 823 (1938); see also, U. S. v. American Standard Remodeling Corp., 252 F. Supp. 690 (E.D. Pa. 1966). Mrs. Bell registered herself with the Commonwealth as an owner of O. M. Bell Trucking & Landfill, and now, when the Commonwealth looks to her for liability under a permit issued to that business, she cannot require the Commonwealth to hold a factual hearing to determine whether she owned the part of the business for which the permit was issued. If Mrs. Bell did not want to be responsible for the landfill activities conducted under the name O. M. Bell Trucking & Landfill, she should not have registered herself as an owner of that business, but instead should have registered her trucking company as a separate business.[1]

The named permittee under water quality management permit No. 0877202 is O. M. Bell Trucking and Landfill, a fictitious name of a business, of

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[1] Also, if Mrs. Bell believed that the permit was mistakenly issued in her name, she should have appealed the issuance of the permit. She had actual notice of the issuance of the permit (a copy was sent c/o Olivia Bell to her residence), or constructive notice (the issuance of the permit was published in the Pennsylvania Bulletin on February 11, 1979, 1979 Pa. Bull 387.) Since Mrs. Bell did not appeal from or obtain a revision to the permit, she is bound by its terms and is precluded from attacking its content or validity in this proceeding. See DER v. Wheeling-Pittsburgh Steel Corp., 473 Pa. 432, 442-43, 375 A.2d 320 (1977); DER v. Williams, 57 Pa. Cmwlth. 8, 11-12, 425 A.2d 871 (1981).

which Mrs. Bell is a registered owner under the Fictitious Names Act. Thus, Mrs. Bell is a permittee under water quality management permit 0877202. As a permittee, Mrs. Bell is liable, as a matter of law, for the terms of the permit. See e.g. Lackawanna Refuse Removal, Inc. v. DER, 1981 EHB 195, 218. This is true regardless of whether Mrs. Bell participated in the daily operation of the landfill. See Middletown Township Municipal Authority v. DER, 1972 EHB 8, 11-13, aff'd, 7 Pa. Cmwlth. 545, 547, 300 A.2d 515 (1973).

This Board has the authority to grant summary judgment when "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." Summerhill Borough v. DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320, 1322 (1978). In her Notice of Appeal and Pre-Hearing Memorandum, the only issue Mrs. Bell raised regarding the portion of the March 9, 1984 order that was directed to her in her individual capacity was her liability. Nowhere has she contested the factual findings of the March 9, 1984 order. Since Mrs. Bell is liable, as a matter of law, under the water quality management permit, and since this is the only issue contested in this appeal, the Board grants DER's Motion for Summary Judgment as to Mrs. Bell's liability under Paragraph 5 of the order dated March 9, 1984. As previously noted, the Board does not grant summary judgment as to DER's theory that Mrs. Bell was an owner or operator of the entire solid waste disposal business on the Bell property, because the order that is the subject of this appeal was only directed to Mrs. Bell, in her individual capacity, as a permittee under the water quality management permit. There being no other issues left in this appeal, the appeal is dismissed.

ORDER

AND NOW, this 21st day of March, 1986, DER is granted Summary Judgment on the issue of Olivia M. Bell's liability under Paragraph 5 of the order dated March 9, 1984, and the appeal of Olivia M. Bell is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

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Central Region

DATED: March 21, 1986

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MAXINE WOELFLING, CHAIRMAN
EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

AL HAMILTON CONTRACTING COMPANY :
:
v. : EHB Docket No. 85-392-W
: Issued: March 24, 1986
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis:

In this appeal from a denial by the Department of Environmental Resources ("DER") of an application for a surface mining permit, DER filed a Motion for More Specific Pre-Hearing Memorandum. DER's motion is denied because appellant's pre-hearing memorandum adequately sets forth its factual and legal bases for this appeal, and DER may obtain further information through discovery.

OPINION

On September 24, 1985, Al Hamilton Contracting Company appealed to this Board a denial by the Department of Environmental Resources (hereinafter "DER") of an application for a surface mining permit. The Board received Al Hamilton's pre-hearing memorandum on February 3, 1986, and on February 18, 1986, DER filed a Motion for More Specific Pre-hearing Memorandum. Al Hamilton filed an Answer to Motion for More Specific Pre-Hearing Memorandum on March 10, 1986.

In its Motion for More Specific Pre-hearing Memorandum, DER argues

that Al Hamilton's pre-hearing memorandum does not comply with the Board's Pre-Hearing Order No. 1 because it is nothing more than a list of generic facts and conclusions of law that could apply to any permit denial case, and, as such, the memorandum is useless as an aid to refining the issues, limiting the factual disputes, or otherwise explaining the true basis for Al Hamilton's appeal. Al Hamilton, on the other hand, argues that its pre-hearing memorandum fully complies with Pre-Hearing Order No. 1, and that the facts and conclusions of law set forth in the memorandum would sustain Hamilton's burden of proof on all issues raised in the Notice of Appeal and lead to the requested relief.

A pre-hearing memorandum is not a pleading, but rather, is a convenience to the Board and other parties. See United Mine Workers of America v. DER, 1983 EHB 365. The purpose of a pre-hearing memorandum is to facilitate the preparation for a hearing before the Board by requiring the parties to set forth the following in pre-hearing memoranda:

> A. Statement of facts each party intends to prove.
> B. Contentions of law and detailed citations to authorities, including specific sections of statutes, regulations, etc., relied upon.
> C. Description of any scientific tests relied upon by any party and summary of testimony of experts.
> D. Order of witnesses.
> E. List documents sought to be introduced into evidence, copies of which shall be attached.
> F. Indicate dates on which you are not available for hearing.

Al Hamilton's pre-hearing memorandum sets forth all of the information required by Pre-Hearing Order No. 1. Although its statements of facts and contentions of law are somewhat broad, the pre-hearing memorandum need not be an all inclusive narrative of events underlying the appeal. Greater specificity may be obtained through the normal discovery procedure. See DER v. Hager, EHB Docket No. 84-366-G (Opinion and Order, March 26, 1985, at p.5); United Mine Workers

of America v. DER, 1983 EHB 365.

Al Hamilton has appealed from a letter from DER that denied an application for a surface mining permit, and that set forth the reasons for denial in three sentences. In the pre-hearing memorandum, Al Hamilton contests each of the reasons given for the permit denial, and argues essentially that its permit application demonstrated compliance with all requirements for obtaining a surface mining permit. DER has the permit application, and presumably knows why it denied it. Al Hamilton's pre-hearing memorandum adequately sets forth its factual and legal bases for this appeal, and, as previously noted, DER may obtain further information through discovery.

ORDER

AND NOW, this 24th day of March, 1986, DER's Motion for More Specific Pre-hearing Memorandum at EHB Docket No. 85-392-W is hereby denied, and DER is ordered to file its Pre-hearing Memorandum by April 8, 1986.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: March 24, 1986

cc: **Bureau of Litigation**
Harrisburg, PA

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MAXINE WOELFLING, CHAIRMAN
EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

NSM COALS, INC.	:	
	:	
v.	:	**EHB Docket No. 86-133-W**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 25, 1986

OPINION AND ORDER

Synopsis:

Appellant's request that the Board supersede the Department of Environmental Resources' ("DER") withholding of a mining permit for alleged violations of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("SMCRA"), or, in the alternative, compel DER to issue such permit, is denied. Granting the relief requested would result in the alteration of the last lawful status quo.

OPINION

This matter was initiated by the filing of a Notice of Appeal by NSM Coals, Inc. on March 6, 1986. Appellant sought review of DER's withholding of a surface mining permit from NSM because of alleged violations of SMCRA and the rules and regulations adopted thereunder by a related party, PBS Coals, Inc., at another mine site. A Petition for Supersedeas accompanying the Notice of Appeal requested that the Board issue an order "superseding the decision of DER to refuse to issue the aforesaid permit to NSM or in the

alternative directing DER to issue said permit to NSM." The Petition for Supersedeas was denied in a telephone conference call with the parties on March 7, 1986. This Opinion and Order is written confirmation of that denial.

The Board recently considered a similar request for relief in Raymark Industries, Inc. v. DER, EHB Docket No. 86-075-W (Opinion and Order, February 26, 1986), wherein the appellant challenged DER's refusal to issue an operating permit for an air contaminant source because all sources operated by the appellant were not in compliance with the Air Pollution Control Act, the Act of January 8, 1960, P.L.(1959) 2119, as amended, 35 P.S. §4001 et seq., and the rules and regulations adopted thereunder. In its supersedeas petition Raymark requested the Board to, inter alia, compel the operation of the air contaminant source for which approval was being withheld. The Board refused to grant the relief noting that it would result in alteration of the lawful status quo. The reasoning in the Raymark opinion is equally applicable to this matter.

In a subsequent conference call on March 11, 1986, NSM Coals urged the Board to reconsider its denial of supersedeas based on the reasoning enunciated in Parker Sand and Gravel v. DER, 1983 EHB 557. The surface mining permit being withheld in the instant matter is likened by NSM Coals to the surface mining license renewal refused in Parker because of the structure of the mining permit program. Because the "master permit" for this site has already been issued, NSM believes its situation similar to the Parker license renewal. Parker, however, is distinguishable because DER did not refuse to renew Parker's license until months after the statutory expiration date and regarded Parker as operating under an automatic extension. No such circumstances are present in this case.

ORDER

AND NOW, this 25th day of March, 1986, the Board's oral order of March 7, 1986, denying NSM Coals' Petition for Supersedeas is confirmed for the foregoing reasons.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: March 25, 1986

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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For Appellant:
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NESHAMINY WATER RESOURCES AUTHORITY	:	
	:	
V.	:	
	:	**Docket No. 85-013-M**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and COMMONWEALTH OF PENNSYLVANIA,	:	
ENVIRONMENTAL QUALITY BOARD	:	

OPINION AND ORDER

Synopsis

This is an appeal of the adoption by the Environmental Quality Board (EQB) of amendments to regulations at 25 Pa. Code, Chapters 93 and 95. Appellant also has an appeal pending in the Pennsylvania Supreme Court from a refusal by the Commonwealth Court to exercise its original jurisdiction, pursuant to 42 Pa. C.S. §761(a), to review the EQB's adoption of these amendments.

The Department of Environmental Resources (DER) filed a Motion to Quash this appeal on the basis that this Board has no jurisdiction to conduct a pre-enforcement review of the EQB's adoption of regulations. Appellant's request to defer a ruling on DER's Motion to Quash, pending the outcome of its appeal in the Supreme Court, is denied because the issue of this Board's jurisdiction in this matter is not before the Supreme Court. DER's Motion to Quash is granted because neither the Administrative Code, 71 P.S. §510-21, nor the Clean Streams Law, 35 P.S. §§691.1 and 691.7, authorizes this Board to conduct a pre-enforcement review of the EQB's adoption of amendments to 25 Pa. Code, Chapters 93 and 95.

OPINION

On January 17, 1985, Neshaminy Water Resources Authority appealed to this Board the adoption by the Environmental Quality Board (EQB) of amendments to 25 Pa. Code, Chapters 93 and 95. The Department of Environmental Resources (DER) filed, on May 9, 1985, a Motion to Quash this appeal on the basis that this Board has no jurisdiction to review the EQB's adoption of amendments to the regulations at 25 Pa. Code, Chapters 93 and 95.

Meanwhile, Neshaminy filed a Petition for Review in the Nature of an Appeal and in the Nature of a Request for Injunctive and Declaratory Relief in the Commonwealth Court (No. 222 C.D. 1985), appealing the adoption of the same amendments that Neshaminy is appealing in this matter. This Board then issued an order on June 5, 1985 that continued generally and stayed the proceedings in this matter pending a decision by the Commonwealth Court in Neshaminy's appeal No. 222 C.D. 1985.

On September 26, 1985, the Commonwealth Court dismissed Neshaminy's appeal No. 222 C.D. 1985. Neshaminy Water Resources Authority v. Com., Dept. of Environmental Resources, and Com., Environmental Quality Board, _____ Pa. Cmwlth. _____, 498 A.2d 1000 (1985). Neshaminy has appealed the Commonwealth Court decision to the Pennsylvania Supreme Court, and has asked this Board to defer ruling on DER's Motion to Quash this appeal pending a ruling from the Supreme Court. Nevertheless, the Board believes that the issue of the Board's jurisdiction in this matter is not before the Supreme Court, and thus sees no reason to defer a ruling in this case pending a ruling by the Supreme

Court in Neshaminy's appeal there.[1]

When the EQB promulgated the amendments to the water quality regulations at 25 Pa. Code, Chapters 93 and 95, Neshaminy sought review of the EQB's action both before this Board and in the Commonwealth Court. Neshaminy's Petition for Review in the Commonwealth Court was addressed to that Court's original jurisdiction pursuant to 42 Pa. C.S. §761(a), and sought a declaratory judgment invalidating the amendments, and injunctive relief preventing DER from implementing the amended regulations. See Neshaminy, 498 A.2d at 1000-1001. The only issue decided by the Commonwealth Court was whether it should exercise its original jurisdiction pursuant to 42 Pa. C.S. §761(a).

It is clear from the Supreme Court's decision in Arsenal Coal Company v. Com., Dept. of Environmental Resources, 505 Pa. 198, 477 A.2d 1333 (1984), that this Board does not have the jurisdiction to conduct a pre-enforcement review of the Environmental Quality Board's promulgation of regulations. This Board's jurisdiction is set forth in Section 1921-A of the Administrative Code, 71 P.S. §510-21, and in Arsenal Coal, after quoting 71 P.S. §510-21(a) and (c), the Pennsylvania Supreme Court held as follows:

> Pre-enforcement review, however, is clearly not within the authority of the Environmental Hearing Board and any suggestion to the contrary can only be founded upon a strained and unrealistic construction of the language of the Code. There appears no reference to

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[1] This matter was originally assigned to former Board Member Anthony J. Mazullo, Jr., who resigned from the Board on January 31, 1986. The case was reassigned to Board Member Gerjuoy. Board Chairman Woelfling has not participated in the review of this matter or the process by which this opinion is being issued because of a conflict created by her former position with the Department of Environmental Resources as Director of the Bureau of Regulatory Counsel. By letter dated March 7, 1986, Board Member Gerjuoy gave the parties until March 27, 1986 to file any objections to a final disposition of this matter by Board Member Gerjuoy acting alone, and the Board received no objections.

> power in the hearing board to rule on the validity of regulations promulgated and adopted by the Environmental Quality Board in advance of the enforcement and application of the regulations to the litigants; it is only within the context of an appeal from Department of Environmental resources action upon the application of the allegedly illegal regulation, contemplated by Section 703(a) of the Administrative Agency Law, supra, 2 Pa. C.S.A. §703(a), that the Board enjoys an ancillary power to rule on the validity of regulations, U.S. Steel Corp. v. Comm., Dept. of Environmental Resources, 65 Pa. Commonwealth Ct. 103, 442 A.2d 7 (1982); St. Joe Minerals Corp. v. Goddard, 14 Pa. Commonwealth Ct. 624, 324 A.2d 800 (1974).

Arsenal Coal, 477 A.2d at 1339.

In Neshaminy, the Commonwealth Court did not reconsider whether this Board has jurisdiction to conduct a pre-enforcement review of the water quality amendments, but followed the holding of Arsenal Coal.[2] This Board too must follow the holding of Arsenal Coal, which precludes this Board from reviewing the EQB's promulgation of the amendments to 25 Pa. Code, Chapters 93 and 95, prior to their enforcement.

Neshaminy also argues that this case is distinguishable from Arsenal Coal because this case involves the Clean Streams Law, 35 P.S. §§691.1 - 691.1001, and the Clean Streams Law has a provision that grants this Board jurisdiction over appeals from EQB promulgations of regulations under the Clean Streams Law, namely 35 P.S. §691.7. This section provides as follows:

> §691.7. Administrative procedure and judicial review
>
> (a) Any person or municipality having an interest which is or may be adversely affected by any action of the department under this act shall have the right to appeal such action to the Environmental Hearing Board.

---

[2] The Commonwealth Court said in a footnote in Neshaminy, "As stated by the Arsenal Coal Court, the Environmental Hearing Board has the authority to hold hearings and issue adjudications on appeal from any order, permit, license or decision of DER. This does not include the authority to conduct pre-enforcement review of promulgated regulations." Neshaminy, 498 A.2d at 1001-1002, footnote 4.

(b) The department may adopt rules and regulations establishing the procedure for, and limiting the time of, the taking of such appeals.

(c) The Environmental Hearing Board shall be subject to the provisions of Title 2 of the Pennsylvania Consolidated Statutes (relating to administrative law and procedure).

Neshaminy argues that since §691.7 gives this Board jurisdiction over appeals from actions of the "department," and since "department" is defined in the Clean Streams Law to include the EQB, then §691.7 gives this Board the authority to review actions of the EQB. "Department" is defined in the Clean Streams Law as follows:

§691.1. Definitions

The following words or phrases, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section.

"Department" means the Department of Environmental Resources, the Environmental Quality Board or the Environmental Hearing Board carrying out the provisions of the act of April 9, 1929 (P.L. 177, No. 175), known as "The Administrative Code of 1929."

The Commonwealth Court, however, has already decided the issue of this Board's authority to conduct a pre-enforcement review of regulations promulgated under the Clean Streams Law. United States Steel Corp. v. Com., Dept. of Environmental Resources, 65 Pa. Cmwlth. 103, 442 A.2d 7 (1982). In this case, United States Steel appealed to this Board the adoption by the EQB of amendments to 25 Pa. Code, Chapters 93, 95, and 97. This Board granted a motion to quash by DER, and in affirming the Board, the Commonwealth Court discussed the functions and interrelationships of the EQB, DER, and this Board in administering the environmental laws of Pennsylvania:

While as a matter of departmental organization the EHB and the EQB are administrative boards within DER, Section 503 of the Code, 71 P.S. §183 provides:

> [D]epartmental administrative bodies, boards, and commissions, within the several administrative departments, shall exercise their powers and perform their duties independently of the heads or any other officers of the respective administrative departments with which they are connected, but, in all matters involving the expenditure of money, all such departmental administrative boards and commissions shall be subject and responsible to the departments with which they are respectively connected. (Emphasis added.)
>
> This provision demonstrates, in our opinion, the General Assembly's intent that when the EQB acts pursuant to its powers and duties, it acts as an independent body separate from DER. When the EQB adopted the regulations challenged by Petitioner, it did so as an administrative board with powers uniquely its own. It cannot be doubted, for instance, that the Secretary of DER would be powerless to adopt, as an act of DER, the regulations here at issue. Keeping in mind, then, the regulatory design by which the rulemaking, enforcement and adjudicatory functions within DER are performed by separate bodies, we conclude that the order of the EQB here at issue does not constitute an order of DER subject to the jurisdiction of the EHB. Accordingly, we hold that the EHB lacks jurisdiction over the Petitioner's direct appeal from the EQB's order adopting amendments to DER regulations.
>
> United States Steel, 442 A.2d at 8 - 9. (footnote omitted).

Therefore, even if Neshaminy's argument that the Clean Streams Law gives this Board the authority to conduct a pre-enforcement review of regulations promulgated under that statute has merit, this Board has no authority to overrule the clear statement of the Commonwealth Court in United States Steel.

The Board does not believe, however, that Neshaminy's argument that §§691.7 and 691.1 give this Board jurisdiction to review EQB actions has merit. This definition of "department," at §691.1, which includes DER and the EQB, as well as this Board, is in the disjunctive rather than the

conjunctive, and does not mean that "department," when used in the Clean Streams Law, necessarily includes all three bodies. In fact, if "department" necessarily did include all three bodies, wherever used in the Clean Streams Law, then, as pointed out by DER in its response to Neshaminy's Answer to Petition for Reconsideration, §691.7 would grant this Board jurisdiction to review its own actions, since "department" also includes this Board. This being the absurd result of the interpretation of "department" as necessarily including DER, the EQB, and this Board wherever used in the Clean Streams Law, it must fail under standard principles of statutory construction. 1 Pa. C.S.A. §1922.

More importantly, however, Neshaminy's interpretation of §691.7 is incorrect because §691.1, which defines "department," expressly limits its scope to the provisions of the Administrative Code of 1929, 71 P.S. §51, et seq. Therefore, the legislature, in using the word "department" in varying contexts in the Clean Streams Law, and then defining "department" in the Clean Streams Law as meaning DER, the EQB, or this Board, did not intend to change the jurisdiction of this Board or that of DER or the EQB, from that which is established under the Administrative Code. In conclusion, neither the Administrative Code, 71 P.S. §510-21, nor the Clean Streams Law, 35 P.S. §§691.1 and 691.7, authorizes this Board to conduct a pre-enforcement review of the EQB's amendments to 25 Pa. Code, Chapters 93 and 95.

ORDER

AND NOW, this 4th day of April, 1986, the appeal of Neshaminy Water Resources Authority at EHB Docket No. 85-013-M is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For the Commonwealth:
Vincent Pompo, Esq.
Louise S. Thompson, Esq.

For Appellant:
George J. Miller, Esq.
Philadelphia, PA

DATED: April 4, 1986

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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GUY AND MARY SETLIFF, et al. :

:

: Docket No. 83-289-G
: 83-293-G

v. : Issued: April 7, 1986

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CLARKSBURG COAL COMPANY, Permittee

ADJUDICATION

By Edward Gerjuoy, Member

Syllabus

This third party appeal of a surface mining permit is sustained. The permit, issued pursuant to the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq., does not include a requirement that the permittee's compliance with dust control provisions be monitored, nor does it include any provision for assuring that noise levels generated by the mine operation do not rise to the level of a public nuisance. Although the Board does not find that DER violated any specific statutory or regulatory provisions in issuing the permit, it is clear that operations under the permit may result in the creation of a public nuisance. The permit must be conditioned to prevent such an occurrence.

INTRODUCTION

The Setliffs (at Docket No. 83-289-G) and Kalp (at Docket No. 83-293-G) have appealed DER's grant of Mine Drainage Permit No. 26820121 to the Clarksburg Coal Company, Inc. ("Clarksburg"). Both appeals were filed pro se. Shortly after the appeals were filed, Clarksburg moved for a more specific pleading in each of the two appeals. The Board rejected the motion in the Kalp appeal, but ordered a more specific pleading in the Setliff appeal. In each of these appeals, the Board's Order in response to Clarksburg's motion was accompanied by a letter to the parties, urging them to secure an attorney. Neither party did so, however, at any time during the course of this matter. The Setliffs responded to the Board's Order by merely reiterating, essentially word for word, the previously inadequate language of their original Notice of Appeal.

On February 16, 1984, therefore, the Board issued an Opinion and Order at Docket No. 83-289-G, limiting the issues in the Setliff appeal to the following possible reasons for holding the permit should not have been granted:

1. Water loss at the appellants' residence caused by Clarksburg's mining.
2. Noise produced by the mining operation.
3. The danger of property damage resulting from Clarksburg's blasting activities.

Thereafter these appeals were consolidated at Docket No. 83-289-G, and a hearing on the consolidated appeal was held, on October 2, 1984. The Setliffs, though duly notified of the hearing, did not appear; nor did they file a post-hearing brief, though given the opportunity to do so in a Board Order dated February 4, 1985.

The appellants bear the burden of proof in these appeals. 25 Pa.Code §21.101(c)(3). Consequently, this appeal is dismissed as to the Setliffs, for

total failure to meet their burden. The remainder of this adjudication is concerned solely with the appeal by Kalp, who did present testimony but did not file a post-hearing brief. Although no formal order limiting the Kalp appeal to the issues 1 - 3 supra was released, the actual Kalp testimony did not go beyond those issues except for evidence about dust from the mining operation. Neither Clarksburg nor DER filed a post-hearing brief, but DER did file statements describing DER's views concerning DER's responsibilities for looking into possible noise and dust problems before issuing the permit.

FINDINGS OF FACT

1. Appellants in the appeal originally docketed at 83-289-G are Guy and Mary Setliff ("Setliffs"), who reside at R.D. #1, Acme, Pennsylvania 15610.

2. Appellant in the appeal originally docketed at 83-293-G is Jess Kalp, Sr. ("Kalp"), who resides at R.D. #1, Acme, Pennsylvania 15610.

3. Appellee is the Pennsylvania Department of Environmental Resources ("DER") which is the agency of the Commonwealth empowered to administer and enforce the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. ("SMCRA"), the Clean Streams Law, 35 P.S. §691.1 et seq. ("CSL"), and the rules and regulations promulgated thereunder.

4. Permittee is Clarksburg Coal Company, Inc. ("Clarksburg"), P. O. Box 119, Jones Mills, Pennsylvania 15646, a Pennsylvania corporation.

5. On November 25, 1983, DER issued Mine Drainage Permit No. 26820121 to Clarksburg, authorizing Clarksburg to operate a surface mine (the "mine") in Saltlick Township, Fayette County, Pennsylvania.

6. This permit has been timely appealed by each of the Setliffs and Kalp.

7. The two appeals were consolidated by Order of this Board on July 23, 1984, under Docket No. 83-289-G.

8. A hearing on the consolidated appeal was held on October 2, 1984.

9. The Setliffs, though duly notified, did not appear at the hearing.

10. The Setliffs, though given the opportunity to do so, have not filed a post-hearing brief.

11. Kalp resides in the immediate vicinity of the mine.

12. At the time of the hearing, the mine already had been in operation for some time.

13. At times, the mine operations have been conducted all through the night, as well as during the day.

14. Kalp's house is located about 1200 feet north of the northern boundary of the area on which mining will be permitted (Tr. 48; Cl.Ex. 1).[1]

15. There is a haul road on the site which starts at the northern boundary of the permit area, at a location not far from the northern boundary's closest point to Kalp's house.

16. Equipment has been moving along and in the vicinity of this haul road.

17. Stripping operations have taken place, and may recur, in the vicinity of the northern portion of the permit area.

18. The noise from the mining operation has been audible to Kalp, during the day and the night.

19. Kalp has found the noise disturbing at all times; at night the noise has kept him awake.

20. There have been occasions when the noise has been so loud that conversations in Kalp's backyard became inaudible.

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[1] Transcript pages are denoted by the abbreviation Tr.; Clarksburg and Kalp exhibits are denoted by Cl.Ex. and K.Ex. respectively; DER offered no exhibits.

21. Kalp testified that dust from the mining operation had reached his house and the houses of several of his neighbors.

22. Gerald Miller ("Miller"), who resides a few hundred feet from the northern boundary of the permit area claims that his house and porch is continually receiving dust from the mining operations (Tr. 62; Cl.Ex. 1).

23. On several occasions, Gerald Miller has complained about the dust to the Township Supervisors.

24. Miller also has complained to the Township Supervisors about the noise.

25. The noise from the mining operation has kept Miller awake at night.

26. At the time when Miller was kept awake by the noise, the stripping operations were only a few hundred feet from Miller's house.

27. On occasion the noise has forced Miller to shout when attempting to conduct conversations on his front porch.

28. Jess Kalp, Jr. ("Junior"), who resides somewhat further north of the site than his father, claims that dust from the mining operation frequently reaches his house, inside and out. (Cl.Ex.1)

29. Sometimes Junior works the night shift and has to sleep during the day.

30. Junior has been bothered by the noise; the noise has kept him awake on days when he was on night shift and was trying to sleep during daylight hours.

31. Junior believes the dust has increased since the mining operations began.

32. Junior stated that his swimming pool, which has been on his property for four years, recently has been covered with much more dirt than before the mining began.

33. No measurements of noise levels produced by the mining operation

were offered into evidence.

34. No objective evidence (e.g., monitoring data, chemical analyses of particulates, etc.) was offered to show that dust from the mining operation actually was reaching Kalp's and other residences in the area.

35. No credible evidence was presented to support Kalp's claim that mining operations under the permit had endangered or could endanger the supply of water to his house or to any other home in the area.

36. The permit incorporates the permit application.

37. The permit application contains a fugitive dust plan (Cl.Ex. 2).

38. The fugitive dust control plan, in toto, reads as follows:

> During periods of dust generation, control practices will be implemented to eliminate the generation and transport of fugitive dust so that no visible emissions occur beyond the property. Normal control methods will include periodic watering of haul roads and speed restrictions. Where necessary, and where road surfacing materials are compatible, the use of non-polluting chemical dust suppressants such as calcium chloride or road oils will be applied.

39. Neither the permit as such, nor the permit application embodied therein, contains any specific limitations on the amount of noise which might be audible at residences in the area.

40. DER's Surface Mine Conservation Inspector Barbara Gunter has inspected the mine site at least once a month (about ten or eleven times in all) since mine operations began.

41. Barbara Gunter does not recall observing dust problems on the site.

42. Barbara Gunter has noticed the noise while on the site, but she did not believe the noise was more than would be heard at any active strip mine (Tr. 104-5).

43. Barbara Gunter has not made any attempt to estimate the noise levels at Kalp's or other residents' homes.

44. There was no evidence that the regulations governing bonding requirements for surface mining permits had been violated.

45. There was no evidence that blasting on the site had been conducted in violation of the permit or of applicable regulations; blasting has not caused any actual damage to residential property in the neighborhood of the site.

46. The witnesses who complained about the noise specifically mentioned the warning sounds emitted by vehicles when backing up.

47. Such warnings are required by the federal Mine Safety and Health Administration regulations.

48. There was no evidence, pro or con, to show whether DER's review of the permit application gave any consideration whatsoever to the noise levels that Clarksburg's operations might generate.

DISCUSSION

The foregoing Findings of Fact in this matter pretty much speak for themselves. Kalp, conducting his appeal pro se, was unable to show that DER had violated any specific regulations in issuing the permit. He did present credible evidence that noise and dust from the actual mine operations under the permit might be violating applicable regulations (dust), or might be rising to the level of a public nuisance (noise and dust). His evidence was insufficiently quantitative, and insufficiently supported by expert testimony (he called no experts) to enable us to conclude that operations under the permit actually have violated applicable dust control regulations or have risen to the level of a public nuisance.

It appears, therefore, that our decision in this matter is governed by our recent adjudications in Robert Kwalwasser v. DER, Docket No. 84-108-G (January 24, 1986) and Wisniewski et al. v. DER et al., Docket No. 82-045-G (February 7, 1986).

We cannot say as a matter of law that Kalp met his burden of showing DER's issuance of the permit--on the facts before DER in the permit application--was an abuse of DER's discretion. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). We do conclude, however, that DER abused its discretion in failing to insert a condition in the permit requiring Clarksburg to monitor its compliance with the dust control measures which DER's regulations require, notably the regulations in 25 Pa. Code Chapters 121, 123, 127 and 129, if such monitoring is technologically possible. The very qualitative dust control plan embodied in the permit (Finding of Fact 38) offers no indication of how Clarksburg is to ascertain that "no visible emissions occur beyond the property," the requirement of 25 Pa.Code §123.28. A once-a-month visit to the site by DER's inspector is not likely to ferret out violations of dust control regulations unless such violations are occurring regularly; yet even relatively infrequent failures to properly control dust emissions can be extremely annoying to Clarksburg's neighbors.

Similarly, on the authority of Kwalwasser, supra, we conclude that DER abused its discretion in not attaching some conditions to the permit which--insofar as is reasonably possible--would ensure that the noise levels from the mining operation could not rise to the level of a public nuisance. There was no evidence, pro or con, as to whether DER ever gave thought to noise levels before issuing the permit. But even if DER (before issuing the permit) did decide the noise would not constitute a public nuisance, DER should have recognized that this decision was based on no quantitative noise level information; thus DER should have taken steps--via appropriate permit conditions--to ensure, insofar as reasonably possible, that operations under the permit would not produce noise levels exceeding those DER had anticipated. This requirement, that there be appropriate permit conditions

specifying (as quantitatively as possible) allowable noise levels, is desirable from the standpoint of all parties to this appeal, Clarksburg's and DER's as well as Kalp's; Clarksburg should know what noise levels it must not exceed, and DER's inspectors should know what noise levels they are expected to enforce. It was obvious from the testimony (Findings of Fact 41 and 42) that the permit as presently written gives DER's Inspector Gunter essentially no criteria for deciding whether operations under the permit are within allowable noise level limits.

Further discussion of the legal reasoning underlying the foregoing rulings may be found in Kwalwasser and Wisniewski, supra. We remark that although we are able to cite no regulation explicitly requiring DER to give consideration to noise levels from non-blasting operations when evaluating a surface mining application, 25 Pa.Code §87.127(b)(e)(1) authorizes DER to restrict blasting activities if necessary "to protect the public from excessive noise." Similarly, DER's power to prevent a permittee from generating excessive noise is recognized in 25 Pa.Code §75.264(r)(34), which authorizes DER to require operators of hazardous waste storage or treatment tanks to carry out noise control procedures when necessary. Moreover, DER has the authority to deny a surface mining permit under the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq., on the basis that the mine operation would constitute a public nuisance. Glasgow Quarry v. DER, 1974 EHB 308, aff'd, 23 Pa.Cmwlth 270, 351 A.2d 689 (1976) (holding that DER acted properly in denying a mining permit where the proposed blasting procedures did not adequately safeguard the health, safety and welfare of the public). Certainly, if DER has the authority to deny a permit on such a basis, it has the authority to condition the permit to prevent such a nuisance from arising.

CONCLUSIONS OF LAW

1. The appellants have the burden of proof in this matter.

2. It is not possible to conclude that DER's issuance of the permit has contravened any applicable regulations.

3. DER did abuse its discretion by failing to insert a condition in the permit requiring Clarksburg to monitor its compliance with the dust control plan in the permit, assuming such monitoring is technically feasible.

4. DER abused its discretion by failing to insert permit conditions which, insofar as is reasonably possible, would ensure that the noise levels from the mining operation could not rise to the level of a public nuisance.

O R D E R

WHEREFORE, this 7th day of April , 1986, it is ordered as follows:

1. The appeal at 83-289-G is dismissed.

2. The appeal at 83-293-G is sustained.

3. The permit is remanded to DER for action consistent with the foregoing discussion.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, Chairman

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: April 7, 1986

cc: Bureau of Litigation, Harrisburg, PA
Robert D. Douglass, Esq., Indiana, PA,
for Permittee
Guy and Mary Setliff, Acme, PA, pro se Appellants
Jess Kalp, Acme, PA, pro se Appellant
Dennis W. Strain, Esq., for DER, Western Region

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MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

SPRING BROOK TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 84-122-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	Issued: April 8, 1986
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER

Synopsis:

Appellant's failure to respond to the Board's rule to show cause why the appeal should not be dismissed for inactivity, as well as an extended period of inactivity in this docket, lead to the dismissal of the appeal.

OPINION

Spring Brook Township instituted this matter by the filing of a Notice of Appeal on April 6, 1984. The Notice of Appeal sought review of a Department of Environmental Resources' order directing Spring Brook Township to take various remedial actions to address alleged public health and environmental problems resulting from alleged inadequate sewage disposal in the municipality.

Pursuant to the Board's Pre-Hearing Order No. 1, Appellant was to have filed its pre-hearing memorandum on or before June 26, 1984. Numerous extensions of this deadline were granted on the basis of representations that either the parties were engaged in settlement negotiations or that Appellant was undertaking actions to comply with the challenged Department order.

In a letter dated February 25, 1985, which was submitted to the Board in response to the Board's request for a status report, counsel for Appellant informed the Board that he advised Appellant to withdraw the appeal and that he expected Appellant to authorize him to do so in a meeting on March 4, 1985. The Board was further informed by letter dated March 7, 1985, that Appellant had accepted the recommendation to withdraw the appeal but formal action of Appellant's Board of Supervisors was required. Apparently, discussion of the possible withdrawal of the appeal occurred at a March 14, 1985 meeting of the Spring Brook Township Board of Supervisors, for the Board received a copy of March 15, 1985 correspondence with counsel for the Department concerning possible conditions or limitations upon the language of the withdrawal.

The Board received no further correspondence from the Appellant. In a letter dated February 12, 1986, the Department requested that the Board either specify a new date for submission of Appellant's pre-hearing memorandum or issue a rule to show cause why the appeal should not be dismissed for inactivity. Because there had been no activity relating to the appeal for nearly a year, the Board, on February 19, 1986, issued a rule to show cause why the appeal should not be dismissed for inactivity. The rule was returnable to the Board on March 18, 1986. The Board has received no response from the Appellant.

The Board will not carry appeals on its docket indefinitely. Parties have an obligation to move forward with their appeals if settlement negotiations with the Department are not productive. Parties also have a duty to adhere to the Board's rules regarding practice and procedure and to timely respond to Board orders. The docket in this matter has remained inactive for a year, and Appellant has failed to respond to the Board's February 19, 1986

order. Setting a new date for submission of a pre-hearing memorandum is pointless and would waste the Board's time and resources. Blake Becker, Jr. v. DER, 1984 EHB 553. For these reasons, this appeal must be dismissed pursuant to Rule 124.

ORDER

AND NOW, this 8th day of April, 1986, upon consideration of the lack of activity at this docket and Appellant's failure to respond to the Board's February 19, 1986 rule to show cause, it is ordered that the appeal of Spring Brook Township is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: April 8, 1986

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
James D. Morris, Esq.
Eastern Region
For Appellant:
Edwin A. Abrahamsen, Esq.
Scranton, PA

bl

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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EUGENE PETRICCA :

:

: Docket No. 85-312-G

: Issued April 9, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

This appeal of a DER compliance order is dismissed as untimely filed, pursuant to 25 Pa. Code §21.52(a). Appellant received the order at a DER office more than thirty days prior to the date he filed his appeal with the Board. 25 Pa. Code §21.11(a) provides that it is the date of receipt by the Board and not the date of mailing which is determinative. Service upon the appellant was effective when he actually received the order. Appellant's signature on the compliance order verifies that he received a copy while at the DER office. DER's motion to dismiss is not untimely; under 1 Pa. Code §35.178, a motion may be filed at any stage of a proceeding. Appellant has alleged no breakdown in the procedures of the Board which would justify filing an appeal nunc pro tunc. Therefore, DER's Motion to Dismiss is granted.

OPINION

This appeal of a DER compliance order was filed with the Board on July 29, 1985. Appellant stated in his Notice of Appeal that he received the compliance order "shortly after June 26, 1985". DER has moved to dismiss the appeal, alleging that appellant received the compliance order on June 26, 1985 at the DER office in Ambrust, Pennsylvania. Pursuant to 25 Pa. Code §21.52(a), the Board has jurisdiction over appeals only if they have been filed with the Board within thirty days of the date on which the appellant received written notice of the DER action appealed. Therefore, if appellant did receive a copy of the compliance order at issue on June 26, 1985, this appeal must be dismissed as untimely.

In response to DER's Motion to Dismiss, appellant has argued that since he mailed his Notice of Appeal within thirty days of the date that he received the order, the appeal should be deemed timely. The law is to the contrary. Under 25 Pa. Code §21.11(a), it is the date of receipt by the Board and not the date of mailing which is determinative. Appellant also argues that "proof of service" should be computed from the date of delivery to the party via certified mail. Under 1 Pa. Code §31.13, however, the date of service of an order such as the instant one is the date of delivery to the party or the date of delivery via certified mail. (DER apparently did not send a copy of the order to appellant via certified mail).

In addition, appellant contends that DER's motion to dismiss is in the nature of a preliminary objection and as such is itself untimely. It is true that pursuant to 25 Pa. Code §21.64, the pleadings allowed under the Pennsylvania

Rules of Civil Procedure are the pleadings permitted before the Board, except as otherwise specified. However, even if we were to agree that DER's Motion is in the nature of a preliminary objection, under 1 Pa. Code §35.178, a motion may be filed at any stage of a proceeding and under Pa.R.C.P. 1032(2), questions of jurisdiction are not waived. Therefore, DER's motion to dismiss is not untimely.

Finally, appellant contends that this appeal should be allowed as an appeal nunc pro tunc. The law of this Commonwealth concerning appeals nunc pro tunc is clear; such an appeal is permitted only where the appellant can demonstrate that there was some breakdown in the court's procedures which resulted in the untimely filing of the appeal. Pa. Dept. of Transportation v. Rick, 462 A.2d 902 (Pa. Cmwlth 1983); Appeal of Farrell, 450 A.2d 266 (Pa. Cmwlth 1982); FMC Corporation v. DER, Docket No. 84-119 (Opinion and Order, July 23, 1984), 1984 EHB 712. No such allegation has been made here and the Board does not have reason to believe that any such breakdown occurred.

Thus, we come to the sole factual issue presented here; i.e., whether appellant in fact received the DER compliance order at issue on June 26, 1985. DER has attached to its motion an affidavit of the DER mine inspector who completed the compliance order. The affidavit states that the inspector "personally served that order on Eugene Petricca on June 26, 1986 at the DER offices in Armbrust, PA." Appellant has filed a counter affidavit which states that "to the best of his knowledge and belief" he did not receive a compliance order while at the DER office in Armbrust. In response to the counter-affidavit, however, DER has pointed out in a document filed March 4, 1986, that appellant's signature appears on the compliance order (which was signed and dated June 26, 1985 by the inspector) in a box below the following statement:

> The undersigned operator/authorized representative, hereby acknowledges receipt of this order and attachments hereto. This signature does not constitute an acknowledgement that any or all of the violations listed in the attachment(s) have occurred or continue to occur.

As of this date, Appellant has not replied to this March 4, 1986 filing by DER.

Accordingly, we conclude that appellant did in fact receive the compliance order on June 26, 1985 at the DER Armbrust office. Since this appeal was filed more than thirty days after that date, it is untimely and must be dismissed. The Board lacks jurisdiction. Rostosky v. DER, 26 Pa. Cmwlth 478, 364 A.2d 761 (1976).

ORDER

WHEREFORE, this 9th day of April, 1986, it is ordered that DER's Motion to Dismiss this appeal is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

Maxine Woelfling, Chairman

Edward Gerjuoy

Edward Gerjuoy, Member

DATED: April 9, 1986
cc: Bureau of Litigation
For Appellant:
Eugene Petricca
Burgettstown, PA 15201
For the Commonwealth, DER
Gary A. Peters, Esq.
Pittsburgh, PA 15206

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

JAMES MARTIN :

:

: Docket No. 83-121-G
: 84-016-G
84-028-G

Issued: April 10, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Edward Gerjuoy, Member

Syllabus

Two appeals from DER compliance orders are dismissed; a third appeal is dismissed in part and sustained in part. One of the dismissed appeals is entirely moot; therefore, there is no relief which the Board can grant and the appeal is dismissed without a ruling on its merits. The dismissed portion of the appeal which has been sustained in part likewise has been dismissed as moot. Neither of the moot appeals falls within an exception to the mootness doctrine; the issues presented are not of significant public importance and are not of a repetitive nature. Although voluntary cessation of allegedly unlawful conduct need not require dismissal on grounds of mootness, to avoid such dismissal there must be a real danger that the allegedly unlawful activity will be resumed after proceedings have terminated. There is no indication that continued allegedly unlawful issuances of compliance orders by DER are likely in the instant appeals, despite appellant's fears to the contrary.

DER's issuance of a compliance order citing the appellant for failing to comply with the terms of a consent order and agreement is upheld; the force majeure clause of the agreement is inapplicable because appellant failed to comply with its terms regarding notification of possible default. However, appellant's appeal of that portion of a compliance order citing a violation of 25 Pa. Code §87.98(a) for failing to conserve topsoil is sustained. DER did not sustain its burden of proving that the alleged violation occurred.

FINDINGS OF FACT

1. The appellant herein is James Martin, whose place of business is Valley Township, Armstrong County, Pennsylvania with a mailing address of R.D. 1, Templeton, PA 16259.

2. The appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), the agency of the Commonwealth empowered to administer and enforce the provisions of the Surface Mining Conservation and Reclamation Act, ("the Surface Mining Act") 52 P.S. §1396.1 et seq., and the regulations promulgated pursuant thereto.

3. Mine Drainage Permit ("MDP") No. 3578BC16 was issued to appellant on March 27, 1979, authorizing the mining of coal by the surface method in Kittaning Township, Allegheny County, Pennsylvania.

4. On August 14, 1979, Mining Permit ("MP") No. 419-16 was issued to appellant for 20 acres on property owned by Martin on MDP No. 3578BC16.

EHB Docket No. 84-016-G

5. On October 18, 1983, appellant and DER entered into a Consent Order and Agreement ("CO&A).

6. Paragraph 4(a) of the CO&A provides:

> On or before December 5, 1983, Martin shall develop and implement erosion and sedimentation controls at the site covered by mine drainage permit 3578BC16 and mining permit 419-16, which controls shall comply with the requirements of 25 Pa. Code Chapter 102 and by said date Martin shall submit a plan for said controls to the Department for approval.

7. Paragraph 17 of the CO&A states:

> Martin will have additional time to carry out any obligation assumed herein, in the event Martin is obstructed or delayed in the commencement, implementation, or completion of any such obligation, other than any obstruction or delay caused in whole or in part by Martin or by Martin's failure to submit a complete plan or application under this Consent Order and Agreement, by any act or delay due to vandalism, acts of God, work slowdown or stoppage, strike, unavailability of materials or labor, any delay or defaults of third parties under contract with Martin with respect to the obligations undertaken hereunder, or because of any other cause beyond the control of Martin, which, despite due diligence, Martin is unable to prevent. Martin shall notify the Department by phone within five (5) days and in writing within ten (10) days of the date Martin becomes aware, or should have reasonably become aware, that such occurrence would cause delay or obstruction. Such notification shall be made to the Mining Compliance Specialist, and shall include all relevant documentation such as copies of third party correspondence and documentation from an authorized representative of Martin specifying each of the excuses and Martin's efforts to perform its obligations on time. The failure of Martin to comply with the requirements of this paragraph specifically and in a timely fashion shall render this paragraph null and void and of no effect.

The first sentence of paragraph 17 of the CO&A is known as the force majeure clause.

8. An inspection report written by DER mine inspector James Davis on October 28, 1983 and mailed to appellant set forth the December 5, 1983 deadline for compliance with paragraph 4(a) of the CO&A.

9. On December 8, 1983 DER issued a compliance order to appellant, No. 83G590, citing appellant for failure to comply with paragraph 4(a) of the CO&A. Appellant appealed the order to the Board, which docketed the appeal at #84-016-G.

10. Appellant failed to submit a plan for erosion and sedimentation controls on or before December 5, 1983, as required by paragraph 4(a) of the CO&A. (Tr. 114-117)

11. Appellant, however, did submit a plan for erosion and sedimentation controls on December 6, 1983. DER agrees that the submission of the plan one day past the December 5, 1983 deadline is a de minimis violation of the CO&A. (Tr. 275-80)

12. Appellant failed to implement erosion and sedimentation controls by December 5, 1983 as required by paragraph 4(a) of the CO&A. (Tr. 44)

13. As of June, 1985 appellant still had not implemented the erosion and sedimentation controls required by paragraph 4(a) of the CO&A. (Tr. 215)

14. Appellant was aware as early as November 7, 1983 that his engineer, Mr. Scott, was having difficulty developing the erosion and sedimentation control plan because of a backlog of business. (Tr. 368)

15. Between November 7, 1983 and December 3, 1983 appellant telephoned Mr. Scott's office on approximately 25 occasions to inquire about the development of the erosion and sedimentation control plan. (Tr. 348)

16. Appellant telephoned DER inspector supervisor John Matviya on December 5, 1983 to notify him that he would be unable to meet the December 5, 1983 deadline for submission of the plan and implementation of the erosion and sedimentation controls. This was the first notice that appellant gave DER that he would be unable to meet the December 5th date. (Tr. 114, 369).

17. Appellant first notified DER in writing of his inability to meet the December 5th deadline by letter dated December 9, 1983, which was received by DER on December 12, 1983. (DER Ex. 12; App. Ex. G).

18. Appellant did not state either during the December 5th telephone call or in his December 9th letter a date by which he intended to have the erosion and sedimentation controls installed. Appellant never expressly requested DER to extend the deadline for compliance under the terms of the CO&A. (DER Ex. 12; Tr. 116)

19. It would take seven to ten days to install the erosion and sedimentation controls required by paragraph 4(a) of the CO&A, weather permitting. (Tr. 66).

20. Appellant reasonably should have known at least ten days prior to December 5, 1983 that he would be unable to implement the erosion and sedimentation controls by that date.

EHB Docket No. 84-028-G

21. On December 19, 1983 Inspector Davis conducted an inspection of the site covered by MDP 3578BC16, and issued a compliance order based upon that inspection. (DER Ex. 1; Tr. 52-4).

22. A portion of this compliance order, #83G613, cited appellant for failure to remove and save topsoil, stating that topsoil had been buried in the pit area. (DER Ex. 1)

23. Appellant appealed compliance order #83G613 to the Board, which docketed the appeal at #84-028-G.

24. DER's inspectors never actually observed appellant pushing topsoil into the pit.

25. On December 19, 1983, DER's inspectors observed what they took to be topsoil in the pit area.

26. DER's inspectors inspected the pit area on December 19, 1983 after receiving a telephone call from a nearby resident, Mr. E. C. Gearhart.

27. Mr. Gearhart testified that he had seen a bulldozer operated by Donald Pinkerton pushing topsoil into the pit.

28. Mr. Pinkerton testified that he indeed had pushed topsoil into the pit, under orders from his employer Earl Cravener, who was doing reclamation work on the site under contract to appellant.

29. Mr. Cravener[1] testified that the topsoil (from the area wherein the alleged pushing into the pit had taken place) had been removed before Mr. Cravener had begun to work on the site.

1. The transcripts of the Cravener and Allshouse depositions have been made a part of the record in these appeals, by agreement of the parties.

30. Mr. Cravener denied that he ever had ordered Mr. Pinkerton to push topsoil into the pit.

31. Mr. Cravener testified that Mr. Pinkerton had not been employed on the site after November 19, 1983.

32. Frederick Allshouse testified that he — not Mr. Pinkerton — had been operating the bulldozer on the site during November-December 1983.

33. Mr. Gearhart's and Mr. Pinkerton's testimony about the time period when the topsoil allegedly was pushed into the pit was quite vague.

34. Mr. Cravener's and Mr. Allshouse's testimony did not rule out the possibility that the topsoil pushing had occurred in mid-November 1983 or earlier, when Mr. Pinkerton unquestionably had been working on the site.

35. Pinkerton testified that he worked on the site "in the last part of November, the first of December, in that area." (Tr. 142)

36. DER inspection reports dated November 30, 1983 and December 8, 1983 explicitly checked as in compliance "Topsoil Removal/Storage Handling" (DER Exhibits 9 and 11).

37. The inspection report of December 19, 1983 was the first to mention observations in violation of 25 Pa. Code §87.97(a) governing topsoil removal.

38. Martin denied the allegation that topsoil had been pushed into the pit area.

39. Martin testified that Mr. Allshouse had been operating the bulldozer on the site in the time period DER believes the topsoil pushing occurred.

DISCUSSION

A. Mootness

These appeals concern several DER compliance orders, issued in connection with surface mining operations conducted by appellant under the authority of Mine Drainage Permits Nos. 3574SM12 and 3578BC16 in Armstrong County, Pennsylvania. After the hearing on the merits of the appeals was held, DER vacated portions of the compliance orders at issue and then sought dismissal of the associated portions of the appeals on grounds of mootness. The parties have addressed the mootness issue in their post-hearing briefs. Since our ruling upon this issue will determine the scope of this adjudication, we discuss it first.

On May 24, 1983 DER issued a compliance order to appellant, citing him for failure to backfill and grade all disturbed areas to the approximate original contour on Permit No. 3574SM12 contrary to section 87.141(a) of 25 Pa. Code. The appeal of this compliance order was docketed at EHB Docket No. 83-121-G. On December 28, 1983, DER issued another compliance order to appellant, this time in connection with Permit No. 3578BC16, citing appellant for failure to reclaim the area affected in conformance with the provisions of his approved reclamation plan, i.e., to approximate original contour, in violation of 25 Pa. Code §87.140. The appeal of this compliance order was docketed at EHB Docket No. 84-028-G.[2] DER has since vacated the portions of the orders which concerned this backfilling and grading. The letter notifying appellant of this action, dated September 30, 1985, also states that "the Department vacates these portions of the compliance orders without prejudice to its right to initiate any other

2. The compliance order appealed at 84-028-G also cited appellant for failure to remove and save all topsoil in a separate area in violation of 25 Pa. Code §87.97(a). Our discussion of the possible mootness of the appeal at 84-028-G does not apply to the portion of the order concerning §87.97(a).

action with regard to these or other matters which were the subject of the compliance orders. The entries will be removed from the violation docket." No explanation for DER's decision to vacate the orders has been provided.

Appellant opposes dismissal of any portion of his appeal on mootness grounds; he contends that since DER has reserved the right to initiate new enforcement action based upon the same alleged violations with which the vacated orders were concerned, he again may have to litigate the factual and legal issues associated with such actions. This he claims would violate his right to procedural due process of law, since he has litigated those issues once already, and should not be put to the trouble and expense of doing so again.

We do not believe that the cases cited by appellant are applicable here. This is not a case in which an administrative agency has taken action adverse to a party's interests without affording an opportunity for hearing as in Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Compensation Board of Review, 10 Pa. Cmwlth 90, 309 A.2d 165 (1973). Nor is this a case in which a "blot" will be placed upon appellant's record, as in Pennsylvania State Athletic Commission v. Graziano, 12 D & C 2d 127 (1957), DER has stated that entries concerning the alleged violations will be removed from the violation docket. The issue here is simply whether it would be proper for the Board to review the merits of DER's decision to issue portions of two compliance orders which since have been vacated.

The general rule, which we are constrained to follow, is that a case will be dismissed as moot when an event occurs while the appeal is pending which

renders it impossible for the requested relief to be granted. Cox v. City of Chester, 76 Pa. Cmwlth 446, 464 A.2d 613 (1983); Atlantic Inland v. Township of Bensalem, 39 Pa. Cmwlth 180, 394 A.2d 1335 (1978). Appellant, in taking his appeal from the compliance orders, has asked the Board to "reverse" the same. It is apparent that this relief can no longer be granted; the orders have been vacated and have no further legal effect.

There is, however, a well recognized exception to this general rule which permits a court to decide what otherwise would be considered a moot issue. Where the matter before the court is of a repetitive nature and of significant public importance, yet is capable of evading review, the court may reach the merits of a claim, despite the fact that it is technically moot. Port Authority of Allegheny County v. Division 85, Amalgamated Transit Union, 34 Pa. Cmwlth 71, 383 A.2d 954 (1978) (holding that the issue of whether a public employees union must submit to binding arbitration is an issue which should be decided despite the fact that the parties have since reached a settlement, since the problem will "unquestionably continue to be the subject of dispute and will recur in future negotiations.") 383 A.2d at 958. This is not such a case. While the particular factual circumstances of this appeal may be of considerable importance to appellant, they are not of an important public nature. Moreover, there is no indication that these issues will arise again. DER merely has reserved the right to take additional enforcement action; there is nothing on the record which indicates that it intends to do so.

A second exception to the general rule that moot cases will be dismissed is perhaps more directly applicable here. It is well established that voluntary

cessation of allegedly unlawful conduct will not necessarily lead to a dismissal on grounds of mootness. Allen v. Colautti, 64 Pa. Cmwlth 160, 439 A.2d 238 (1982); Temple University v. Pennsylvania DPW, 30 Pa. Cmwlth 595, 374 A.2d 991 (1977). The rationale that underlies this exception to the mootness doctrine is that a dismissal for mootness under such circumstances "would allow the party [allegedly] acting wrongly to revert, upon dismissal of the proceedings, to the offensive pattern of conduct." Temple University, 374 A.2d at 995 (citing U.S. v. Grant, 345 U.S. 629 (1953)). This doctrine was applied against the Commonwealth in both Allen and Temple University, supra. In determining whether dismissal is appropriate, the following factors are considered: 1) the good faith of the announced intention to discontinue the challenged activity; 2) the effectiveness of the discontinuance and 3) the character of the past violation. Highway Auto Service v. Commonwealth, DER, 64 Pa. Cmwlth 160, 439 A.2d 238 (1982); Allen, supra.

One who seeks to pursue a case against a party whose allegedly unlawful conduct has ceased bears a heavy burden. He must show that there still exists "a real danger of recurrence of the activity — that is, something more than mere possibility." Highway Auto, 439 A.2d at 240. In the present appeals, the appellant fears that their dismissal as moot will be followed by reinstatement of the orders which appellant originally challenged as unlawful. As we have noted above, however, there is no indication on the record that DER intends to reinstate the orders which it vacated on September 30, 1985 or that it is planning additional enforcement action; if there were we might hold differently here. In the absence of such indications we presume that DER is acting in good faith and that its vacating

of the orders is intended to remain effective. See Highway Auto, supra. Accordingly, we conclude that this matter is moot insofar as it is concerned with the compliance order of May 24, 1983 (appealed at Docket No. 83-121-G) and the portion of the compliance order dated December 28, 1983 (appealed at Docket No. 84-028-G) concerning appellant's alleged failure to return the site to the approximate original contour.[3]

B. Compliance With The Consent Order and Agreement

The appeal docketed at EHB #84-016-G concerns a compliance order which cited appellant for having failed to comply with a Consent Order and Agreement (CO&A) executed by Appellant and DER on October 18, 1983. Paragraph 4(a) of the CO&A required him to submit a plan for erosion and sedimentation (E&S) controls for the site covered by MP 419-16 by December 5, 1983. Paragraph 4(a) also required appellant to have implemented the E&S controls by December 5, 1983.

Appellant does not contest the fact that he did not submit the required plan to DER by December 5, 1983. The plan was submitted the following day, however, and DER has stipulated that this was simply a de minimis violation of the terms of the CO&A. It also is established, however, that appellant did not implement the E&S controls by December 5, 1983. This failure cannot be considered de minimis.

Appellant argues that additional time for compliance with paragraph 4(a) should have been granted by DER because the delay in implementation of the controls was due to causes beyond appellant's control. Specifically, appellant points to the "force majeure" clause of the CO&A (set forth supra at finding of fact 7) which provides that appellant will have additional time to comply with the provisions of the CO&A if he is "obstructed or delayed" in implementation of any

3. An additional appeal, EHB Docket No. 83-182-G, on which hearings were held in conjunction with the appeals at issue here, was withdrawn on November 1, 1985.

obligation under the CO&A by "any delay or defaults of third parties under contract with Martin". Appellant had arranged with an engineer, Mr. Scott, to design an E&S plan for the 419-16 site. Due to a large workload, however, Mr. Scott was unable to get the E&S plan to appellant prior to December 5, 1983. Appellant claims that without the plan he was unable to implement the E&S controls.

We need not decide whether the actions of Mr. Scott constitute the type of circumstance contemplated by the parties in executing the force majeure clause of the CO&A, however. Resolution of the issue of appellant's compliance with the CO&A requirement that E&S controls be installed by December 5, 1983 turns upon another portion of the paragraph containing the force majeure clause which reads:

> Martin shall notify the Department by phone within five (5) days and in writing within ten days (10) of the date Martin becomes aware, or should have reasonably become aware, that such occurrence would cause delay or obstruction.

The first notification which appellant provided DER concerning his inability to comply with paragraph 4(a) of the CO&A was on the day compliance was due, i.e. December 5, 1983 via a telephone call to DER inspector supervisor John Matviya. Appellant followed the phone call with a letter, dated December 9, 1983 and received by DER on December 12, 1983. We conclude, based upon the record before us, that appellant reasonably should have known that he would be unable to comply more than five days prior to the December 5th phone call or ten days prior to the December 9th letter. Appellant made approximately twenty five phone calls to Mr. Scott during November and early December, 1983 inquiring about the

development of the E&S plan. Yet he did not inform DER that he might encounter difficulty implementing the plan until December 5, 1983. The record establishes that it would have taken at least seven to ten days to implement the E&S controls once a plan had been submitted, weather permitting. In light of the foregoing we conclude that appellant failed to comply with the notification provisions associated with the force majeure clause of the CO&A. Consequently, DER was under no obligation to grant him additional time to comply with the requirements of paragraph 4(a). Appellant failed to comply with paragraph 4(a); therefore, issuance of the compliance order was a proper exercise of DER's powers and duties.

C. Failure to Conserve Topsoil

The appeal docketed at EHB #84-028-G is from a compliance order which was issued as a result of a site inspection on December 18, 1983. The order cites appellant for a violation of 25 Pa. Code §87.97(a) which provides:

> All topsoil shall be removed from the areas to be disturbed in a separate layer prior to drilling, blasting, mining, or other surface disturbance. Any vegetative cover which would interfere with the removal and use of the topsoil shall be removed prior to topsoil removal.

DER has the burden of proof that the compliance order was justified. 25 Pa.Code §21.101(b).

DER contends that appellant violated this regulation in that, at some time between a site inspection of October 28, 1983 and December 18, 1983, topsoil and overburden in a support area above the highwall on MP 419-16 was pushed off the top of the highwall into the underlying pit. As appellant notes, the

regulation does not explicitly proscribe dumping of topsoil into the pit. The purpose of 25 Pa. Code §87.97 ("Topsoil:removal") and §87.98 ("Topsoil: storage), however, is to assure that topsoil be conserved for later redistribution during reclamation. It is implicit in §87.97(a) that topsoil not be mixed with other material such as overburden.

DER's inspectors never actually observed appellant pushing topsoil into the pit. They examined the pit area on December 18, 1983 after a telephone call from a nearby resident, Mr. E. C. Gearhart. Mr. Gearhart testified that he had seen Donald Pinkerton operating a bulldozer and pushing topsoil into the pit. Mr. Pinkerton testified that he indeed had been employed as a bulldozer operator by Earl Cravener who was doing reclamation work on the site under contract to appellant. According to Mr. Pinkerton, he had pushed topsoil into the pit area under orders from Mr. Cravener. There was no testimony that Mr. Martin himself had given orders that topsoil should be pushed into the pit, but such testimony was not required to justify DER's compliance order; any activities "in which the land surface has been or is disturbed as a result of or incidental to surface mining operations of the operator" are surface mining activities subject to DER's regulations and enforcement powers. 52 P.S. §1396.3; 25 Pa. Code §86.1.

Mr. Gearhart's and Mr. Pinkerton's testimony did not go unchallenged, however. Mr. Cravener testified that the topsoil (from the area wherein Mr. Gearhart and Mr. Pinkerton testified the pushing had taken place) already had been removed and stored before Mr. Cravener had begun to work on the site. Mr. Cravener also declared that he never had ordered Mr. Pinkerton to push topsoil into the pit, and that anyway Frederick Allshouse — not Mr. Pinkerton — had been operating the bulldozer on the site after November 19, 1983. Frederick Allshouse agreed that he -- not Mr. Pinkerton — had operated the bulldozer on the site during November-December 1983. The significance of this testimony about the time period of Mr. Pinkerton's employment on the site is uncertain because Mr. Gearhart's and Mr. Pinkerton's testimony about when the topsoil pushing occurred was quite vague; Mr. Cravener's and Mr. Allshouse's testimony did not rule out the possibility that the pushing had occurred in mid-November 1983 or earlier, when Mr. Pinkerton unquestionably had been working on the site. On the other hand we note that the first reported DER observation of topsoil in the pit was December 19, 1983. On no previous inspection report, including an inspection report as late as December 8, 1983 (DER Ex. 11) is there any mention of such observation, although we recognize that the inspection on December 8, 1983 (unlike the December 19, 1983 inspection) was not looking for evidence of topsoil in the pit area; in fact, the December 8, 1983 inspection report explicitly checked "Topsoil-Removal/Storage Handling" as in compliance with requirements. Topsoil-Removal/Storage Handling similarly had been regarded as satisfactory in DER's inspection report of November 30, 1983 (DER Ex. 9).

On the foregoing review of the evidence we conclude that DER's own sole direct observation -- that on December 19, 1983 there was material in the pit area that DER's inspectors identified as topsoil — is insufficient to meet DER's burden of proof without substantiation by Mr. Gearhart's and Mr. Pinkerton's testimony. This testimony was contradicted by Mr. Cravener's and Mr. Allshouse's testimony, however, and we have no good reason to regard DER's witnesses as more credible than appellant's witnesses. Appellant Martin also contradicted the Gearhart-Pinkerton testimony, but we cannot regard Mr. Martin as unbiased in this matter, although he did appear to be a forthright witness. If DER's inspection reports are to be taken at face value, then the topsoil must have been pushed into the pit area after December 8, 1983 when Pinkerton's own testimony indicates he no longer was working on the site (Finding of Fact 37). Moreover, we find it difficult to understand why the appellant should have been burying topsoil, which as Martin's post-hearing brief argues is a valuable resource he was going to need for revegetating the area Mr. Cravener had been backfilling. We find unconvincing DER's suggestion that the few inches of topsoil available on the edge of the pit area was used to fill the pit area in order to avoid taking the time to bring up the filling material from the toe of the spoil (Tr. 99).

In sum, we are not convinced that Mr. Gearhart's and Mr. Pinkerton's testimony provides the substantiation needed for DER's December 19, 1983 observations to meet DER's burden of proof. Therefore, DER has not met its burden of justifying that portion of its December 19, 1983 compliance order which cited appellant for violating 25 Pa. Code §87.97(a). Accordingly, the portion of the appeal at Docket No. 84-028-G which challenges the asserted violation of §87.97(a) must be sustained.

CONCLUSIONS OF LAW

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

2. An appeal will be dismissed as moot if an event occurs while the appeal is pending which renders it impossible for the requested relief to be granted.

3. There is no relief which the Board can grant here with regard to those portions of the appeals of DER compliance orders (docketed at EHB #83-121-G and #84-028-G) which have been vacated by DER.

4. Dismissal of these appeals as moot does not violate appellant's right to procedural due process of law.

5. Where the subject matter of a proceeding is of considerable public importance and is of a repetitive nature and yet is capable of evading review, the Board may reach the merits of a claim despite the fact that it technically is moot.

6. The matters before the Board at EHB #83-121-G and #84-028-G (to the extent the latter concerns the alleged failure to return the site to AOC) are not of significant public importance and it is not clear that they are of a repetitive nature.

7. Voluntary cessation of allegedly unlawful activity will not lead to a dismissal for mootness if there is a real danger that the allegedly harmful activity will be resumed once the proceeding has been dismissed.

8. There is no indication on the record before the Board that DER intends to reinstate the vacated orders appealed at EHB #83-121-G and #84-028-G or that it intends to take additional enforcement action with regard to the circumstances which gave rise to those orders.

9. The burden of proof herein rests with DER pursuant to 25 Pa. Code §21.101(b)(3).

10. DER has met its burden with regard to one of the compliance orders which remain at issue herein, namely No. 83G590, appealed at EHB #84-016-G; DER has not met its burden with respect to that portion of compliance order No. 83G613, appealed at EHB #84-028-G, which alleges a violation of 25 Pa. Code §87.97(a).

11. Appellant failed to comply with paragraph 4(a) of the Consent Order and Agreement of October 18, 1983.

12. DER was under no obligation to extend the deadline for compliance with paragraph 4(a) of the Consent Order and Agreement; the force majeure clause of the agreement was not applicable because appellant failed to comply with the requirement that he provide DER with notice by phone within five days and in writing within ten days of the date he reasonably should have been aware that he would be unable to comply with paragraph 4(a).

13. Appellant reasonably should have known that he would be unable to comply with paragraph 4(a) more than five days prior to the December 5, 1983 phone call and more than ten days prior to the December 9, 1983 letter.

14. DER did not show that appellant violated 25 Pa. Code §87.97(a); in particular DER did not show that employees of appellant's subcontractor unlawfully removed overburden and topsoil and dumped them together into a pit on MP 419-16.

15. DER's issuance of compliance order 83G590 was not an abuse of discretion or otherwise an arbitrary exercise of its duties and functions.

16. Issuance of the portion of DER's compliance order 83G613 relating to appellant's alleged violation of 25 Pa. Code §87.97(a) was an abuse of DER's discretion.

ORDER

WHEREFORE, this 10th day of April, 1986, it is ordered as follows:

1. The appeal docketed at EHB Docket No. 83-121-G is dismissed as moot.

2. The portion of the appeal docketed at EHB Docket No. 84-028-G which concerns an alleged failure to return the mine site to its approximate original contour is dismissed as moot.

3. The portion of the appeal docketed at EHB Docket No. 84-028-G dealing with the alleged violation of 25 Pa. Code §87.97(a) is sustained, on the merits.

4. The appeal docketed at EHB Docket No. 84-016-G is dismissed on the merits.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

Maxine Woelfling, Chairman

Edward Gerjuoy

Edward Gerjuoy, Member

DATED: April 10, 1986
cc: Bureau of Litigation
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MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

AMBROSIA COAL AND CONSTRUCTION CO.	:	
	:	
v.	:	**EHB Docket No. 85-078-W**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 10, 1986

OPINION AND ORDER

Synopsis:

This is an appeal from an order of the Department of Environmental Resources (DER), issued under the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1, et seq., charging appellant with failure to restore or replace a private water supply allegedly affected by appellant's mining operations. The order directed appellant, pursuant to 52 P.S. §1396.4b(f) and 25 Pa.Code §87.119, to provide both a temporary and a permanent replacement for the private water supply, which is contaminated by hydrocarbons and sodium.

Appellant has moved for summary judgment because DER responded to an interrogatory that it does not intend to show that the hydrocarbons and sodium in the water supply resulted from appellant's mining operation. Appellant's Motion for Summary Judgment is denied because DER's response to another interrogatory indicates that there is a factual dispute as to whether appellant's mining operations caused the hydrocarbons and sodium to be in the water supply.

The water supply in question is a replacement well, which appellant

voluntarily drilled to replace another well that was contaminated by acid mine drainage. Therefore, appellant's liability for the original well was never finally established. Thus, appellant does not have an ongoing obligation, pursuant to 52 P.S. §1396.4b(f), for the adequacy of the replacement well. DER has the burden of proof in appeal by a mining operator from an order issued under §1396.4b(f), directing a mining operator to replace a water supply. In the instant appeal, DER must prove, first of all, that appellant's mining operations affected the original well, and then that the replacement well does not meet the statutory standards of being "adequate in quality and quantity for the purposes served by the supply." Even if DER establishes both of these elements, the mining operator is not perpetually responsible for the replacement supply under a strict liability standard. The mining operator is entitled to prove, as an affirmative defense to orders relating to replacement water supplies, that the contamination is a result of an intervening cause not ascribable to negligent installation of the supply by the mining operator. The mining operator would bear the burden of proof to establish this affirmative defense.

OPINION

On March 15, 1985, Ambrosia Coal and Construction Company ("Ambrosia") filed a Notice of Appeal and Petition for Supersedeas from an order of the Department of Environmental Resources ("DER") issued pursuant to 25 Pa.Code §87.119. The order charged Ambrosia with failure to restore or replace the Marilyn Nelson water supply with an adequate alternate source. In addition, it directed Ambrosia to provide an alternate temporary source of water within 48 hours; to file a plan to provide a permanent source of water within 30 days; to provide a permanent source of water within 90 days; and,

after achieving compliance with the order, to submit a notarized letter from an official of the company certifying that compliance has been achieved.

The Board held a supersedeas hearing on May 10, 1985, and on May 30, 1985, the Board issued a temporary supersedeas of DER's order, conditioned upon Ambrosia's agreement to install a temporary water supply for the Nelson residence pending the disposition of this appeal. On August 6, 1985, the Board indefinitely extended the temporary supersedeas. Then, on December 9, 1985, Ambrosia filed a Motion for Summary Judgment. DER filed its response to Ambrosia's Motion for Summary Judgment, as well as a Petition to Dissolve Supersedeas, on December 26, 1985.

In its Motion for Summary Judgment, Ambrosia argues that the basis for the order that is the subject of this appeal is the presence of hydrocarbons and sodium in the Nelson well. Because DER does not intend to prove that the hydrocarbons and sodium are a result of Ambrosia's mining,[1] Ambrosia argues that there is no material issue of fact, and, hence, it is entitled to a summary judgment.

DER argues that Ambrosia's Motion for Summary Judgment should be denied for the following reasons. Ambrosia conducted surface mining activities at a site known as the Paden Mine between June, 1978 and August, 1982. Marilyn Nelson lives approximately 2000 feet south of the Paden Mine. Mrs. Nelson received pure water for all of her domestic needs from a water well drilled on her property in August of 1974, which did not contain hydrocarbons. Mrs. Nelson's water supply is hydrologically linked to the Paden Mine site, and Ambrosia's mining operations at the Paden site

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[1] In response to Ambrosia's Interrogatory No. 10, DER said, "At this time the Department does not intend to show that the hydrocarbons and sodium present in the Marilyn Nelson well were the result of Appellant's mining operation."

contaminated her water supply with mine drainage on or before March 31, 1983. On or about June 7, 1984, Ambrosia drilled a water well to replace Mrs. Nelson's well, which had been polluted by mine drainage. Ambrosia's contamination of Mrs. Nelson's water supply through its surface mining activities obligates Ambrosia, under Section 4.2(f) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1, et seq., ("Surface Mining Act"), 52 P.S. §1396.4b(f), and 25 Pa.Code §87.119, to restore or replace Mrs. Nelson's water supply with an alternative source of water adequate in quality and quantity for the purposes served by the supply. Since Mrs. Nelson's replacement water supply contains hydrocarbons that were not present in her original water supply, and the adequacy of Mrs. Nelson's water supply is the central issue of this appeal, a genuine issue of fact remains in this appeal, and Ambrosia is not entitled to summary judgment. DER further argues that the supersedeas, which this Board granted on May 30, 1985, should be dissolved because the temporary water supply that Ambrosia provided for Mrs. Nelson is unsatisfactory.

This opinion will dispose of Ambrosia's Motion for Summary Judgment, but will not address DER's Petition to Dissolve Supersedeas. The Board believes that DER's Petition to Dissolve Supersedeas involves factual questions regarding the adequacy of the temporary water supply that Ambrosia has provided for Mrs. Nelson, while Ambrosia's Motion for Summary Judgment involves the legal question of whether this appeal contains any genuine issue of material fact. Therefore, to avoid confusion of the issues, the Board will address these questions separately.

This Board has the authority to grant summary judgment when, "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 a judgment as a matter of law." Summerhill Borough v. DER, 34 Pa.Cmwlth 574, 383 A.2d 1320, 1322 (1978). Ambrosia's Motion for Summary Judgment is based upon the following interrogatory Ambrosia posed to DER, and DER's response:

> 10. State in detail, including all facts used as a basis of the determination that the hydrocarbons and sodium present in the Marylyn Nelson Well were the result of Appellant's mining operation.
>
> At this time the Department does not intend to show that the hydrocarbons and sodium present in the Marilyn Nelson well were the result of Appellant's mining operation.

Ambrosia argues, in essence, that when Mrs. Nelson's well became contaminated with mine drainage, it drilled a replacement well for her on June 7, 1984, and this well is not contaminated by acid mine drainage, but rather, by hydrocarbons and sodium. Since DER does not intend to prove that the hydrocarbons and sodium present in the Nelson well are a result of Ambrosia's mining operations, there is no genuine issue of material fact in this case.

As a preliminary matter, the Board notes that in an appeal by a mining operator of a DER order under §1396.4b(f) of the Surface Mining Act, directing the mining operator to replace a public or private water supply, DER has the burden of proof. W. P. Stahlman Coal Co., Inc. v. DER, EHB Docket No. 83-301-G, (Adjudication issued April 29, 1985). Section 1396.4b(f) provides as follows:

> (f) Any surface mining operator who affects a public or private water supply by contamination or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply. If any operator shall fail to comply with this provision, the secretary may

> issue such orders to the operator as are necessary to assure compliance.

The Board construes this statutory provision as empowering DER to issue orders under two circumstances, one where the water supply has been affected and the operator refuses to acknowledge its obligation to replace it, and the other where effect has been established and the supply has been replaced, but it is not adequate in quality or quantity for the purposes served or, after the passage of time, it becomes inadequate for the purpose served. In the latter situation, the Board recognizes that there may be an intervening cause for the contamination or diminution not related to the surface mining operation, for which the mining operator should not be held responsible because the new contamination or diminution cannot be ascribed to negligent installation by the mining operator. In such a case, it is inconceivable that the General Assembly intended a surface mine operator to be responsible perpetually for replacement by imposing, in essence, a liability without fault standard, once the initial effect has occurred. The pre-existence of an intervening cause should be regarded as an affirmative defense, however, for which the mining operator should bear the burden of proof. This assignment of the burden is consistent with 25 Pa.Code §21.101(a), recognizing that the mining operator who installed the replacement supply, not DER, is in possession of the facts concerning the circumstances of the installation of the replacement supply.

In the instant appeal, however, DER never ordered Ambrosia to replace Mrs. Nelson's water supply, but rather, Ambrosia voluntarily drilled the replacement well. Thus, Ambrosia's liability for the contamination of Mrs. Nelson's original well was never finally established. The Board is reluctant to construe Ambrosia's voluntary replacement of the Nelson supply as an

admission of liability for replacement, for it could have been motivated by many reasons. Therefore, DER's argument that it does not have to show that Ambrosia's mining operations caused the hydrocarbons in Mrs. Nelson's replacement well because Ambrosia has an ongoing obligation under §1396.4b(f) to provide Mrs. Nelson with a water supply adequate in quantity and quality is without merit. DER must demonstrate, first of all, that Ambrosia's mining operations affected Mrs. Nelson's original well, then that the replacement supply does not meet the statutory standards of being "adequate in quality and quantity for the purposes served by the supply." Then, assuming DER really does not seek to prove the mining operation contaminated the replacement supply, the mining operator must show the installation was not negligent, implying that the contamination was caused by an intervening circumstance for which the operator should not be held responsible. In this connection, Ambrosia's demonstration should include a showing that it had no reason to anticipate the new well would become contaminated by, e.g., having been drilled into an already contaminated aquifer. If Ambrosia meets its burden of showing it was non-negligent, then the burden will shift back to DER, to prove its theory that the hydrocarbons and sodium in Mrs. Nelson's well were caused by Ambrosia's mining through or otherwise disturbing oil or gas wells in the recharge area of Mrs. Nelson's well.

Since DER has never proven that Ambrosia's mining operations affected Mrs. Nelson's original well, and since DER has stated, in response to one of Ambrosia's interrogatories, that it does not intend to show that the hydrocarbons and sodium present in Mrs. Nelson's well were the result of Ambrosia's mining operations, it would appear that there is no genuine issue of material fact in this case. DER, however, answered another of Ambrosia's interrogatories with a response that this Board believes is inconsistent with

DER's statement that it does not intend to show that the hydrocarbons and sodium in Mrs. Nelson's well were the result of Ambrosia's mining operations:

> 13. State in detail what theory, if any, the Department has as to the cause of the hydrocarbons and sodium in the Nelson well.
>
> The Department's theory as to the cause of the hydrocarbons and sodium in the Nelson's well is that Ambrosia mined through, or otherwise disturbed, pre-existing oil or gas wells in the recharge area of Marilyn Nelson's well.

DER's response to Ambrosia's Interrogatory No. 13 indicates that there is a factual dispute as to whether Ambrosia's mining operations caused the hydrocarbons and sodium to be present in Mrs. Nelson's replacement well.

Summary judgment should not be granted unless the case is clear and free from doubt. Mallesky v. Stevens, 427 Pa. 352, 235 A.2d 154 (1967). That is, summary judgment can only be properly invoked when it is clear that there are no factual issues that must be resolved at trial. City of Wilkes-Barre v. Ebert, 22 Pa.Cmwlth 356, 349 A.2d 520 (1975). Because DER's inconsistent answers to Ambrosia's interrogatories present the possibility that there is a factual issue in this case, and since summary judgment should only be granted in the clearest cases, the Board will deny Ambrosia's Motion for Summary Judgment.

ORDER

AND NOW, this 10th day of April, 1986, the Motion for Summary Judgment filed by Ambrosia Coal and Construction Company at EHB Docket No. 85-078-W is hereby denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: April 10, 1986

cc: **Bureau of Litigation**
Harrisburg, PA

For the Commonwealth, DER:
Joseph K. Reinhart, Esq.
Western Region

For Appellant:
Leo M. Stepanian, Esq.
STEPANIAN & MUSCATELLO
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KOCHER COAL COMPANY	:	
	:	
V.	:	**DOCKET NO. 82-073-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 22, 1986

OPINION AND ORDER

Synopsis

This is an appeal from an order of the Department of Environmental Resources (DER) directing appellant to discontinue mining activities being conducted outside the boundary of appellant's approved mining permits. Appellant had submitted an amended permit application to DER for additional acreage for its mining activities, and although DER had not approved the amended permit, appellant alleged that it believed that DER had approved it. During the pendency of this appeal DER did grant the permit for the additional acreage. Thus, there is no relief this Board can grant appellant with respect to the order that is the subject of this appeal, and therefore, the appeal is dismissed as moot.

OPINION

On March 1, 1982, Kocher Coal Company appealed a Cease and Desist order that the Department of Environmental Resources ("DER") issued to it on February 2, 1982, pursuant to the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1, et seq., ("Surface Mining Act"). The Cease and Desist order directed Kocher to discontinue all surface mining operations, which Kocher was conducting under Mine Drainage Permit No. 5471304, and Mining Permit Nos. 90-11(A), 90-11(A2), and 90-11(A3) at a site known as the Lincoln Strip in Tremont Township, Schuylkill County. The basis for the Cease and Desist order was Kocher's mining without a mining permit and bond on approximately 13 acres off the permitted area, in violation of section 4 of the Surface Mining Act, 52 P.S. §1396.4. DER, however, modified the Cease and Desist order by letter dated February 5, 1982, and allowed Kocher to continue its mining operations under all approved mining permits, but directed Kocher to discontinue the mining outside the boundary of the approved mining permits.

The unpermitted mining operation that Kocher had been conducting was the storage of materials from its surface mining operations on a site contiguous to a permitted storage site. Kocher had submitted to DER, on or about March 23, 1981, an amended permit application for the purpose of acquiring additional acreage for storage, and Kocher alleged that it believed that this permit application had been approved. DER, however, informed Kocher in January, 1982, that approval of the permit application was being withheld pending submission by Kocher of a landowner's consent.

Meanwhile, during the pendency of this appeal, DER issued a permit to Kocher for the additional acreage for storage. DER then indicated that it intended to file a civil penalty assessment against Kocher for its violation

of section 4 of the Surface Mining Act, 52 P.S. §1396.4, noted in the Cease and Desist order of February 2, 1982. At this point, however, DER has not assessed civil penalties against Kocher for this violation.

By letter dated September 29, 1983, DER informed the Board that this appeal is moot because the permit that was withheld for the additional acreage for storage was granted, and Kocher is not in "violator status." The only issue remaining in this case is the civil penalty assessment, and whether DER ultimately assesses a civil penalty is a decision that DER will make independent of this particular appeal.

No further action was taken in this appeal by either party or the Board following DER's September 29, 1983 letter until February 19, 1986, when the case was reassigned to Board Chairman Maxine Woelfling, who issued a rule upon Kocher Coal to show cause why this appeal should not be dismissed as moot as requested by DER in its letter dated September 29, 1983. The rule was returnable on March 17, 1986, and Kocher did not respond to it. The Board agrees with DER that this appeal is moot, and hereby dismisses it.

Since DER issued a permit to Kocher for the additional acreage for storage, Kocher is no longer in violation of 52 P.S. §1396.4, and there is no relief that this Board can grant Kocher from the Cease and Desist order dated February 2, 1982, which is the subject of this appeal. When, during the course of an appeal, events occur that render it impossible for the Board to grant any relief, the appeal must be dismissed as moot. Silver Spring Township v. DER, 28 Pa. Cmwlth. 302, 368 A.2d 866 (1977); Highway Auto Service v. DER, 1980 EHB 10, aff'd. 64 Pa. Cmwlth. 160, 439 A.2d 238 (1982). If DER decides to assess a civil penalty against Kocher for the violation of the Surface Mining Act noted in the Cease and Desist order of February 2, 1982, this would constitute an action of DER, separate from the Cease and Desist

order, which Kocher can appeal to this Board.

ORDER

AND NOW, this 22nd day of April, 1986, the appeal of Kocher Coal Company at EHB Docket No. 82-073-W is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For the Commonwealth:
John Wilmer, Esq.
DER/Eastern Region

For Appellant:
Edward Kopko, Esq.
Pottsville, PA

DATED: April 22, 1986

SMITHKLINE CHEMICALS	:	
	:	
V.	:	Docket No. 85-467-M
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued April 23, 1986

OPINION AND ORDER

Syllabus

This is an appeal of an NPDES Renewal permit. DER objected to Appellant's Request for Production of Documents and Admissions. DER is here ordered to reply to said requests.

The discovery period in a matter before the Board is 60 days, but it may be extended at the Board's discretion. 25 Pa. Code §21.111(a). Further, specific discovery requests will be viewed liberally so as not to allow the over broad use of privileges.

OPINION

The above-captioned appeal was filed on October 31, 1985. It is an appeal by SmithKline Chemicals (Appellant), of an NPDES Renewal Permit issued to it by the Department of Environmental Resources (DER). Appellant specifically complains that the effluent limitations for the discharge of wastewater contained in the permit are overly stringent. On December 30, 1986, DER received Appellant's Request for Production of Documents and Admissions. Said Request for Admissions concerned items including specific

requirements of the Permit, confirmation of earlier communications between the parties, and confirmation of certain statutory environmental requirements. The Request for Production of Documents primarily concerned communications between DER and the Delaware River Basin Commission, documents relating to communications between DER and Appellant, DER documents concerning the state of the Schuylkill River, and DER documents concerning the NPDES Permit in question. On January 21, 1986, DER filed Objections to said Request. On January 30, 1986, Appellant filed its response to said Objections. DER objected to both the Request for Production of Documents and for Admissions on the ground that the time for discovery had already lapsed. DER also objected to Appellant's Request for Production of Documents numbers 1 through 8 on the grounds that the items requested were protected by the privileges of attorney-client confidentiality, attorney work product, and confidentiality of a public informant. Further, DER objected to Document Requests 2, 3, 6, and 8 as unduly burdensome and/or oppressive. All of DER's objections are here dismissed.

Discovery is available to a party without leave of the Board for a period of sixty days after an appeal has been filed with the Board. 25 Pa. Code §21.111(a). The Board's rules do not set forth the method for counting the sixty-day period, but the general rules of administrative practice and procedure, 1 Pa. Code §§31.1-35.251, apply to the Board's proceedings, except where inconsistent with the Board's own rules. 25 Pa. Code §21.1(c); see York Resources v. DER, EHB docket 85-421-M issued December 2, 1985. In computing a proscribed time period the day of the triggering event is not included and the last day of the period is included, except as otherwise provided by law. 1 Pa. Code §31.12. In the present matter DER admits that it received the request for production on December 30, 1986, which was the

last day for valid service considering the October 31, 1985 filing date. It should also be noted that the date of service of one party upon another is the date a document is deposited in the U. S. mail, or is delivered in person. 25 Pa. Code §21.33(a). In the present matter service appears to have been effectuated on December 27, 1985. Thus, DER's objections as to timeliness are without merit.

DER's other objections also appear to be without merit. Having read Appellant's various discovery requests, the Board believes that on their face they are reasonable and not overly burdensome or oppressive. The Board does not believe that requiring compliance with Appellant's discovery requests will violate attorney-client confidentiality, attorney work product or the confidential public informant privilege as suggested by DER. Further, the documents requested all appear to be matters of public record, which are relevant and within DER's control. The work product doctrine and attorney-client privilege cannot be used to shield from discovery information to which opposing counsel otherwise would be entitled. Bradford Coal Co., Inc. v. DER, EHB docket 83-061-G (issued December 9, 1985). As the comment to Pa. R.C.P. 4003.3 indicates, despite a claim of work product, documents otherwise subject to discovery cannot be immunized by placing them in the "lawyer's file." The facts discovered by an attorney, whether from an expert or otherwise, on which allegations are based, are discoverable by the opposing party; the attorney work product limitation on discovery protects opinions, conclusions, impressions, and the like, but not the facts themselves. Claster v. Citizens General Hospital, 14 D. & C. 3d 243 (1980). Likewise, the attorney client privilege protects only disclosure of communications; it does not prevent disclosure of the underlying facts. Holowis v. Philadelphia Electric Co., 38 C. & C. 2d (1966). Information existing in the normal course of events apart

from the party's involvement in probable or actual litigation is subject to discovery.

The Board also recognizes that DER has at least a limited privilege to protect its confidential sources of information concerning violations of the laws administered by the Department, so as to insure a free flow of information concerning possible violations where it will not otherwise impinge the rights of the opposing party. See Commonwealth v. Dorsey, 266 Pa. Super. 442, 405 A.2d 516 (1979). However, the Board sees no connection between the present case, the documents requested and anyone who would seem to qualify as a confidential public informant.

In the unlikely event that the documents here requested contain privileged information, they are to be submitted to the board for in camera inspection. However, the Board cautions that while "fishing expeditions" will not be contenanced under the guise of discovery, requests for discovery must be considered with liberality as the rule rather than the exception. In Re Thompson's Estate, 206 A.2d 21, 416 Pa. 249 (1965).

ORDER

AND NOW, this 23rd day of April, 1986, DER is ordered to comply with the Appellant's discovery requests of December 30, 1986.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

cc: Bureau of Litigation

Kenneth A. Gelburd, Esq./DER Eastern

Thomas J. Stukane, Esq./For Appellant

DATED: April 23, 1986
nb

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EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

SUSSEX, INCORPORATED	:	
	:	
v.	:	**EHB Docket No. 82-238-M**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 23, 1986

OPINION AND ORDER

Synopsis:

The Board issued an adjudication dismissing the above-captioned appeal and subsequently granted appellant's Petition for Reconsideration and/or Reargument. The Board has reconsidered the adjudication, and, although it contains some inaccurate statements of law and fact, the result reached is correct. Therefore, the Board affirms the adjudication, and hereby dismisses the above-captioned appeal.

OPINION

On July 27, 1984, this Board issued an adjudication in the above-captioned matter, which dismissed the appeal of Sussex, Incorporated. Sussex, Incorporated v. Com., Dept. of Environmental Resources, 1984 EHB 355. On August 16, 1984, Sussex filed a Petition for Reconsideration of the adjudication, which the Board granted by order dated August 17, 1984.[1] In the Petition for Reconsideration, Sussex argues that the adjudication

[1] The Department of Environmental Resources ("DER" or the "Department") filed a Motion to Dismiss Petition for Reconsideration and/or Reargument on August 22, 1984.

contains, "two important fundamental errors of law, and several misstatements of fact." The Board has reconsidered the adjudication, and, although it contains some inaccurate statements of law and fact, the result reached is correct.

The adjudication dismissed Sussex's appeal from a refusal by the Department to approve a revision to the official sewage facilities plan of East Hanover Township, Dauphin County, pursuant to the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, as amended, 35 P.S. §§750.1-750-21, and the supporting regulations, 25 Pa.Code Chapters 71 and 73. The proposed revision concerned Section 6 of the Fairfield Subdivision in East Hanover Township. Sussex, the developer, previously received approval for five other sections of Fairfield. DER refused to approve the proposed revision concerning Section 6 on the basis that the soil conditions were inadequate to support the number and configuration of lots projected for the site, in view of both the short and long term sewage disposal needs of the development.

A hearing in this matter was held on November 18, 1983 before former Board Member Mazullo. The record was then transmitted to a Board appointed hearing examiner, who drafted the adjudication, which the Board issued, with modifications, under the signatures of former Board Member Mazullo and Board Member Gerjuoy.

Sussex argues, in its Petition for Reconsideration, that the first and most serious mistake of law that appears in the adjudication is the following statement of this Board's scope of review of actions by DER:

> 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 or other decision-making body can be shown to have occurred. (Garrett's Estate, 335 Pa. 287 (1939)).
>
> Sussex, 1984 EHB at 366.

Sussex is correct in its argument that the language in Garrett's Estate defining "abuse of discretion" does not accurately enunciate this Board's scope of review of actions of DER. The Administrative Code, 71 P.S. §510-21, empowers this Board to conduct hearings de novo in appeals from actions of DER, and to substitute its discretion for that of DER when DER acts with discretionary authority. Warren Sand and Gravel v. DER, 20 Pa.Cmwlth 186; 341 A.2d 556 (1975). In the instant appeal, the Board did conduct a hearing de novo, and after reviewing all the evidence that each party put on the record, the Board upheld DER's decision to disapprove Sussex's proposed revision to the official sewage facilities plan of East Hanover Township.

When DER reviews proposed revisions to sewage facilities plans, it is acting with discretionary authority.[2] Thus, in reviewing a DER decision to approve or disapprove a plan revision, this Board may substitute its discretion for that of DER. This Board, however, is not required to substitute its discretion for that of DER when it finds that DER did not abuse its discretion. Western Hickory Coal Company v. DER, 86 Pa.Cmwlth 562, 485 A.2d 877 (1984). In Western Hickory, the appellant argued, in an appeal to the Commonwealth Court from a decision of this Board, that this Board misapprehended the scope of its review by limiting its determination to that of whether DER had abused its discretion in fixing the amount of a civil

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2 Section 5(e) of the Sewage Facilities Act, 35 P.S. §750.5(e), authorizes the Department to approve or disapprove official plans for sewage systems.

penalty because Warren Sand & Gravel requires the Board to hold a hearing de novo, and determine the matter "on the merits," in disregard of DER's determination. The Commonwealth Court held that Western Hickory misapprehended Warren Sand & Gravel:

> We there wrote: "[i]f. . .DER acts with discretionary authority, then the Board, based upon the record before it, may substitute its discretion for that of DER." 20 Pa.Commonwealth Ct. at 204, 341 A.2d at 565. We emphasize the phrase "may substitute" because it imports that EHB is not required to substitute its discretion for DER's--that the Board may decide not to substitute its discretion for that of DER, in which case it is wholly appropriate for it to write that DER had not committed an abuse of discretion. The only evidentiary record was made by EHB whose findings were based on that record and whose discussion refers only to the facts and events described in that record. There is no reason why EHB should be required to express the basis for its conclusion not to substitute its discretion for DER's otherwise than that DER had not committed an abuse of discretion.

Western Hickory, 86 Pa.Cmwlth. at 565-566, 485 A.2d at 878-879 (footnote omitted).

Therefore, in reviewing a discretionary act of DER, it is appropriate for the Board to determine whether DER abused its discretion, which is what the Board did in the instant appeal.

Language used throughout the adjudication demonstrates that the Board applied the correct standard of review:

> The burden of proving that DER abused its discretion or exercised its duties or functions arbitrarily lies with Sussex as the appellant.

1984 EHB at 365 (footnote omitted).

> We therefore find that DER acted reasonably and neither abused its discretion, nor exercised its duties and functions arbitrar-

ily or capriciously, in disapproving the proposed Plan Revision for Fairfield Section 6, requiring that additional testing be conducted as a prerequisite to reconsideration of the revision, and insisting that the plan provide adequately for both primary and replacement septic systems on each lot.

1984 EHB at 368.

The foregoing considerations lead this Board to rule that DER neither abused its discretion nor arbitrarily exercised its powers or functions in this case.

1984 EHB at 371.

CONCLUSIONS OF LAW

. . .

3. This Board's review of a DER action is to determine whether DER committed an abuse of discretion or an arbitrary or capricious exercise of its duties or functions.

. . .

6. DER did not act arbitrarily or capriciously in requiring appellant to verify the existence of adequate suitable areas for primary and replacement disposal systems on each proposed lot, in light of the marginality of the soils and the slopes thereof.

7. It was not an abuse of discretion, nor was it an arbitrary or capricious exercise of its duties and functions, for DER to disapprove the proposed Plan Revision for Section 6 of the Fairfield Subdivision, or to require that additional testing be conducted as a prerequisite to reconsideration of the plan, or to insist that the plan provide adequately for both primary and replacement septic systems on each lot.

1984 EHB at 372-373.

The evidence of record supports the Board's conclusions. DER disapproved Sussex's proposed revision on the basis that soil conditions were inadequate to support the number and configuration of lots projected for the site, in view of both the short and long term sewage disposal needs of the development. The record showed that although soil testing demonstrated that

there was some adequate soil on each lot, the soil conditions varied, and it was not shown that there was enough adequate soil on each lot to support the proposed sewage disposal systems.

Sussex argues that the adjudication was also in error at Finding of Fact 21, and in the final paragraph of page 12 (1984 EHB at 366), because of the assumption that certain types of soil, specifically Comly and Brinkerton, are unsuitable, per se, for septic systems. Finding of Fact 21 refers to Exhibit A-8, which is a letter from DER to the East Hanover Township Board of Supervisors dated May 7, 1982. This letter refers to the regulations in 25 Pa.Code, Chapter 73, which were in effect when the letter was written, but these regulations have since been substantially revised. Under the former regulations, there were certain soil types that were considered to be unsuitable, per se, for elevated sand mounds. The current regulations, however, do not list certain soil types as being unsuitable, per se. Rather, the regulations contain requirements for slope, depth to limiting zone, and percolation rates, which are to be determined by on-site testing. 25 Pa.Code §73.14 and 73.55. The testing done in this case indicated that the slopes and depths to limiting zones were marginally acceptable at best. Thus, although the adjudication contains some oblique references to the superseded regulations, which were in effect when the Department first began reviewing this project, DER's decision and this Board's affirmance of DER's decision to disapprove Sussex's proposed revision were not based on the per se unsuitability of certain soil types on the site. Rather, the disapproval was based on the actual on-site testing, which showed that the site conditions were, at best, marginally suitable. Further, although some marginally suitable areas were found, it was not demonstrated that there is enough suitable soil on the site to support the proposed systems.

Sussex also argues that the adjudication was in error at page 13 (1984 EHB at 367) because it states there was only one test showing one area suitable for each lot. Sussex, however, misinterprets page 13 (1984 EHB at 367) of the adjudication. The adjudication takes the position that although the testing showed some adequate soil on each lot, Sussex has not demonstrated that there is enough adequate soil to support the proposed sewage disposal systems. The presence of an area on each lot with acceptable soil, whether this is demonstrated by one or several tests, is not enough to meet the legal requirements. Rather, there must be enough acceptable soil with uniformly acceptable depths to limiting zone, existing over an area with acceptable slope that is large enough to accommodate the bed or trench of at least one elevated sand mound as a primary system, and one as a replacement system. Sussex has not demonstrated that these requirements are met.

The next error of law that Sussex finds in the adjudication is the citation, in Finding of Fact 15, to 25 Pa.Code §71.15(c)(3) as authority for requiring the current sewage enforcement officer to verify testing on the site. Sussex is correct that this section is not applicable to this case. Nevertheless, this error had no impact on the result of the adjudication. The Board considered all the data submitted, and did not base its decision on whether testing was done by the current or previous sewage enforcement officer. Rather, the basis for the Board's decision was that all of the data submitted demonstrated that DER was justified in disapproving Sussex's proposed revision.

The final argument that Sussex makes in its Petition for Reconsideration is that the Board's use of a hearing examiner to write the adjudication violates the Administrative Agency Law (2 Pa. C.S.A. §§504, 505) and violates Sussex's due process rights because the Board did not consider

the demeanor of the witnesses at the hearing in reaching its decision. The Board's enabling legislation, however, authorizes the Board to employ hearing examiners. 71 P.S. §510-21(f). In this case, Board Member Mazullo conducted the hearing, a hearing examiner drafted the adjudication, and then Board Member Mazullo and Board Member Gerjuoy both signed the adjudication after making some modifications. Thus, the Board Member who held the hearing and observed the demeanor of the witnesses reviewed and signed the adjudication. Therefore, the Board did consider the demeanor of the witnesses. There was nothing improper or unfair in the procedure followed in this appeal, in which a hearing examiner, acting much as a law clerk would, drafted an adjudication that was reviewed and approved by a majority of the Board, including the Board Member who conducted the hearing. See e.g. Com., Dept. of Transportation v. Mitchell's Structural Steel Painting Co., 18 Pa.Cmwlth 591, 336 A.2d 913 (1975) (holding that a change in membership of Board of Arbitration of Claims between date of hearing and date of decision did not necessitate remand). See also United States Steel Corporation v. DER, 7 Pa. Cmwlth 429, 300 A.2d 508 (1973) (holding that no unfairness was shown in practice whereby testimony and evidence were presented to hearing examiner of DER, after which the EHB rendered its decision based upon record made).

ORDER

After reconsidering the adjudication issued on July 27, 1984 in the above-captioned matter, the Board affirms its decision and hereby dismisses the above-captioned appeal.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: April 23, 1986

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Winifred M. Prendergast, Esq.
Central Region
For Appellant:
Eugene E. Dice, Esq.
Harrisburg, PA

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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B & D COAL COMPANY :

:

: Docket No. 86-137-G

: (Issued April 25, 1986)

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO DISMISS

Synopsis

A ruling on DER's Motion to Dismiss is deferred pending receipt of an amended Notice of Appeal from the appellant. Section 1396.4(b) of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. requires DER to reach a decision on an application for release of surface mining bonds within a specified time period, provided certain procedural requirements are met. There are no allegations on the record here which go to these procedural requirements, however. Therefore, appellant is granted leave to amend its Notice of Appeal to provide, if possible, the lacking allegations.

OPINION

On March 10, 1986, B & D Coal Company ("appellant") filed an appeal with the Board from the alleged "refusal of the Bureau of Mining and Reclamation, Department of Environmental Resources to release various reclamation bonds on Appellant's mining permits." Under the Board's rules governing the form and content

of Notices of Appeal, where the appellant has received written notice of the DER action at issue, it is required to attach a copy of such notification to the appeal form. 25 Pa. Code §21.51(d). Appellant stated that it was unable to do so because the subject of the appeal was DER's alleged refusal to take action. DER has moved to dismiss the appeal, arguing that DER has taken no appealable action and that, therefore, the Board lacks jurisdiction.

The Board's jurisdiction derives from 71 P.S. §510-21 (Section 1921-A of the Administrative Code) which provides in relevant part as follows:

> (a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388) known as the Administrative Agency Law, on any order, permit, license or decision of the Department of Environmental Resources.
>
> * * *
>
> (c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board. . .

Section 21.2 of the Board's rules, 25 Pa. Code §21.2, defines "action" as:

> Any order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person. . .

It is well established that in the absence of DER "action", as defined above, the Board is without jurisdiction. Gateway Coal Company v. DER, 41 Pa. Cmwlth. 442, 399 A.2d 802 (1979); Sunbeam Coal Corp. v. DER, 8 Pa. Cmwlth. 622, 304 A.2d 169 (1973). The Board, however, has been willing to consider the argument that where DER fails to take action for an extended period of time,

under circumstances where it has a duty to act, this failure to act at some point must be termed a refusal to act affecting rights, duties, liabilities and the like, and thereby constituting an appealable action. William Fiore v. DER, 1984 EHB 790 (Opinion dated September 6, 1984).

DER's duty to act upon an application for a bond release is established by the following provision of the Surface Mining Conservation and Reclamation Act:

> The applicant shall give public notice of every application for a permit or bond release under this act in a newspaper of general circulation, published in the locality where the permit is applied for, once a week for four consecutive weeks. . .In all cases involving surface coal mining operations, any person having an interest which is or may be adversely affected shall have the right to file written objections to the proposed permit application or bond release within thirty (30) days after the last publication of the above notice which shall conclude the public comment period. Such objections shall immediately be transmitted to the applicant by the department. If written objections are filed and an informal conference or a public hearing requested within the public comment period, the department shall then hold an informal conference or a public hearing in the locality of the surface mining operation. In the case of bond release applications, such hearings or conferences shall be held within thirty (30) days from the date of request for such hearings or conferences: Provided, however, that all requests for such hearings or conferences that are filed prior to the tenth day following the final date of publication shall have a constructive date of filing as of the tenth day following the final date of publication of such notice. The department shall notify the applicant of its decision within thirty (30) days of such hearing or conference. If there has been no conference or hearing, the department shall notify the applicant for a bond release of its decision within sixty (60) days of the date of the filing of the application.
> 52 P.S. §1396.4(b) (emphasis added).[1]

1. The quoted language has been a portion of the Surface Mining Conservation and Reclamation Act since at least October 10, 1980.

The underscored language of section 1396.4(b) apparently contemplates that DER will reach a decision on an application for bond release within a specific time period. No such duty would arise, however, unless the applicant had complied with the procedural requirements, e.g., publication in a local newspaper, set forth in that section of the Act. In addition, 25 Pa. Code §86.171 specifies certain requirements which must be met in order for a mine operator to obtain release of bonds.

The record before us is devoid of allegations[2] concerning appellant's compliance with these procedural prerequisites to bond release. Appellant has not alleged that it applied for bond release (and if so, when this occurred), that it published the fact of such application in a local newspaper for the requisite period of time, or that all of the requirements of §86.171 have been met. In addition, there has been no statement made concerning whether or not objections were filed or an informal conference or a public hearing was requested by a party pursuant to §1396.4(b), supra. (This latter fact would be relevant to a determination of the period of time within which DER was to notify the applicant of its decision on the bond release.) Consequently, we are unable to determine whether DER actually was under a duty to act concerning release of appellant's bonds. If it was not, then we cannot deem its failure to take such action to be appealable. On the other hand if appellant has fulfilled all of the requirements specified in §1396.4(b) and 25 Pa. Code §86.171, and the time periods for a DER decision set forth in §1396.4(b) have elapsed we would be willing to consider the possibility

2. For present purposes, we are treating DER's Motion to Dismiss as a Motion for Judgment on the Pleadings. Pa.R.C.P. 1034. In ruling upon such a motion the Board cannot rule upon issues of fact [Goodrich Amran §1034(a):1] and must accept as true, for purposes of such ruling, the allegations of the non-moving party. [Goodrich Amran §1034(b):1]

that DER's failure to reach a decision on the requested bond release has become an appealable action. Therefore, we defer our ruling upon DER's motion to dismiss pending receipt of an amended Notice of Appeal from appellant, as authorized by the accompanying order.

ORDER

WHEREFORE, this 25th day of April, 1986 it is ordered that:

1. The Board's ruling upon DER's Motion to Dismiss is deferred for the present.

2. Appellant is hereby granted leave to amend its Notice of Appeal to supply, if possible, the factual allegations which the Board, in the foregoing opinion, has noted are lacking. Said amended Notice of Appeal must be filed within twenty days of this date. DER will have 15 days to amend its Motion to Dismiss in the light of Appellant's amended Notice of Appeal. The Board will rule upon DER's Motion to Dismiss as soon as possible after the above deadlines have passed.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy, Member

DATED: April 25, 1986
cc: Bureau of Litigation
For Appellant:
Leo M. Stepanian, Esq., Butler, PA
For the Commonwealth, DER:
Timothy J. Bergere, Esq., Western Region

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RIGHT OF WAY PAVING COMPANY, INC.

:

:

: Docket No. 86-079-G
: Issued April 25, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

The petition to intervene filed in this appeal by the surety on the bonds which DER has forfeited is denied for the present. The surety, however, is granted leave to file an amended petition which satisfies the requirements of 25 Pa. Code §21.62(a).

OPINION

On January 14, 1986 DER sent Right of Way ("ROW") a certified letter declaring its intention to forfeit Surety Bond 2453829, because of ROW's alleged violations of the Surface Mining Conservation and Reclamation Act, 52 P.S.1396.1 et seq. The bond had been posted by ROW as part of its surface mining permit applications, under Mine Drainage Permit 3275SM21 and mining permit 1382-1, for surface mining in Fallowfield Township, Washington County. The American Insurance Co. ("AIC"), the surety on the aforementioned bond, also received certified mail notification of the intended forfeiture.

ROW filed a timely appeal of DER's forfeiture letter, at the above-captioned

docket number. AIC also appealed the forfeiture letter, in a separate appeal docketed at 86-106-G. That appeal was untimely, however, and has been dismissed by an Order of this Board dated April 4, 1986. Prior to that dismissal, in an answer to Rule to Show Cause why its appeal at 86-106-G should not be dismissed as untimely, AIC petitioned to intervene in the instant 86-079-G appeal. ROW has not objected to this request to intervene; DER has objected. All other parties in this 86-079-G appeal having responded, now shall rule on AIC's intervention request.

Petitions to intervene in actions before this Board are governed by 25 Pa. Code §21.62, and by the provisions of 1 Pa. Code Chapter 35 which supplement §21.62 [see §21.62(e)]. The intervention requirements spelled out by these rules are similar to, but not identical with, the criteria for intervention in civil actions before the Pennsylvania Courts, as prescribed by Pa.R.C.P. Rule 2327. Pa.R.C.P. Rule 2327 reads:

> Rule 2327. Who May Intervene
> At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if. . .
>
> (3) such person could have joined as an original party in the action or could have been joined therein;

Under Pa.R.C.P., therefore, a person may intervene in a civil suit filed by another party, even though such person could have filed the suit himself but chose not to do so. Neither 25 Pa. Code §21.62 nor the sections of 1 Pa. Code Chapter 35 to which §21.62 refers contain language like Rule 2327(3) quoted supra, explicitly permitting intervention by a person who could have been an original party. It is our belief, however, that if anything our rules are intended to be more permissive of intervention than the Rules of Civil Procedure. This belief stems from the nature of administrative proceedings, which are expected to be less formal than

civil court proceedings and from a careful comparison between our rules and Pa. R.C.P. Rule 2327. For example, our rule §21.62(c) states:

> (c) The Board shall not deny the right to intervene on the basis that the proposed intervenor does not have a proprietary interest affected by the action appealed.

§21.62(c), which means that intervention cannot be denied on the grounds that the would-be intervenor would not have had standing to appeal in his own right, has no counterpart in Rule 2327.

We conclude, therefore, that DER's main objection to AIC's intervention--namely that AIC by intervening is attempting to circumvent its original failure to timely appeal the January 14, 1986 forfeiture letter -- lacks merit. Whether or not AIC took advantage of its original right to appeal should not affect our decision about its right to intervene. On the other hand, we agree with DER that intervention cannot be employed to obviate the deserved consequences of failure to file a timely appeal. For reasons explained infra, we presently defer a ruling on AIC's request to intervene. But we now do state that AIC's intervention, if allowed, definitely will be in a capacity subordinate to that of the appellant ROW, consistent with Pa.R.C.P. Rule 2329(1) and pertinent interpretive court decisions. In addition, the Board will suitably prescribe the terms and conditions of intervention, as per 25 Pa. Code §21.62(b).

Turning now to AIC's stated grounds for intervention, we agree with DER that those grounds are insufficient under §21.62(a). In particular, AIC has not presented a satisfactory statement of the reasons why its interests in this appeal will not be adequately represented by ROW, with whom -- on first sight -- AIC's interests seem to completely coincide. AIC's only assertion in this regard, in paragraph 4 (C) of its request for intervention, is:

(C) While the interest of the American Insurance Company is in many ways similar to Right of Way Paving Company, Inc., its (sic) is not the same and cannot fully be protected by Right of Way Paving Company, Inc.

This assertion obviously is purely conclusory and is otherwise totally uninformative.

Nevertheless, because we recognize the possibility that AIC's interests really may be inadequately protected by ROW, and because this Board consistently attempts to interpret its rules in accordance with the instruction of 1 Pa. Code §31.2, we shall give AIC an opportunity to amend -- and if possible improve -- its request for intervention before finally ruling on that request.

ORDER

WHEREFORE, etc., it is ordered that AIC, if it wishes, may file an amended petition for leave to intervene, consistent with the requirements of 25 Pa. Code §21.62, within 10 days of the date of this Order. DER shall file renewed objections, if any, to AIC's intervention within 10 days after receipt of AIC's amended petition. The Board will rule on AIC's petition as soon as possible after the due date of DER's renewed objections. In the meantime, ROW's and DER's prehearing memoranda in the above-captioned appeal remain due as previously scheduled.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy, Member

DATED: April 25, 1986
cc: Bureau of Litigation
For Appellant:
Gregg M. Rosen, Esq., ROSEN & MAHFOOD, Pittsburgh
For the Commonwealth, DER
Joseph K. Reinhart, Esq., Western Region

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BELL COAL COMPANY	:	
	:	
V.	:	**Docket No. 85-257-W**
	:	**Issued: April 28, 1986**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER

Synopsis

This is an appeal of a compliance order issued by the Department of Environmental Resources ("Department") to the appellant pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (the Clean Streams Law"); the Coal Refuse Disposal Control Act, the Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.51 et seq. (the Coal Refuse Disposal Control Act"); the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("the Surface Mining Conservation and Reclamation Act"); and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 ("the Administrative Code"). The Department's motion to dismiss the appeal is granted because the appeal was not timely filed in accordance with 25 Pa. Code §21.52.

OPINION

The Department, in a compliance order dated May 17, 1985, directed the appellant, Bell Coal Co., to cease operations on Permit 7275SM131667MO49 because of Bell's failure to comply with a May 10, 1985 compliance order relating to the same site. The order was issued pursuant to §§5, 316, 402, and 610 of the Clean Streams Law, §§4.2 and 4.3 of the Surface Mining Conservation and Reclamation Act, §§3.1 and 9 of the Coal Refuse Disposal Control Act, and §1917-A of the Administrative Code. A Notice of Appeal challenging the May 17, 1985, compliance order was filed with the Board and docketed as a skeleton appeal on June 21, 1985. The Notice of Appeal indicated that Bell Coal Co. received the Department's compliance order on May 20, 1985. The appeal was perfected on June 28, 1985. The Department, in a motion filed December 18, 1985, has requested the Board to dismiss the appeal as untimely filed. The Board notified appellant of the Department's Motion to Dismiss and informed it, in a letter dated December 19, 1985, that it must respond to the Department's motion on or before January 8, 1986. The Board has not received a response from Appellant.

Rule 21.52 of the Board's rules of practice and procedure provides that the jurisdiction of the Board does not attach to an appeal from an action of the Department unless the appeal is filed with the Board within 30 days after the appellant has received written notice of the Department's action. The Commonwealth Court, in a line of cases beginning with Rostosky v. Comm. of Pa., DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976), has held that the failure to timely file an appeal in accordance with the Board's regulations deprives the Board of jurisdiction to hear an appeal.

In the matter before the Board, Bell Coal Co. has stated that it received the Department's May 17, 1985 compliance order on May 20, 1985. Its

appeal was filed on June 21, 1985, thirty-two (32) days after it had received written notice of the compliance order.[1] Since Appellant did not file its appeal with the Board within the mandated appeal period, this Board is without jurisdiction to hear it, and the appeal must be dismissed. Edward W. Beedle v. DER, EHB Docket No. 85-512-W, Opinion and Order issued February 14, 1986.)

ORDER

AND NOW, this 28th day of April, 1986, it is ordered that the Department's motion to dismiss this appeal is granted, and the appeal of Bell Coal Co. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For the Commonwealth:
John Wilmer, Esq./Eastern

For the Appellant:
Anthony Kovalchick, Owner
Bell Coal Company

DATED: April 28, 1986

[1] In its Motion to Dismiss the Department alleges that Bell Coal Co. noted on a certified mail receipt that the order was received on May 21, 1985. A copy of the certified mail receipt was not attached to the motion. The Board has no proof of this receipt, but even if May 21, 1985 is the date of notice, the appeal is still untimely.

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MAXINE WOELFLING, CHAIRMAN
EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

PITTSBURGH COAL AND COKE, INC.	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**EHB Docket No. 85-430-W**
and	:	
VICO, INC., Permittee	:	Issued: April 29, 1986
and	:	
STANDARD AGGREGATES, INC., Intervenor	:	

OPINION AND ORDER SUR
PETITION FOR SUPERSEDEAS

Synopsis:

A petition for supersedeas is denied because there is little likelihood of success on the merits. The Department's amendment of a mining permit to conform it to the terms and conditions of the mine drainage permit issued for the same operation merely corrects a clerical error. Because the correction is not a substantive modification of the permit, it was not subject to the provisions of a subsequently enacted statute.

OPINION

Pittsburgh Coal and Coke, Inc. initiated this matter by the filing of a Notice of Appeal with the Board on October 17, 1985. The notice of appeal challenged the Department's September 24, 1985 letter to Leonard Stephens of Pittsburgh Coal and Coke informing him that the Department had corrected Mining Permit 30206-26800401-01-0 ("the mining permit"), which had been issued to VICO, Inc. to conduct noncoal surface mining at a site in

Georges Township, Fayette County, commonly known as the Laurel Quarry. Pittsburgh Coal and Coke owns a portion of the property encompassed by Mine Drainage Permit No. 26800401 ("the mine drainage permit") and the mining permit. The Department's stated reason for the correction was to conform the mining permit to the provisions of the mine drainage permit which authorized terrace backfilling as the means of reclamation. Pittsburgh Coal and Coke alleged that, in issuing the corrected mining permit, the Department had disregarded various procedural and substantive requirements in the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("the Clean Streams Law") and the Non-Coal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, 52 P.S. §3301 et seq. ("the Noncoal Act"). A Petition for Supersedeas was filed with the Board on October 24, 1985.

On November 12, 1985, Standard Aggregates, Inc., which is presently conducting mining at the Laurel Quarry, filed a Petition to Intervene with the Board. The petition was amended on November 21, 1985, and intervention was granted by the Board in an order dated November 26, 1985. Shippingport Sand and Gravel and VICO, Inc. entered into an agreement dated December 27, 1984, effective January 1, 1985,[1] regarding the operation of the Laurel Quarry. Shippingport Sand and Gravel was obligated by the agreement to reclaim the Laurel Quarry in accordance with all applicable regulatory requirements. The name of Shippingport Sand and Gravel was changed to Standard Aggregates, Inc. in 1985; Standard Aggregates, Inc. is a subsidiary of Duquesne Slag.

A supersedeas hearing was held on December 5, 1985, and briefs were

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[1] The dates on the Board's copy of the agreement are nearly illegible.

filed by the parties after receipt of the hearing transcript. A motion to dismiss was filed by Standard Aggregates on March 10, 1986, and joined in by VICO, Inc. on March 10, 1986.[2] By order dated April 16, 1986, supersedeas was denied, with an opinion to follow. This opinion is a confirmation of that order of denial.

Rule 21.78(a) of the Board's rules of practice and procedure sets forth the standards governing the denial or grant of a supersedeas:

> §21.78. Circumstances affecting grant or denial.
> (a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the following factors:
> (1) Irreparable harm to the petitioner.
> (2) The likelihood of the petitioner's prevailing on the merits.
> (3) The likelihood of injury to the public.

A party seeking a supersedeas must satisfy all three standards enumerated in Rule 21.78(a). Carroll Township Authority v. DER, 1983 EHB 239, 240. However, it is not necessary to determine whether petitioner will suffer irreparable harm or whether injury to the public will occur if the Department had no underlying authority to take the action at issue before the Board. WABO Coal Company v. DER, EHB Docket No. 85-416-W (Opinion and Order issued January 24, 1986).

The parties to this appeal have strongly divergent views as to the nature of the Department action before the Board. The Permittee, Intervenor, and the Department are of the view that the action was nothing more than the correction of a clerical error, a purely ministerial act by the Department. Appellant, on the other hand, advances the proposition that the action was a

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[2] That motion will be dealt with in a separate Opinion and Order.

substantive modification of the mining permit and, as such, is subject to the provisions of the Noncoal Act.[3] In particular, because terracing is the restoration method authorized by the correction, §7(c)(2) of the Noncoal Act would require the consent of the landowner, which is, in this case, the Appellant. Public notice of the modification would have to be given in accordance with §10 of the Noncoal Act, and the Department would be required, under §8, to determine whether the permittee or any related party was in violation.[4]

The Permittee and the Intervenor contend that the Noncoal Act does not apply because §24 of the statute provides that "all orders, permits, licenses, decisions, and actions of the Department. . .under the Surface Mining Act remain in effect". . .until modified, repealed, suspended, superseded, or otherwise changed. . ." under the Noncoal Act. They further recommend that this was not a modification pursuant to the Noncoal Act.[5]

The Board is hesitant to impose the strained interpretation of the Department's action being urged by Appellant. While the Board cannot condone sloppy or negligent administration of a program, it must, under the facts presented herein, view the Department action as a correction of a clerical error, a mere ministerial act. If we did otherwise, permittees, through no fault of their own, would be subjected to complex procedures for the

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[3] Prior to the enactment of the Noncoal Act, surface noncoal mining was regulated pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("the Surface Mining Act").

[4] If the correction is deemed substantive, but the Noncoal Act is deemed inapplicable, a similar requirement is imposed under the Surface Mining Act.

[5] They urge that no action can be taken under the Noncoal Act until rules and regulations are prolulgated, but that issue need not be decided in this context.

rectification of minor and inconsequential errors, thereby suffering losses in resources and efficiency. No environmental protection purpose would be served, either, and Department resources would be diverted away from more serious matters. This conclusion in this matter is supported by several considerations.

The Mine Drainage permit issued in this instance unambiguously provided for terracing as the method of restoration. Special condition 4 states:

> This permit is approved for:
> a. ____ approximate original contour.
> b. _x_ terrace
> c. ____ water impoundment
> d. ____ other (solid waste disposal sites)
> reclamation of the area affected by this operation.
> (Intervenor's Exhibit 1)

The mine drainage permit, which was issued pursuant to §315 of the Clean Streams Law, regulates the operation of a mine from an overall hydrologic, hydrogeologic, and pollution standpoint. The physical operation of the mine and its manner of restoration directly affect the quality and quantity of surface and ground waters. The regulatory schemes under the Clean Streams Law and the Noncoal and Surface Mining Acts must be closely coordinated and fully consistent, both as a practical matter and by operation of statute.

The mining permit changed by the Department was internally inconsistent. It provided that mining was to be performed in accordance with the terms and conditions of the mine drainage permit, which authorized terracing, yet, it also noted that restoration was to be to approximate original contour. The mine drainage and mining permits must be construed in pari materia. The mine drainage permit was issued on May 21, 1981, by T. P. Vayansky, as was the mining permit. Because the permits were issued on the same day by the same Department official and because the mining permit was

required by its own terms and conditions to be consistent with the mine drainage permit, we believe that the provision of the mining permit requiring restoration to approximate original contour was a clerical error and that correction of the error did not subject the permittee to the Noncoal Act.

We have been unable to discover any case law directly on point. However, we believe that Boyd v., St. Bd. of Osteopathic Examiners, 12 Pa.Cmwlth 620, 317 A.2d 307 (1974) may be apposite. In Boyd, a doctor of osteopathy whose license was suspended alleged that his suspension was improper because the Board hearing his case was comprised of seven doctors of osteopathy. The relevant statute required that the Board be comprised of two medical doctors and five doctors of osteopathy. Two of the doctors on the Board were, through a clerical error, incorrectly identified as doctors of osteopathy, when they were, in fact, medical doctors. Commonwealth Court held that:

> It is clear that a clerical error which does not prejudicially affect a complainant cannot be the basis of a reversible error. Sharp's Convalescent Home v. Department of Public Welfare, 7 Pa.Commonwealth Ct. 623, 300 A.2d 909 (1973). And it is equally clear here that the clerical error did not change the fact that the composition of the Board met all legal requirements.
>
> 12 Pa.Cmwlth Ct. at 625-626, 317 A.2d at 309-310.

Here, we cannot conclude that there was any prejudicial effect on Appellant from the Department's action. Appellant was approached by the Permittee in 1980 for the purpose of obtaining landowner consent for the proposed operation. Appellant, through its representatives and agents, has been on the site several times between 1982 and 1985 and certainly should have been aware of the nature of the operation and the type of reclamation being

employed. And, Appellant, as landowner, has been regularly receiving royalties from the operation.

Because the Department's action is the mere correction of a clerical error in a permit issued pursuant to the Surface Mining Act, it was not subject to the Noncoal Act. Thus, there is little likelihood that Appellant will succeed on th merits of its argument and it is unnecessary to address harm to the Appellant or injury to the public.

ORDER

AND NOW, this 29th day of April, 1986, it is ordered that the Board's order of April 16, 1986 is affirmed, and Appellant's Petition for Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: April 29, 1986

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Joseph K. Reinhart, Esq.
Western Region
For Appellant:
Robert P. Ging, Jr., Esq.
Pittsburgh, PA
For VICO, Inc.:
William M. Radcliff, Esq.
Uniontown, PA
For Standard Aggregates, Inc.:
Gregg M. Rosen, Esq.
Pittsburgh, PA

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483.

MAXINE WOELFLING, CHAIRMAN
EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

SCHELLSBURG BOROUGH COUNCIL and OWEN SAYLOR	:	
v.	:	**EHB Docket No. 85-526-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 1, 1986

OPINION AND ORDER

Synopsis:

This is an appeal of the Department of Environmental Resources' ("Department") disapproval of a proposed revision to the Schellsburg Borough's official plan submitted pursuant to the provisions of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L.(1965) 1535, as amended, 35 P.S. §750.1 et seq. ("the Sewage Facilities Act"). The appeal is dismissed as untimely because, although the Department received a copy of the appeal within the 30 day appeal period, the appeal was not filed with the Board within that period.

OPINION

The Department, in a letter dated August 20, 1985, disapproved a proposed revision to the Schellsburg Borough Sewage Facility Plan which would have accommodated a small-flow discharge system on property in the borough owned by Owen Saylor. The disapproval was issued pursuant to §5 of the Pennsylvania Sewage Facilities Act and the rules and regulations adopted thereunder at 25 Pa.Code §71.16. A Notice of Appeal seeking review of the

disapproval was filed with the Board on December 5, 1985 by Schellsburg Borough Council and Owen Saylor. The Notice of Appeal indicated that Appellants had received notice of the Department action on or about August 20, 1985. The transmittal letter accompanying the appeal stated that a copy of the appeal had been received by the Department's Bureau of Litigation on September 19, 1985. By motion filed April 3, 1986, the Department requested the Board to dismiss the appeal as untimely filed. Appellants responded to the motion on April 16, 1986.

Rule 21.52(a) of the Board's rules of practice and procedure provides that jurisdiction of the Board to hear an appeal shall not attach unless "the appeal is in writing and it is filed with the Board within 30 days after the party appellant has received written notice of such action. . ." The mailing of a Notice of Appeal to the Department within the appeal period prescribed by Rule 21.52(a) is not sufficient to confer jurisdiction upon the Board to hear an appeal. Hillcrest Construction, Inc. v. DER, 1984 EHB 663. The Board is independent from the Department in everything except budgetary matters. See §503 of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended 71 P.S. §183.

It is Appellant's responsibility to assure that the Notice of Appeal is filed with the Board within the appeal period. Because the appeal in this matter was not filed with the Board until over three months after the appeal period had expired and Appellants have alleged no facts warranting the grant of an appeal nunc pro tunc, this appeal must be dismissed as untimely filed.

ORDER

AND NOW, this 1st day of May, 1986, it is ordered that the Department's motion to dismiss this appeal is granted, and the appeal of the Schellsburg Borough Council and Owen Saylor is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: May 1, 1986

cc: **Bureau of Litigation**
Harrisburg, PA

For the Commonwealth, DER:
George Jugovic, Jr., Esq.
Central Region

For Appellant:
Donley C. Logue, Jr., Esq.
Bedford, PA

bl

GEORGE AND BARBARA CAPWELL	:	
	:	
V.	:	**Docket No. 83-081-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 1, 1986

OPINION AND ORDER

Synopsis

The Board's rule, 25 Pa. Code §21.111(a) allows parties to conduct discovery without leave of the Board for a period of 60 days after the filing of an appeal. The Board is relatively quick to grant reasonable extensions. However, after a period of three years, some significant new development would be needed to cause the Board to reopen discovery.

OPINION

The above-captioned appeal was filed on April 28, 1983. George and Barbara Capwell (Appellants) are appealing the denial by the Department of Environmental Resources (DER) of their application for a permit to construct and maintain a solid-fill stationary dock along Quaker Lake in Silver Lake Township, Susquehanna County. On January 29, 1986, DER petitioned this Board for allowance of discovery. On March 3, 1986, Appellants moved to have said petition denied. The Board here grants Appellants' motion and denies DER's petition for discovery.

The Board's rule, 25 Pa. Code §21.111(a), permits parties to conduct discovery without leave of the Board for a period of 60 days after the filing

of an appeal. The Board has been relatively quick to grant reasonable extensions to the allotted discovery period where sufficient cause is shown by the requesting party. In the present situation, DER is requesting leave for further discovery almost three years after the discovery period expired. This request for discovery was made despite DER's explicit statements in letters to the Board dated February 24, 1984 and August 21, 1985 that it was then ready to proceed with this matter. Barring some significant new development, three years should not be needed to complete discovery. Inasmuch as no compelling reason has been presented to allow discovery at this late date and because there has already been an almost three-year delay in bringing this appeal to a hearing, DER's petition for discovery is denied.

ORDER

AND NOW, this 1st day of May, 1986, DER's petition for allowance of discovery is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

cc: Bureau of Litigation

For the Commonwealth:
Winifred M. Prendergast, Esq.
Central Region

For Appellant:
George and Barbara Capwell
Brackney, PA

DATED: May 1, 1986

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

DELTA MINING, INC.

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 85-484-G

Issued: May 1, 1986

OPINION AND ORDER

Synopsis

This appeal of DER's denial of a surface mining permit is dismissed; the appeal was not filed within thirty days of the date upon which appellant received notice of the DER action and therefore the Board lacks jurisdiction. 25 Pa. Code §21.52(a); Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

Appellant's service of the Notice of Appeal upon the DER Bureau of Litigation instead of filing the appeal with the Board will not justify the allowance of the appeal nunc pro tunc. The Notice of Appeal form is not misleading. Only a breakdown in the procedures of the Board will result in the grant of permission to appeal nunc pro tunc.

Opinion

This appeal of DER's denial of appellant's surface mining permit application was filed with the Board on November 4, 1985. The Notice of Appeal states that

appellant received notice of the denial on September 30, 1985. The Board's rules, 25 Pa. Code §21.52(a) provide that "jurisdiction of the Board shall not attach to an appeal unless the appeal . . . is filed with the Board within thirty days after the party appellant has received written notice of such action." Accordingly, on February 21, 1986, the Board ordered appellant to show cause why the appeal should not be dismissed as untimely.

In its response to the Board's order appellant argues, first, that the thirty day rule for the filing of appeals is a statute of limitations which can be tolled and not a jurisdictional limit on the right to appeal. Appellant relies upon the following provision of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4(b) ("SMCRA"):

> The applicant, operator, or any person having an interest which is or may be adversely affected by an action of the department to grant or deny a permit or to release or deny release of a bond and who participated in an informal hearing held pursuant to this subsection or filed written objections before the close of the public comment period, may proceed to lodge an appeal with the Environmental Hearing Board in the manner provided by law . . .

Appellant contends that since section 4(b), supra, establishes no time limit for taking an appeal from the denial of a permit, the Board should allow this appeal despite the fact that it was filed more than thirty days after appellant received the permit denial.

This argument ignores the fact that section 4(b) requires that a party file the appeal "in the manner provided by law." Appeals from actions of DER are governed by section 1921-A of the Administrative Code, 71 P.S. §510-21, which provides:

> (a) the Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945

(P.L. 1388), known as the "Administrative Agency Law" on any order, permit, license or decision of the Department of Environmental Resources.

The Environmental Quality Board has established the thirty day appeal period set forth in 25 Pa. Code §21.52(a) pursuant to the statutory authority of section 510-21(a) supra. See Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761, 763, n.4 (1976). Contrary to appellant's assertion that this thirty day filing requirement is not a prerequisite to the Board's jurisdiction, the court in Rostosky held:

> Where a statute has fixed the time within which an appeal may be taken, we cannot extend such time as a matter of indulgence. . .Here the time was established by regulations promulgated pursuant to statute [71 P.S. §510-21(e)] rather than by a statute itself. However, a regulation so promulgated has the force of law and is binding as a statute on a reviewing court. . .The untimeliness of the filing deprives the Board of jurisdiction. 364 A.2d at 763. (emphasis added).

As the above quote makes clear, where the appellant has not filed its appeal within the thirty day period prescribed by 25 Pa. Code §21.52(a), the Board has no discretion to extend the period and exercise jurisdiction over the case.

Where the untimely filing is a consequence of a breakdown in the Board's procedures, however, the appeal may be allowed nunc pro tunc. Petricca v. DER, 1984 EHB 519 (Opinion dated January 13, 1984). Appellant's second argument is that the Board's Notice of Appeal form misled him into believing that service of the Notice of Appeal upon the DER Bureau of Litigation would suffice to meet the requirements of 25 Pa. Code §21.52(a), and that this constitutes a deficiency of the sort which would justify the allowance of an appeal nunc pro tunc. This argument is without merit.

The Board's Notice of Appeal form bears the following statement immediately below the Board's address which appears at the top center portion of the form:

> Any party desiring to appeal any action of the Department of Environmental Resources must file its Appeal with this Board at the above address within thirty days from date of receipt of notification of the Action.

The quoted instruction appears as the first line on the Notice of Appeal form; the underscored portion is printed on the form in italics. The last paragraph of the Notice of Appeal form lists the entities for whom a copy of the appeal must be sent, one of whom is DER's Bureau of Litigation (emphasis added). The clear reference to a copy, of which the Bureau of Litigation is not the sole recipient, taken together with the italicized first line of the Notice of Appeal form, does not permit the conclusion that the form is misleading. The Board has held that where the appeal form provides the Board's correct address, an appellant who mails the Notice of Appeal to the Bureau of Litigation and not to the Board cannot complain that the untimely filing was caused by the Board's procedures; under such circumstances an appeal nunc pro tunc will not be permitted. Fuel Transportation Company, Inc. v. DER, EHB Docket No. 85-360-M (November 13, 1985).

Finally, appellant contends that since DER has not complained that the appeal is untimely, the Board lacks authority to dismiss this appeal sua sponte. It is elementary hornbook law that any tribunal has the authority to raise questions going to the basis for its jurisdiction over a case. If the Board lacks jurisdiction over a given appeal, any relief which it might grant would be subject to collateral attack in a subsequent proceeding. Thus, it is in the interest of all parties to have the jurisdictional issues raised by the Board, even when they are not raised by opposing counsel.

ORDER

WHEREFORE, in light of the foregoing, it is ordered that this appeal is dismissed as untimely filed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

Maxine Woelfling, Chairman

Edward Gerjuoy

Edward Gerjuoy, Member

DATED: May 1, 1986
cc: Bureau of Litigation
For Appellant:
Stephen C. Braverman, Esq.
For the Commonwealth, DER:
Michael E. Arch, Esq.

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MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

MEARS ENTERPRISES, INC.	:	
	:	
V.	:	**DOCKET NO. 83-200-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 5, 1986

OPINION AND ORDER

Synopsis

This is an appeal from a denial by the Department of Environmental Resources ("DER") of an application to amend a mine drainage permit. During the pendency of this appeal, appellant permanently ceased its mining operations at the site covered by the mine drainage permit that appellant wishes to have amended. Thus, there is no relief that this Board can grant appellant with respect to DER's denial of the application to amend the mine drainage permit, and therefore, the appeal is dismissed as moot.

OPINION

Mears Enterprises, Inc. filed this appeal on September 9, 1983, from a denial by the Department of Environmental Resources ("DER") of an application for an amendment to Mine Drainage Permit No. 3281302, which covered the Cherryhill No. 5 Mine in Cherryhill Township, Indiana County. The application for the permit amendment requested authorization to construct and modify mine drainage treatment ponds at the site. By letter dated August 16, 1985, Mears informed the Board that it had ceased its mining operations at the Cherryhill No. 5 Mine, but that it still wanted to proceed with this appeal.

On March 17, 1986, DER filed a Motion to Dismiss this appeal for mootness. In the Motion to Dismiss, DER alleges that since the filing of this appeal, Mears permanently terminated its operations at the Cherryhill No. 5 Mine, and discontinued the use of the treatment facilities that were the subject of the application for the permit amendment. Since the mining facility is permanently closed, DER argues that there is no meaningful relief that the Board can grant from DER's denial of an application to modify the treatment works.

Mears did not respond to DER's Motion to Dismiss. Section 21.64(d) of the Board's Rules of Practice and Procedure, 25 Pa. Code §§21.1-21.124, provides as follows:

> (d) Any party failing to respond to a complaint, new matter, petition or motion shall be deemed in default and at the Board's discretion, sanctions may be imposed in accordance with §21.124 of this title (relating to sanctions); such sanctions may include treating all relevant facts stated in such pleading or motion as admitted.

Since Mears did not respond to DER's Motion to Dismiss, the Board deems Mears, pursuant to 25 Pa. Code §§21.64(d) and 21.124, to have admitted all the relevant facts set forth in DER's motion. See Love Northeast, Inc. v. DER, 1982 EHB 307.

The Board agrees with DER that this appeal is moot and hereby dismisses it. When, during the course of an appeal, events occur that render it impossible for the Board to grant any relief, the appeal must be dismissed as moot. Silver Spring Township v. DER, 28 Pa. Cmwlth. 302, 368 A.2d 866 (1977); Highway Auto Service v. DER, 1980 EHB 10, aff'd 64 Pa. Cmwlth. 160, 439 A.2d 238 (1982). Since Mears has permanently terminated its mining operations at the Cherryhill No. 5 Mine, the Board cannot grant any relief with respect to DER's refusal to grant an application for an amendment to the mine drainage

permit to authorize the construction and modification of mine drainage treatment ponds at the site.

ORDER

AND NOW, this 5th day of May, 1986, the appeal of Mears Enterprises, Inc., at EHB Docket No. 83-200-M is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For the Commonwealth:
Michael E. Arch, Esq.
Western Region

For the Appellant:
Robert P. Mears, Vice President
Mears Enterprises

DATED: May 5, 1986

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

LOWER PROVIDENCE TOWNSHIP :
:
V. : DOCKET NO. 81-078-M
:
COMMONWEALTH OF PENNSYLVANIA, : Issued: May 5, 1986
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
and ALTERNATE ENERGY STORE, Permittee

OPINION AND ORDER

Synopsis

Permittee's petition to reopen the record, pursuant to 1 Pa. Code §35.231, for the purpose of supplementing the record with new evidence is denied. Even though permittee may not have been able to present the evidence at the hearing, the new evidence is not such as would likely compel a different result in the case, and therefore the Board will not reopen the record to admit it.

OPINION

Lower Providence Township ("Township") filed this appeal on June 3, 1981 from the issuance by the Department of Environmental Resources ("DER") of Mine Drainage Permit No. 46800301 and Mining Permit No. 302093-46800301-01-0 to Alternate Energy Store, Inc. (A.E.S.) for noncoal surface mining at a site in the Township known as the Troop Farm. Hearings in this matter were concluded on June 14, 1984, and all post-hearing briefs were received by the Board by October 31, 1984. Then, on November 29, 1984, A.E.S. filed a Petition to Supplement Record, which the Board denied by Opinion and Order

dated January 29, 1985 because the Petition did not set forth any persuasive reasons or legal basis for the Board to reopen the record.

On February 27, 1985, A.E.S. filed a Petition to Reopen Pursuant to 1 Pa. Code Section 35.231, which requested the Board to admit the same evidence that was the subject of the first Petition to Reopen. The Township filed an answer in opposition to the second Petition to Reopen on March 8, 1985.

The evidence that A.E.S. seeks to have admitted consists of analyses of wells that the United States Environmental Protection Agency ("EPA") conducted in late May and early June of 1984. in connection with its work at the Moyer's Landfill, which is listed on the EPA's National Priority List of hazardous waste sites, and is adjacent to the Troop Farm. A.E.S. alleges that it did not learn of these analyses until after the close of the hearings and submission of final briefs.

As explained in the Board's Opinion and Order denying the first Petition to Reopen, Lower Providence Township v. DER, (Opinion and Order, January 29, 1985), petitions to reopen the record before this Board for the purpose of supplementing the record with additional evidence after the hearings have been closed, but before the Board has issued an adjudication, are governed by §35.231 of the General Rules of Administrative Practice and Procedure, 1 Pa. Code §§31.1-35.251. 1 Pa. Code §35.231(a) provides as follows:

> (a) Petition to reopen. At any time after the conclusion of a hearing in a proceeding or adjournment thereof sine die, any participant in the proceeding may file with the presiding officer, if before issuance by the presiding officer of a proposed report, otherwise with the agency head, a petition to reopen the proceeding for the purpose of taking additional evidence. Such petition shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

A decision to grant a rehearing or to reopen a record is within the discretion of an administrative agency. Fritz v. Com., Dept. of Transportation, 79 Pa. Cmwlth. 52, 468 A.2d 538 (1983). For the Board to grant a petition to reopen the record under 1 Pa. Code §35.231, the petitioner must show that the circumstances have changed or new evidence has become available, the petitioner could not with due diligence have presented the evidence at the hearing, and the evidence is such as would likely compel a different result in the case. See Fritz v. Com., Dept. of Transportation, 79 Pa. Cmwlth. 52, 468 A.2d 538 (1983) (Holding that a petition for rehearing is properly denied unless it is shown that circumstances have changed or new evidence has become available); Pawk v. DER, 39 Pa. Cmwlth. 457, 395 A.2d 692 (1978) (Holding that this Board did not abuse its discretion in denying a petition to take additional testimony on the basis of after-discovered evidence when the evidence was not such evidence as would likely compel a different result in the case.)[1]

A.E.S. does allege that it could not, with due diligence, have presented the EPA well analyses at the hearing, and this evidence does constitute new evidence. Nevertheless, the Petition to Reopen is denied because the evidence is not evidence that would likely compel a different result in the case.

A.E.S. has had a full and fair opportunity to present evidence to the Board in this matter during seven days of hearings. In light of the EPA's monitoring of the Moyer's Landfill, which is adjacent to the site that is the subject of this appeal, there will recurrently be additional information that

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[1] In Pawk, the Commonwealth Court also held that this Board's summary denial, without a hearing, of a petition to reopen the record did not violate the petitioner's due process rights.

is arguably relevant to this appeal. If the Board were to reopen the record simply on the basis of EPA's generation of more information about this area, the Board would be unable to conclude this matter. Therefore, the record is closed in this matter, and an adjudication will be issued.

ORDER

AND NOW, this 5th day of May, 1986, the Petition to Reopen Pursuant to 1 Pa. Code Section 35.231, filed by Alternate Energy Store on February 27, 1985, at EHB Docket No. 81-078-M, is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For the Commonwealth:
John Wilmer, Esq./DER Eastern

For the Appellant:
Richard C. Sheehan, Esq.
Audubon, PA

For the Permittee:
Marc D. Jonas, Esq.
Silverman, Jonas & Lawrence
Norristown, PA

DATED: May 5, 1986

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

LOWER PROVIDENCE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 84-338-G**
	:	**85-239-G**
COMMONWEALTH OF PENNSYLVANIA	:	**85-276-G**
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**85-371-G**
	:	
and	:	Issued: May 13, 1986
	:	
COUNTY OF MONTGOMERY, Permittee	:	

OPINION AND ORDER

Synopsis:

In a petition for supersedeas from an order to a municipality to revise its official sewage facilities plan, and the issuance of accompanying permits, the petitioner must show irreparable harm to himself, a strong likelihood that he will succeed on the merits, and the likelihood of injury to the public. However, it is not necessary to determine whether a petitioner will suffer irreparable harm or whether injury to the public will occur when it is apparent DER has no underlying authority to take the action at issue. DER exceeds its authority where it grants permits which are not in conformity with an existing official sewage facilities plan. 25 Pa.Code §91.31.

OPINION

This matter concerns a petition for supersedeas filed by Lower Providence Township ("Appellant") in the above-captioned appeals. These matters, although not consolidated, each stem from the desire of Montgomery

County ("Permittee") to construct an interim sewage treatment facility to service a new county correctional facility being built in Lower Providence Township. Appellant challenges the legality of such a sewage treatment facility. The appeal filed at EHB Docket No. 84-338-G involves Appellant's appeal of a Department of Environmental Resources' ("DER") order [pursuant to §5 of the Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.5 ("Sewage Facilities Act") and 25 Pa.Code §71.17] to Appellant to submit a revision to Appellant's official sewage facilities plan in order to accommodate Permittee's interim sewage treatment facility. Said appeal was filed September 17, 1984. The appeal filed at EHB Docket No. 85-239-G involves Appellant's appeal of DER's grant [pursuant to §202 of the Clean Streams Law, the Act of June 25, 1937, P.L. 1987, as amended, 35 P.S. §691.202 ("the Clean Streams Law")] of an NPDES permit to Permittee for the same facility. This appeal was filed on June 14, 1985. The appeal filed at EHB Docket No. 85-276-G involves Appellant's appeal of a letter dated June 3, 1985 from DER stating that a project approval and a sewerage permit were to be issued to Permittee for said facility. This appeal was filed July 5, 1985. The appeal filed at 85-371-G involves Appellant's appeal of the issuance of sewerage permit 4685407 to Permittee by DER pursuant to §207 of the Clean Streams Law. Said appeal was filed on September 6, 1985. A hearing on the merits in EHB Docket No. 84-338-G was held September 9-11, 1985. The petition for supersedeas in the above-captioned matters was filed November 11, 1985 and a hearing was held on December 19, 1985. The Board's power to issue a supersedeas arises under §1921-A of the Administrative Code of 1929, as amended, 71 P.S. §510.21(d). The Board's criteria for so doing are described in its rules and regulations at 25 Pa.Code §§21.76-21.78. In particular, §21.78(a) states:

> (a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive law as requiring consideration of the following factors:
>
> (1) irreparable harm to the petitioner;
> (2) the likelihood of the petitioner's prevailing on the merits; and
> (3) the likelihood of injury to the public.

In general, the Board interprets §21.78(a) in light of the existing case law of this Commonwealth. Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 467 A.2d 805 (1983); Tenth Street Building Corporation v. DER, Docket No. 85-068-G (Opinion and Order, November 1, 1985); WABO Coal Company v. DER, Docket No. 85-416-W (Opinion and Order, January 24, 1986). More specifically, the petitioner generally must make a credible showing on each of the three factors listed in §21.78(a); the showing that the petitioner is likely to succeed on the merits should be strong.

In regard to the appeal filed at 84-338-G, insufficient evidence was adduced at the supersedeas hearing to support Appellant's entitlement to a supersedeas; certainly there was no strong showing that Appellant is likely to succeed on the merits. Thus, the Board denies said petition as to 84-338-G.

The petition as to the remaining three appeals presents a somewhat different problem. Despite the general rule from Process Gas, supra, it is not necessary to determine whether a petitioner will suffer irreparable harm or whether injury to the public will occur when it is apparent that DER has no underlying authority to take the action at issue, i.e., when it is apparent that the challenged DER action was unlawful. Ny-Trex, Inc. v. DER, 1980 EHB 335; WABO Coal, supra. Nowhere in the record or the various pleadings of these matters is it indicated that Appellant's official plan has actually

been revised. It is equally clear that the proposed interim sewerage treatment facility would not be consistent with the existing plan. DER lacks the authority to grant permits, such as the NPDES permit and sewerage permit here involved, where the permits are not in conformity with the official plan for the municipality in which they are located. 25 Pa.Code §91.31. Thus, the petitions for supersedeas in the appeals docketed at 85-239-G and 85-371-G are granted.

Finally, the supersedeas petition in the appeal docketed at 85-276-G is rejected, although this appeal rests on much the same grounds as do the 85-239-G and 85-371-G appeals, because upon further examination it appears that the letter appealed from was not an appealable action; the letter merely informed Appellant that DER intended to issue a water quality management permit. Where the underlying action was not appealable, we cannot grant a supersedeas of that action. In any event, the issuance of the sewerage permit which is the subject of the appeal at 85-371-G renders the appeal at 85-276-G moot.

ORDER

WHEREFORE, this 13th day of May, 1986, our Order of April 25, 1986 in the above-captioned appeals is affirmed. In particular:

1. The petitions for supersedeas in the appeals docketed at 84-338-G and 85-276-G are denied.

2. The petitions for supersedeas in the appeals docketed at 85-239-G and 85-371-G are granted, pending an adjudication of the appeal at 84-338-G.

3. The Board will attempt to adjudicate the appeal at 84-338-G as promptly as possible, consistent with the Board's other commitments; following the adjudication, and depending on its conclusions, reconsideration of the supersedeases at 85-239-G and 85-371-G may be appropriate.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, MEMBER

DATED: May 13, 1986

cc: **Bureau of Litigation**
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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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REFINER'S TRANSPORT AND TERMINAL CORPORATION :

:

: Docket No. 84-132-G

: Issued: May 14, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Edward Gerjuoy, Member

Syllabus

This consolidated appeal of a hazardous waste transporter license denial and civil penalty assessment is sustained in part and dismissed in part. DER's decision to deny appellant's license renewal application represents an abuse of DER's discretion. DER's decision to assess a civil penalty was appropriate; however, the Board revises the amount of the penalty to reflect the severity of the violations.

The burden of proof in an appeal of a civil penalty assessment rests with DER; the burden in an appeal of a license denial rests with the appellant. Appellant is precluded from challenging in this proceeding the content or validity of an earlier, unappealed DER action, i.e., the issuance of its original transporter's license. Appellant, however, may raise issues going to the propriety of the two DER actions at issue here: the license denial and the civil penalty

assessment.

DER is not estopped from taking the two actions at issue by virtue of the alleged fact that DER employees had knowledge of appellant's violations several months prior to taking those actions. No showing has been made that Commonwealth officials made affirmative representations upon which appellant detrimentally relied, or that in taking the actions at issue DER was not acting in an "official" capacity.

DER regulations concerning the management of toxic hazardous waste are not impermissibly vague in contravention of the due process clause of the Fourteenth Amendment to the U.S. Constitution. The Board possesses the authority to rule upon the constitutionality of regulations promulgated by the Environmental Quality Board where the constitutional challenge is raised in the context of an appeal from a DER action applying the regulation to a given party.

DER is not preempted by the Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq., or the Hazardous Materials Transportation Act, 49 U.S.C. §1801 et seq. from requiring that a hazardous waste transporter ascertain that the hazardous waste manifest accompanying a shipment of hazardous waste contain an entry for the hazard code before the transporter accepts the waste for shipment.

DER has the authority under section 605 of the Solid Waste Management Act, 35 P.S. §6018.605 to assess a civil penalty for violations of the conditions of a hazardous waste transporter license. DER's reliance upon an internal policy in determining the amount of penalty to be assessed was not improper; the policy is not a regulation which must be published pursuant to the Commonwealth Documents Law, 45 P.S. §1102 et seq., before DER may rely upon it in assessing the penalty.

Appellant repeatedly violated the conditions of its license limiting it to transport of certain categories of ~~hazardous~~ waste and also violated DER

requirements concerning the acceptance of hazardous waste for transport without a completed manifest. Therefore, assessment of a civil penalty was a proper exercise of DER's discretion. The amount of the civil penalty, however, was improper. Contrary to the findings of DER, the violations at issue here are of a low degree of severity. Therefore, the Board adjusts the amount of the penalty to reflect the actual degree of severity.

DER did not waive its authority to deny appellant's hazardous waste transporter application despite the fact that DER had previously amended appellant's license. Even where an administrative agency mistakenly has issued a license contrary to the requirements of the law, it is not precluded from correcting its error once the error is revealed.

Under section 503(c) of the Solid Waste Management Act, 35 P.S. §6018.503(c), DER has discretion to deny a permit or license under any of three circumstances: 1) where the applicant in the past has failed to comply with the applicable law, regardless of whether the violations have been corrected; 2) where the applicant has presently existing violations; or 3) where DER finds, based upon past or existing violations, that the applicant lacks the ability or intention to comply with the law.

Section 503(d) of the Solid Waste Management Act, 35 P.S. §6018.503(d), places the burden upon the applicant with a history of violations to establish -- during the license application review process -- that the violations have been corrected. DER is not required to prove that the violations continue to exist. Where the license or permit application fails to make the required showing, DER must deny it.

Although the appellant has a violation history, none of the violations were of a continuing nature. In addition, the violations at issue did not result in any environmental harm. Rather, they were of a technical nature. Therefore, DER's decision to deny the license was an abuse of its discretion.

INTRODUCTION

This appeal concerns two related actions of the Department of Environmental Resources ("DER"): the denial of appellant's renewed Hazardous Waste Transporter License Application and the assessment of a civil penalty, pursuant to the Pennsylvania Solid Waste Management Act, 35 P.S. §6018.101 et seq. ("SWMA"). Both DER actions resulted from DER's finding that appellant had transported types of hazardous waste for which it did not possess a proper license and, in addition, that some of the manifests accompanying the shipments of hazardous waste were incomplete. The appeal of the license denial was docketed at EHB Docket No. 84-132-G; the appeal from the assessment of the civil penalty was docketed at EHB Docket No. 84-289-G. By order of September 17, 1984 the two appeals were consolidated for hearing.

FINDINGS OF FACT

1. The appellant is Refiners Transport and Terminal Corporation, a Delaware corporation with a business address of 445 Earlwood Avenue, Oregon, Ohio 43616. Appellant's EPA I.D. number is OHD000720102.

2. The appellee is the Pennsylvania Department of Environmental Resources (DER), the agency of the Commonwealth vested with the authority to administer and enforce the provisions of the Solid Waste Management Act, 35 P.S. §6018.101

et seq. and the regulations promulgated thereunder.

3. By letter dated June 16, 1981, appellant submitted to DER an application for a hazardous waste transporter license. This application indicated appellant intended to transport corrosive and EP toxic wastes in a liquid state. (The designation EP toxic is related to extraction procedures).

4. On August 4, 1981, appellant submitted to DER a notification of hazardous waste activity showing hazard codes for reactive and toxic waste.

5. On March 8, 1982, DER issued to appellant hazardous waste transporter license PA-AH0022, authorizing transportation of corrosive and EP toxic waste. Appellant did not appeal the conditions of this license.

6. DER has amended appellant's license on two occasions; on February 9, 1984 DER amended the license to allow transportation of ignitable waste and on February 28, 1984, DER amended the license to permit transport of toxic waste.

7. The amended licenses issued on February 9, 1984 and February 28, 1984 contain the following statement:

> THIS TRANSPORTER IS LICENSED TO HAUL ONLY THOSE TYPES OF WASTES IDENTIFIED BY THE CONDITIONS OF THIS LICENSE.

8. The original license, issued on March 8, 1982, did not contain a statement such as that set forth in finding of fact 7, supra.

9. Appellant's license, issued March 8, 1982, expired on March 15, 1984.

10. The cover letter dated March 8, 1982 accompanying the issuance of the original license contains the following statement:

> Compliance with the conditions set forth on your license is mandatory. You are only authorized to transport the types of hazardous waste identified in the conditions on your license. A license amendment application must be filed with the Department and approved prior to transporting any other types of hazardous waste.

11. Prior to issuance of the original license, DER sent a letter to appellant, dated September 16, 1981. This letter, which discussed certain requirements which appellant would have to satisfy before a license could be issued, contained the following statement:

> Please be advised that you will be licensed to transport only the types of hazardous waste(s) you designated on your hazardous waste transporter license application, and that the required bond amount is dependent on the types (hazard classes), physical state, and quantities of wastes transported.

12. The license as amended on February 9, 1984 contains the letters "I", "C", "E" in the block labeled "Conditions"; these hazard codes indicate appellant was authorized to transport ignitable, corrosive and EP toxic waste.

13. The license as amended on February 28, 1984 contains the letters "I", "C", "E", and "T" in the block labeled "Conditions". The hazard code "T" indicates that appellant was authorized to transport toxic waste, as of that date.

14. By letter dated January 17, 1984, appellant submitted a renewal application for a hazardous waste transporter license. The renewal application requested authorization to transport ignitable, corrosive and toxic wastes.

15. By letter dated February 10, 1984, appellant amended its renewal application to request authorization to transport all types of liquid hazardous waste, i.e., ignitable, corrosive, reactive, EP toxic, acute hazardous and toxic.

16. In addition to requesting amendment of its renewal application, appellant requested, by letter dated February 7, 1984, that its existing license be amended to include transport of ignitable waste.

17. By letter dated February 24, 1984, appellant requested that its existing license be amended to include toxic waste.

18. Also on February 24, 1984, a representative of appellant telephoned DER and requested immediate approval of an amendment to the existing license to authorize transport of toxic waste.

19. In response to the request for immediate amendment, DER informed appellant that verbal approval was not possible and that a written request for amendment must be submitted.

20. On March 14, 1984, DER denied appellant's renewal application by telegram.

21. On March 15, 1984, DER denied appellant's renewal application with a formal notice sent certified mail.

22. On March 23, 1984, DER amended the denial of the renewal application.

23. Between January 21, 1983 and February 24, 1984, appellant did not possess a license authorizing transport of toxic waste.

24. Between January 21, 1983 and February 24, 1984 appellant transported the following shipments of toxic waste for which it did not possess

a proper license:

a) Between April 7, 1983 and February 22, 1984: 94 shipments of spent sulfuric acid from Wheatland Tube Company in Pennsylvania to Envirite Corporation in Ohio.

b) Between January 21, 1983 and February 17, 1984: 7 shipments of flammable liquid N.O.S. from Jamestown Paint and Varnish in Pennsylvania to Hukill Chemical Corporation in Ohio.

c) On October 17, 1983 and December 20, 1983, 2 shipments of hazardous waste N.O.S. from Gibson Electric Company in Pennsylvania to Envirite in Ohio.

d) Between May 23, 1983 and February 21, 1984: 18 shipments of spent sulfuric acid from Sharon Tube Corporation in Pennsylvania to Envirite in Ohio.

e) On January 19, 1984 a shipment of spent cyanide plating bath solution from Keystone Stamping Company in Pennsylvania to Envirite in Ohio.

f) Between February 10, 1984 and February 24, 1984: 4 shipments of toxic wastewater treatment plant sludge from Keystone Stamping Company in Pennsylvania to Envirite in Ohio.

g) Between September 23, 1982 and February 24, 1984: 6 shipments of waste chromic acid solution and hazardous waste N.O.S. from Proctor-Silex in Pennsylvania to Envirite in Ohio.

h) Between May 17, 1983 and January 5, 1984, 4 shipments of waste caustic alkali liquids from GTI Corporation in Pennsylvania to Envirite in Ohio.

Each of the types of toxic waste shipped by appellant between January 21, 1983 and February 24, 1984 are listed as toxic, by waste number, in DER and EPA regulations.

25. Between January 21, 1983 and February 17, 1984 appellant did not possess a license to transport ignitable waste.

26. Between January 21, 1983 and February 17, 1984, appellant transported 7 shipments of ignitable waste from Jamestown Paint and Varnish Co. in Pennsylvania to Hukill Chemical in Bedford, Ohio.

27. On January 19, 1984 appellant did not possess a license for transport of reactive waste.

28. On January 19, 1984, appellant transported a shipment of reactive waste from Keystone Stamping in Pennsylvania to Envirite in Canton, Ohio.

29. On November 28, 1984, appellant accepted for transport seven shipments of material from Sun Oil Company's facility in Vanport, Pennsylvania to American Refining Company in Indianola, Pennsylvania.

30. The manifests for the material shipped from Sun Oil on November 28, 1984 indicated that the material was hazardous waste, bearing hazardous waste numbers U220 and U239. U220 is a toxic waste; U239 is both toxic and ignitable.

31. On November 28, 1984 appellant possessed no license for transport of any variety of hazardous waste within Pennsylvania.

32. Appellant presented no evidence to indicate that the material shipped from Sun Oil to American Refining on November 28, 1984 was not in fact hazardous waste, as indicated on the manifests accompanying the shipments.

33. The manifest accompanying the shipment of reactive and toxic waste from Keystone Stamping to Envirite on January 19, 1984 was incomplete. No entry had been made for the EPA hazard code.

34. The manifests accompanying the four shipments of toxic waste from

Keystone Stamping to Envirite between February 10, 1984 and February 24, 1984 were incomplete. No entry had been made for the EPA hazard code.

35. The manifests accompanying the seven shipments of toxic and ignitable waste from Sun Oil to American Refining on November 28, 1984 were incomplete. No entry had been made for the either EPA hazard code or for the transporter's EPA I.D. Number.

36. All the shipments of hazardous waste transported by appellant with the exception of the shipments from Sun Oil on November 28, 1984 were interstate in nature.

37. DER first informed appellant, via a Notice of Violation dated February 2, 1984 that DER considered appellant to have violated the Solid Waste Management Act by transporting a shipment of reactive and toxic waste on January 19, 1984 from Keystone Stamping to Envirite without a license authorizing shipment of those types of waste. Appellant received this Notice of Violation on February 8, 1984. This notice does not make reference to appellant's acceptance of waste without complete manifests.

38. DER sent appellant a second Notice of Violation on March 2, 1984 informing appellant that DER considered it to have violated the Solid Waste Management Act by transporting four shipments of toxic waste between February 10 and 24, 1984, from Keystone Stamping to Envirite without a license authorizing shipment of that type of waste. Appellant received this second Notice of Violation on March 8, 1984.

39. The following shipments of hazardous waste were transported by appellant after it received the first of the two DER Notices of Violation:

- Five shipments from Wheatland Tube between February 10, 1984 and February 22, 1984.
- One shipment from Jamestown Paint and Varnish on February 17, 1984.
- Four shipments from Sharon Tube between February 10, 1984

and February 21, 1984.

- Four shipments from Keystone Stamping between February 10, 1984 and February 24, 1984.

- Three shipments from Proctor Silex between February 22, 1984 and February 24, 1984.

- Seven shipments from Sun Oil on November 28, 1984. At the date of the seven Sun Oil shipments appellant possessed no Pennsylvania hazardous waste transporter license and had been informed of this fact several months earlier.

All of the aforesaid shipments were of toxic waste.

40. On February 24, 1984 appellant transported a shipment of toxic waste from Keystone Stamping to Envirite. This shipment occurred prior to the conversation between appellant's employee and DER described in finding of fact 18, supra.

41. The denial of appellant's hazardous waste transporter license renewal application was based solely upon DER's determination that appellant had hauled waste types for which it did not have a properly conditioned license and that appellant had accepted hazardous waste for transport without properly completed manifests.

42. On July 17, 1984 DER assessed a civil penalty against appellant in the amount of $82,000. The dollar amounts of the civil penalty were determined solely as follows:

> For each shipment of hazardous waste of a type which appellant's license did not authorize which occurred prior to appellant's receipt of the Notice of Violation of February 2, 1984, DER assessed $500.
>
> For each failure to ascertain that the hazardous waste manifest had been properly completed before accepting the waste for shipment, prior to receipt of the February 2, 1984 Notice of Violation, DER assessed a penalty of $500.
>
> For each shipment of ~~hazardous waste~~ of a type which appellant's license did not authorize and which occurred after appellant's receipt of the February 2, 1984 Notice of Violation, DER assessed a penalty of $1000, with the exception of a single shipment on February 24, 1984, for which $2000 was assessed.

For each failure to ascertain that the hazardous waste manifest had been properly completed before accepting the waste for shipment after receipt of the February 2, 1984 Notice of Violation, DER assessed a penalty of $1000.

43. Higher amounts were assessed for each violation occurring after appellant's receipt of the Notice of Violation to reflect a higher degree of willfulness.

44. The actual dollar amounts were calculated as follows:

$59,000 for 118 shipments prior to February 8, 1984 of waste types for which appellant did not possess a proper license.

$1000 for one shipment prior to February 8, 1984 which was of a waste type for which appellant did not possess a proper license and which was accompanied by an incomplete manifest.

$9000 dollars for four shipments after February 8, 1984 which were of waste types for which appellant did not possess a proper license and which were accompanied by incomplete manifests.

$13,000 for thirteen shipments after February 8, 1984 which were of types of waste for which appellant did not possess a proper license.

45. The shipments from Sun Oil on November 28, 1984 were not considered by DER in assessing the civil penalty against appellant.

46. In general, appellant has not operated at a profit in transporting hazardous waste; however precise figures were not presented for all of the shipments at issue in this appeal.

47. Appellant had no hazardous waste spills and did not damage the air, water, land or other natural resources of the Commonwealth during the period appellant transported hazardous waste within the Commonwealth.

48. Neither DER nor appellant has incurred or will incur any costs of restoration or abatement due to appellant's hazardous waste transporting within

the Commonwealth.

49. Other than savings resulting from posting a lower bond with DER, appellant obtained no savings with respect to its transporting operations as a result of transporting types of hazardous waste which its license did not authorize it to transport.

50. A higher bond amount is required by DER to transport reactive hazardous waste than the types of waste which appellant's license authorized it to transport.

51. In addition to considering the factors set forth in section 605 of the Solid Waste Management Act, 35 P.S. §6018.605, i.e. degree of "willfulness", damage to the Commonwealth's natural resources or their uses, costs of restoration or abatement, and savings to the violator, DER considered the following additional factors in assessing the civil penalty pursuant to internal DER policy: consistency with similar violations within the same program, deterrence, and the severity of the violations.

52. At the time of the two DER actions at issue, no other hazardous waste transporter in Pennsylvania had as many violations as appellant had.

53. DER does not regulate the types of equipment which hazardous waste transporters may use for shipment of hazardous waste.

54. Use of the hazard codes (EP, R,I,C,E and T) is not connected with any of the requirements imposed upon hazardous waste transporters by the United States Department of Transportation, e.g., labeling, packaging, marking and equipment safety requirements.

DISCUSSION

A. ISSUE LIMITATION

Appellant has raised numerous legal issues in this proceeding. The first question we are called upon to address is which of these issues properly are before the Board. Resolution of this problem is determined by well-established principles of administrative finality; appellant cannot challenge DER actions which have become "final".

Section 1917-A of the Administrative Code provides the starting point for our analysis and reads in pertinent part as follows:

> Anything to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified. 71 P.S. §510-21(c).

At the time DER issued the original Transporter License in March, 1982, appellant was afforded an opportunity to appeal, pursuant to §510-21, supra. Appellant was at that time a party "adversely affected" within the meaning of the quoted provision since the license imposed certain obligations upon appellant. See Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 22 Pa. Cmwlth. 280, 348 A.2d 765, 767 (1975), aff'd 473 Pa. 432, 375 A.2d 320 (1977). Appellant did not appeal the license as originally issued, however; therefore, the final clause of §510-21(c) operates to establish the "finality" of appellant's 1982 Transporter's License.

Once an administrative agency action has become final, challenges

to the "content or validity" of that action are foreclosed. Commonwealth v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976). The Commonwealth Court's decision in Wheeling Pittsburgh Steel, supra, discusses the scope of the preclusive effect of a "final" administrative action:

> It is settled both under common law and statute that where an act creates a right or liability or imposes a duty and prescribes a particular remedy for its enforcement such remedy is exclusive and must be strictly pursued. This means that one who fails to exhaust 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. . . This is particularly true of special statutory appeals from the action of administrative bodies. Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 22 Pa. Cmwlth 280, 348 A.2d at 767 (quoting Philadelphia v. Sam Bobman Department Store Company, 189 Pa. Super. 72, 149 A.2d 518 (1959)) (emphasis added).

In affirming the Commonwealth Court decision in Wheeling Pittsburgh Steel, the Pennsylvania Supreme Court made clear that issues which "could have and should have been raised", within the meaning of the above quote, include issues going to the underlying legal authority for the administrative action as well as to the content of that action. 375 A.2d at 325.

In its post-hearing brief appellant argues that DER's position regarding the license conditions did not become "ripe" for appeal until DER denied the license renewal application. Appellant does not elaborate on this contention; however, we gather that it is arguing that DER's position with regard to the import of the license conditions did not become apparent until DER denied the renewal application as a consequence of the violation of those conditions, and that therefore appellant had no reason to appeal those conditions at the time DER first imposed them in 1982.

This argument lacks merit. The cover letter accompanying the issuance of the license, dated March 8, 1982 contains the following statement:

> Compliance with the conditions set forth on your license is mandatory. You are only authorized to transport the types of hazardous waste identified on your license. A license amendment application must be filed with the Department and approved prior to transporting any other types of hazardous waste.

A letter dated September 16, 1981, which DER sent to appellant concerning its license application contains a nearly identical statement. In addition, the face of the 1982 license contains a box labeled "Conditions" within which were listed the "Hazard Codes" limiting the types of waste which appellant was authorized to transport. Appellant surely had reason to know that DER had limited the types of activities which appellant could undertake pursuant to its license; appellant's failure to appreciate this fact at the time the original license was issued cannot justify our permitting it to litigate the propriety of those limitations at this late date. As the Commonwealth Court repeatedly has stated:

> We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party 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.
>
> Commonwealth, DER v. Williams, 57 Pa. Cmwlth. 8, 425 A.2d 871, 873 (1981); Wheeling-Pittsburgh Steel Corp. v. DER, 22 Pa. Cmwlth. 280, 348 A.2d 765, 767 (1975).

Appellant also argues that to the extent DER's denial of the license renewal application is an action separate from the issuance of the original license, it should be allowed to challenge the imposition of license conditions

here, in the context of an appeal from the denial of the renewal. The short answer to this argument is that DER denied the renewal application; in so doing it imposed no license conditions upon appellant. Therefore, since there are no conditions to review in connection with the denial of the renewal application, appellant's argument must fail.

In conclusion, we hold that since the conditions of appellant's original transporter's license have been conclusively established by principles of administrative finality, appellant is precluded from raising the following issues in this proceeding, all of which address either the content or the validity of those conditions:

1. Whether the conditions imposed upon appellant in the 1982 license have any valid basis in SWMA or the rules and regulations promulgated pursuant thereto.

2. Whether, by imposing such conditions in the absence of explicit statutory or regulatory authority, DER has violated the Commonwealth Documents Law, 45 P.S. §1102 et seq.

3. Whether in imposing such conditions DER's alleged failure to give consideration to the "Notification of Hazardous Waste Activity", filed with DER by appellant, constituted an abuse of DER's discretion.

4. Whether in establishing such conditions DER has impermissibly exercised legislative powers in violation of Art. 1, §2 of the Pennsylvania Constitution.

5. Whether the imposition of such conditions constitutes an unconstitutional burden upon interstate commerce under Art. I, §8, cl. 3 of the U.S. Constitution.

6. Whether the imposition of such conditions constitutes a denial of appellant's right to equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution.

7. Whether the imposition of such conditions constitutes a violation of appellant's right to due process of law under the Fourteenth Amendment to the U.S. Constitution.

Appellant, however, is not precluded from raising issues directly challenging DER's civil penalty assessment and license denial, which issues we now address.

B. ESTOPPEL

Appellant contends that DER had knowledge of the unlawful shipments of hazardous waste several months prior to the date it denied appellant's application for renewal of its transporter license and that, as a consequence of this knowledge, DER is estopped from taking the actions which are at issue in this appeal. We need not examine in detail the facts concerning DER employees' knowledge of appellant's transport of waste for which it did not have a properly conditioned license. The law on this subject is clear; under the circumstances of this case estoppel will not lie.

It is true that the Commonwealth can be estopped. Commonwealth, DPW v. UEC, Inc. 483 Pa. 503, 397 A.2d 779 (1979); Fossil Fuels Inc. v. DER, 1981 EHB 125 (Adjudication dated June 19, 1981). Before estoppel will be found, however, there must be a showing that 1) highly placed Commonwealth officials have made affirmative representations, knowing or having reason to know that another party will justifiably rely on those representations and 2) that there has in fact been substantial detrimental reliance upon those representations by the party claiming to be aggrieved. Commonwealth, DPW v. UEC, Inc., supra; Heckert v. Commonwealth, Dept. of State, 82 Pa. Cmwlth. 636, 476 A.2d 481 (1984); Hauptmann v. Commonwealth, Department of Transportation, 59 Pa.Cmwlth 277, 429 A.2d 1207 (1981). No such showing has been made here.

Moreover, estoppel generally has been held inapplicable to a government

entity exercising its lawful authority in its "official capacity". Nevius v. Workmen's Compensation Appeal Board, 52 Pa.Cmwlth 418, 416 A.2d 1134 (1980). For example, in a recent case involving DER authority under SWMA, the Commonwealth Court has stated that in enforcing the Commonwealth's environmental laws "DER is exercising a governmental function, so that even if its agents had been mistakenly indulgent or lax in enforcing the laws, DER cannot now be prevented from performing its duty of enforcing the statutes." Lackawanna Refuse Removal, Inc. v. DER, 65 Pa.Cmwlth 372, 442 A.2d 423, 426 (1982). This holding is directly applicable to the instant appeal. Even if DER employees knew as early as 1982 that appellant was transporting types of hazardous waste for which its license was not conditioned, this fact would not preclude DER from taking action in 1984 in response to the unlawful activity. Sussex, Inc. v. DER, 1984 EHB 355 (Adjudication dated July 27, 1984; Fossil Fuels, supra.

C. UNCONSTITUTIONAL VAGUENESS

Appellant contends that the license denial and civil penalty should be set aside to the extent those actions are based upon the finding that appellant transported "toxic" hazardous waste without a proper license. Appellant claims that the regulations defining types of hazardous waste fail to define "toxic" waste, making it impossible for a transporter to know whether the type of waste it wishes to ship falls within that category. Thus, it is argued, the civil penalty and license denial are based upon a categorization which is impermissibly vague, amounting to a violation of due process under the 14th Amendment of the U.S. Constitution.

This Board has limited authority to rule upon issues of a constitutional nature. It is clear that we lack the authority to rule upon a facial challenge

to a legislative enactment; being an administrative tribunal and not a court of record we do not possess the power of judicial review as such. Philadelphia Life Insurance Co. v. Commonwealth, 410 Pa. 571, 190 A.2d 111 (1963). However, the Board clearly has the authority to rule upon the constitutionality of DER's application of a statute or regulation in a particular case. Rochez Brothers v. DER, 18 Pa.Cmwlth 137, 334 A.2d 790 (1975). In addition, the Board possesses the power to rule upon facial challenges to regulations promulgated by the Environmental Quality Board where that challenge is raised in the context of an appeal of a specific DER action.[1] St. Joe Minerals v. Goddard, 14 Pa.Cmwlth 624, 324 A.2d 800, 802 (1974).

Due process requires that laws give persons of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that they may act accordingly. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Grayned v. City of Rockford, 408 U.S. 104 (1972). As the Court stated in Grayned: "Vague laws may trap the innocent by not providing fair warning. . .A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." 408 U.S. at 109.

The analysis to be followed in reviewing a challenge on vagueness grounds is set forth in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982). A court should uphold such a challenge only if the law being applied is vague "in all of its applications." A party "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." 455 U.S. at 494-95.

1. Preenforcement review of EQB regulations is not within our jurisdiction, however; such challenges, to the extent that they are available, must be raised before the Commonwealth Court. Arsenal Coal Company v. DER, 505 Pa. 198, 477 A.2d 1333 (1984).

The facts of this appeal do not support a finding of unconstitutional vagueness. All the shipments of toxic waste for which appellant has been penalized were of types specifically listed as "toxic" under DER regulations. Each shipment was accompanied by a manifest prepared by the generator bearing a number designating the particular waste it was accompanying. At the time these shipments occurred, 25 Pa. Code §75.261(h) listed each of these numbers as toxic waste.[2] Therefore, we conclude that since each type of toxic waste which appellant shipped was specifically enumerated as such in the DER regulations, there is no basis for appellant's claim that the regulations concerning toxic waste are unconstitutionally vague; as applied to appellant's conduct the regulations could not be more specific. DER's reliance upon appellant's shipments of toxic waste without a proper license as a basis for the actions at issue does not constitute a denial of appellant's right to due process of law under the Fourteenth Amendment.

D. TRANSPORT OF HAZARDOUS WASTE WITHOUT A PROPER LICENSE

Section 401 of SWMA provides that "no person. . .shall transport hazardous waste within the Commonwealth unless such person. . .has first obtained a license for the transportation of hazardous waste from the Department [of Environmental Resources]." 35 P.S. §6018.401(a). SWMA also authorizes DER to impose conditions upon the licenses it issues pursuant to section 401; under section 502, 35 P.S. §6018.502(f), DER may impose "such terms and conditions as it deems necessary or proper to achieve the goals and purposes of this act." Failure to comply with the terms and conditions of a license issued by DER pursuant to SWMA constitutes a violation of section 403(a) of SWMA, 35 P.S. §6018.403(a).

2. Since the date of the shipments at issue §75.261 has been revised; subsection (h) no longer contains the lists of waste types but simply incorporates the lists of hazardous wastes established by the federal Environmental Protection Agency and published at 40 C.F.R. Part 261, Subpart D. 25 Pa.Code §75.261(h) (1) (ii), effective Sept. 14, 1985. See 15 Pa. Bull. 3289 (Sept. 14, 1985).

As noted above, appellant's failure to appeal the conditions imposed upon its original license renders those conditions final. Therefore, our concern here is limited to determining whether appellant in fact violated those license conditions. Appellant has stipulated that on 136 occasions between January 21, 1983 and February 24, 1984, it transported types of hazardous waste for which it did not possess a proper license. For example, although appellant did not receive permission from DER to transport toxic waste until February 28, 1984, prior to that date it had transported 136 shipments of toxic waste within Pennsylvania. Likewise, although appellant did not possess a license authorizing transport of ignitable waste within the Commonwealth until February 9, 1984, appellant had transported seven shipments of ignitable waste prior to that date. And, although appellant never has been authorized to transport reactive waste within Pennsylvania, on January 19, 1984 appellant transported a shipment of reactive waste.[3] Each of these shipments constitutes a violation of section 403(a) of SWMA, 35 P.S. §6018. 403(a).

In addition to the foregoing violations, appellant has stipulated that on November 28, 1984 it transported seven shipments of hazardous material from the Sun Oil Company's facility in Vanport, Pennsylvania to American Refining Company in Indianola, Pennsylvania. The manifests designated the material to be shipped as hazardous waste[4] bearing EPA identification numbers U220 and U239, indicating that the waste was both toxic and ignitable. No evidence was placed in the record showing that the material shipped by appellant on November 28, 1984 was not in fact hazardous waste. There was some suggestion that under certain circumstances, shipment of hazardous waste designated by the numbers U220 and U239 would not require a licensed hazardous waste transporter. The facts which are a prerequisite

3. Some of the shipments were of waste types designated toxic and reactive or toxic and ignitable.

4. Under federal Department of Transportation regulations, promulgated pursuant to the Hazardous Materials Transportation Act, 49 U.S.C. §1801 et seq., hazardous waste is a type of hazardous material. 49 CFR §171.8. See also 75 Pa.C.S.A. §102.

for such a finding however, have not been established here, and we believe it was the appellant's burden to do so if it intended to substantiate its allegation that a license would not be required for the seven shipments at issue. Where the face of a hazardous waste manifest designates the material to be shipped as hazardous waste, DER, this Board and any other parties involved in the transport and disposal of that material must treat the material as hazardous waste unless and until facts to the contrary have been established. In other words, the face of the manifest is controlling, in the absence of proof that the entries thereon are incorrect. Any other holding clearly would be contrary to the intent of SWMA. Consequently, we must assume that the seven shipments from Sun Oil on November 28, 1984 were shipments of hazardous waste. Since appellant possessed no hazardous waste transporter license on that date each shipment constitutes a violation of section 401(a) of SWMA, 35 P.S. §6018.401(a)

E. VIOLATION OF MANIFEST REQUIREMENTS

SWMA and the regulations promulgated thereunder provide for a hazardous waste manifest system which imposes joint responsibility upon the generator and the transporter of hazardous waste. Under 25 Pa. Code §75.262(e), the generator is required to see that the hazardous waste manifest is properly completed before the waste is transported off-site. 25 Pa. Code §75.263(d) precludes a transporter from accepting hazardous waste for shipment where the manifest has not been properly completed by the generator, pursuant to §75.262(e). This dual check protects the public by assuring that both parties -- the generator and the transporter — bear responsibility for assuring that the waste is properly designated and thus, properly handled. Neither can rely upon the assurances of the other that the DER requirements have been or will be satisfied.

The stipulated facts here establish that on five occasions prior

to March 1984 and on seven occasions on November 28, 1984, appellant accepted shipments of hazardous waste for transport where the manifests accompanying the shipments failed to indicate either the hazard code for the waste, or the transporter's EPA identification number, or both. DER relied in part upon these facts in deciding to deny appellant's transporter license renewal application and to assess the civil penalty.

Federal Preemption

Appellant contends that the DER actions should be set aside to the extent that they are based upon appellant's failure to assure that the manifests included information which is not required by federal law. That is, appellant argues that Pennsylvania's manifest requirements have been preempted by the federal regulatory scheme applicable to hazardous waste transporters. To a limited extent appellant is correct; as a general rule, federal law now does preempt most state law requirements governing hazardous waste manifests. Under the facts of this appeal, however, the federal requirements do not supersede Pennsylvania law, as we explain infra.

Congressional power to preempt state law derives, of course, from the supremacy clause of the federal Constitution. U.S. Const. Art. VI, section 2. Where state regulations are challenged as being violative of the supremacy clause, one must begin with the assumption that Congress does not intend to displace state law. Maryland v. Louisiana, 451 U.S. 725 (1981). And, where the state law in question regulates public health, safety or welfare, as does the Pennsylvania program at issue, the guiding rule is that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corporation, 331

U.S. 218, 230 (1947).

For purposes of the present discussion, the federal government's authority to regulate hazardous waste transport derives from two statutes: the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 et seq., and the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §1801 et seq. The Environmental Protection Agency ("EPA") is the administrative agency charged with administering the provisions of RCRA while the Department of Transportation ("DOT") implements HMTA. Neither statute entirely preempts state regulation of hazardous waste transport.

Section 1811 of HMTA provides that any state law which is "inconsistent" with the federal program established under that Act is preempted. The same section of the Act, however, allows a state to apply to DOT for a determination that its law is not inconsistent with the federal program, and therefore not preempted. In order for such a finding to be made the state law must 1) afford " an equal or greater level of protection to the public than is afforded by the requirements [of HMTA] or of regulations issued under [HMTA]," and 2) "not unreasonably burden commerce." 49 U.S.C. §1811(b). Thus, HMTA preempts state law to the extent it is less stringent than or otherwise inconsistent with federal requirements.

Section 6929 of RCRA likewise prohibits the States from imposing requirements less stringent than the requirements imposed by that Act. 42 U.S.C. §6929. RCRA, unlike HMTA, expressly contemplates that the States will assume primary authority for implementation of the federal program, however. Section 6926 authorizes EPA to delegate program management to a state if the state program is no less stringent than and not inconsistent with the federal program, and not inconsistent with hazardous waste management programs of other states. 42 U.S.C. §6926(b).

The states are free to impose more stringent requirements regarding hazardous waste management. 42 U.S.C. §6929. Thus, state law is preempted to the extent it is less stringent than or conflicts with the federal program. RCRA, however, does not indicate any "clear and manifest purpose of Congress to preempt the entire field of interstate waste management or transportation." City of Philadelphia v. New Jersey, 437 U.S. 617, 620-21, n.4 (1978).

Pursuant to the preemptive authority of RCRA and HMTA, EPA and DOT jointly promulgated regulations, effective September 20, 1984, requiring the use of a "Uniform Hazardous Waste Manifest" for all offsite transport of hazardous waste. 49 Fed. Reg. 10490 (March 20, 1984). The agencies' decision to require nationwide use of a "Uniform Manifest System" was a consequence of their finding that there had been "a proliferation of manifests as various states decided to develop and print their own forms" and that "lack of uniformity in state manifest forms has created a burden for generators, transporters and state programs." 49 Fed. Reg. 10490-91. This lack of uniformity was found to be exactly the type of inconsistency which Congress was attempting to avoid by passing §6926 of RCRA and §1811 of HMTA.

As noted above, RCRA allows EPA to delegate program management to the States. Pursuant to §6926 of RCRA, this delegation generally is accomplished via a two step process; a state first is granted "interim authorization" which allows it to administer limited aspects of the RCRA program and later is granted "final authorization", permitting it to carry out the entire RCRA program in lieu of EPA. Under RCRA, use of the Uniform Manifest form is mandatory only in those states which have been granted final authorization. States wishing to achieve final authorization must conform their regulations to require its use. 40 C.F.R.

§271.10(f). States with only interim authorization, however, are not required by EPA to use the Uniform Manifest. 40 CFR, Part 271, Subpart B.

EPA apparently has created this distinction simply as a matter of programatic convenience and not as a consequence of basic limitations on federal authority. Since states with interim authorization wishing to apply for final authorization eventually must conform their regulatory scheme to achieve the minimum federal standards (including use of the Uniform Manifest) EPA determined that it would be more efficient to allow the States latitude in this area until such time as they were granted final authorization. 49 Fed. Reg. 10492.

As of September 20, 1984 (the effective date of the Uniform Manifest System) Pennsylvania had been granted interim, but not final, authorization. 46 Fed.Reg.28161 (May 26, 1981)[5]. Therefore, use of the Uniform Manifest form pursuant to RCRA was not required for offsite shipments of hazardous waste within Pennsylvania and — insofar as EPA was concerned -- Pennsylvania manifest requirements were not preempted by the federal Uniform Manifest System as of that date.

Under HMTA, however, use of the Uniform Manifest form became mandatory in all States as of September 20, 1984. Since HMTA does not provide for state implementation of the federal program as does RCRA, there were no programatic efficiency considerations to justify delayed imposition of the Uniform Manifest requirement. Thus, although under RCRA Pennsylvania manifest requirements were not preempted as of September 20, 1984, under HMTA the federal Uniform Manifest System did preempt state law on and after that date. Thus, for those shipments transported by appellant within Pennsylvania after September 20, 1984 (and only for those

5. Pennsylvania was granted final authorization under RCRA effective January 30, 1986. 51 Fed. Reg. 1791 (January 15, 1986).

shipments) we must determine — as part of our examination of the merits of this preemption issue —whether DER has cited appellant for violations of manifest requirements which Pennsylvania was barred from requiring as a consequence of HMTA.

The DOT regulations under HMTA concerning use of the Uniform Manifest do not set forth what information a state may or may not require be placed on that form.[6] 49 C.F.R. §172.205(a) simply states that:

> No person may offer, transport, transfer, or deliver a hazardous waste . . . unless an EPA form 8700-22 . . . hazardous waste manifest . . . is prepared in accordance with 40 C.F.R. §262.20 and is signed, carried and given as required of that person by this section.

(Form 8700-22 is the Uniform Hazardous Waste Manifest form jointly promulgated by DOT and EPA. 49 Fed. Reg. 10500 (March 20, 1984); 40 C.F.R. §260.10.) The reference to 40 CFR §262.20 likewise is not helpful in determining what information states are prohibited from requiring on the Uniform Manifest. §262.20 is simply the regulation promulgated by EPA pursuant to RCRA which requires the generator of hazardous waste to complete the Uniform Manifest; its purpose is not to describe limitations on state authority.

The comments published in conjunction with the promulgation of the regulations implementing the Uniform Manifest System do explain the extent of federal preemption concerning the entry of state information on the manifest,

6. 40 CFR Part 271, Subpart A, which sets forth the requirements a state must meet under RCRA in order to be granted final authorization by EPA, does specifically describe what optional items a state may require be entered on the Uniform Manifest. Subpart A is consistent with the comments of EPA and DOT infra. Since at the time of the shipments at issue here Pennsylvania had not yet been granted final authorization by EPA, however, the requirements of Subpart A were not directly applicable to those shipments.

however. The basic concern of both EPA and DOT was that the States were requiring completion of several different manifest documents, imposing burdens on the transport of hazardous waste. Thus, the intent of the Uniform Manifest System was to eliminate this practice, in effect consolidating the many state forms into the single federal manifest:

> The effect of these amendments is twofold. First, the use of a nationally uniform manifest will be required for all offsite transport of hazardous waste. Second, no State may require a carrier to provide information with or on the manifest which is in addition to that authorized by the uniform manifest system. Thus, no carrier could be required to carry any state manifest form that differs from the EPA form.
>
> 49 Fed. Reg. 10508 (Comment of DOT, emphasis added).

The issue here is what state-required information is "authorized by the uniform manifest system." The EPA comment sets forth general limitations:

> Although no other form may be required by a State to accompany a waste shipment, EPA and DOT have modified the Uniform Manifest form to allow the entry of certain optional State information items in addition to the federally required items . . . States may require generators to complete any of the information items included in the optional State section of the Uniform Manifest prior to the transportation of hazardous waste . . .
>
> 49 Fed.Reg. 10492.

It appears that the DOT regulations promulgated pursuant to HMTA do not specifically set forth what items of information the states may require be entered on the Uniform Manifest, but simply make reference to the EPA requirements. Therefore we conclude that the limitations on state authority set forth in the EPA regulations at 40 CFR, Part 271, Subpart A, may be considered the definitive statement -- of both EPA and DOT -- on the extent to which the states may require (after September 20, 1984) the entry of information on the Uniform Manifest above and

beyond what is required by federal law. 40 CFR §271.10(h) provides as follows:

> (h) The State must follow the Federal manifest format . . . and may supplement the format to a limited extent subject to the consistency requirements of [HMTA].
>
> * * *
>
> (2) In addition to the federally required information, both the State in which the generator is located and the State in which the designated facility is located may require completion of the following items:
>
> * * *
>
> (vii) Additional waste description associated with particular hazardous wastes listed in the Manifest. This information is limited to information such as chemical names, constituent percentages, and physical state. (EPA form 8700-22, item J).

The manifests for shipments of hazardous waste transported by appellant after September 20, 1984, i.e., the Sun Oil shipments of November 28, 1984, were found by DER to be incomplete in two particulars: no entry had been made for the appellant's EPA identification number and no entry had been made for the hazard code. The EPA identification number is required by the federal regulations to be entered on the manifest in any event, and therefore, no pre-emption issue arises with regard to DER's insistence that it be entered. 40 CFR §262.20(a) and associated appendix. Appellant's failure to ascertain that the EPA I.D. number had been entered constitutes a violation of 25 Pa.Code §75.263(d).

Appellant's preemption argument primarily concerns DER's requirement that the hazard code be entered on the manifest. At the time of the Sun Oil transports, no DER regulation specifically required entry of a hazard code on a

manifest; however, 25 Pa.Code §75.262(e) did require that the generator complete the manifest according to the instructions provided with the manifest form. The form then in use, pursuant to HMTA after September 20, 1984, was EPA form 8700-22, the Uniform Manifest. The face of this document as printed by DER provides, under item "J", that the hazard code be entered. As noted above, 40 CFR §271.10(h)(2)(vii) authorizes the state to require entry of certain limited information under item J on form 8700-22. For reasons which follow, we hold that DER's requirement that the hazard code be entered in item J is permissible within the intent of §271.10(h)(2)(vii).

DER regulations in effect as of the date of the Sun Oil shipments identified certain types of waste by their "hazard codes".[7] Specifically, 25 Pa. Code §75.261(h)(1)(ii) provided as follows:

> The basis for listing the classes or types of wastes listed in this subsection is indicated by one or more of the following hazard codes:
>
> (A) Ignitable Waste (I)
> (B) Corrosive Waste (C)
> (C) Reactive Waste (R)
> (D) EP Toxic Waste (E)
> (E) Acute Hazardous Waste (H)
> (F) Toxic Waste (T)

It is the absence of the appropriate one of these hazard codes in Item J of the manifests accompanying the Sun Oil shipments which DER asserts renders the manifests incomplete.

Under the EPA regulations quoted supra, a state may require that a generator enter information in Item J yielding "additional waste descriptions" pertinent to the physical and chemical qualities of the waste to be transported. DER regulations classify each type of hazardous waste by these hazard codes; the classification is determined by the physical and chemical properties of the waste,

7. See supra, footnote 2, regarding revision to §75.261(h)(1)(ii).

e.g., the degree of its toxicity, flammability, etc., consistent with 40 CFR §271.10(h)(2)(vii). The DER regulations derive from parallel federal regulations. 25 Pa.Code §75.261(h); 40 CFR Part 261, Subpart D. We conclude that the federal Uniform Manifest System does not preempt Pennsylvania's requirement that a hazardous waste generator enter the appropriate hazard code in item J of the manifest. Thus, DER is not precluded from requiring that a transporter ascertain that item J has been completed before accepting the waste for transport. Each shipment of hazardous waste by appellant without a properly completed manifest constitutes a violation of 25 Pa.Code §75.263(d).

F. THE CIVIL PENALTY ASSESSMENT

Construction of Section 605

In assessing the $82,000 civil penalty against appellant, DER relied upon section 605 of SWMA which provides:

> In addition to proceeding under any other remedy available at law or in equity for a violation of any provision of this act, any rule or regulation of the department or order of the department or any term or condition of any permit issued by the department, the department may assess a civil penalty upon a person for such violation.
> 35 P.S. §6018.605

Appellant argues that section 605 does not give DER the authority to assess a civil penalty for a violation of the conditions of a license, since the portion of section 605 addressing violations of DER-imposed conditions speaks only of permit conditions. Thus, appellant would have us hold that DER is without authority to assess a civil penalty for appellant's transport of hazardous waste without a properly conditioned license.

We cannot accept appellant's argument. Section 605 authorizes DER to assess a civil penalty for "a violation of any provision of this act". Under

section 403 of SWMA it is unlawful to carry out transportation activities in violation of DER rules and regulations. 35 P.S. §6018.403(b)(8). DER regulations require that a transporter comply with the conditions of its license, that it not transport hazardous waste without a license, and that it not accept hazardous waste for shipment without a proper manifest. 25 Pa.Code §75.263(c) and (d). Thus, each of the violations established by the record here is a violation of DER rules and regulations and therefore, of SWMA. Consequently, DER possesses the authority to assess a civil penalty for those violations.

In light of the foregoing, we reject appellant's argument that DER's assessment of the civil penalty violates appellant's due process rights because appellant did not have reason to know that violation of its license conditions could subject it to such a penalty. Appellant is correct that due process requires that a person be afforded notice of what acts may subject him to a penalty. Keyishian v. Board of Regents, 385 U.S. 589 (1967). Appellant, however, is charged with knowledge of the law applicable to its activities. SWMA clearly prohibits transportation of hazardous waste in violation of the conditions of a license; the DER regulations establish that acceptance of hazardous waste for transport with an incomplete manifest is likewise unlawful. Therefore, we conclude that appellant had ample notice of what the law required and that a penalty could be assessed for violations of these requirements. DER has not violated appellant's right to due process of law.

The Commonwealth Documents Law

Appellant next argues that DER relied upon an unpublished policy in determining the amount of the civil penalty and that this constitutes a violation of the Commonwealth Documents Law, 45 P.S. §1102 et seq. The first issue

we must address in this connection is whether DER in fact did rely upon such a policy. The record establishes that there now exists a written memorandum within DER which sets forth guidelines for establishing the proper amount of a civil penalty under SWMA. The civil penalty assessment at issue here, however, was not calculated based upon that written policy per se. Rather, at the time this assessment was calculated the practice was to take into account the factors which now are explicitly set forth in the DER internal memorandum. The dollar figures recommended by the memorandum, however, were not used to determine the amount of the penalty here. Nevertheless, since is is clear that DER personnel did rely upon an unwritten policy, we must decide whether the failure to publish this policy as a regulation renders DER's reliance upon it invalid insofar as the civil penalty is concerned.

The Commonwealth Documents Law ("CDL") requires that all regulations of administrative agencies be published in accordance with the provisions set forth in that Act before the regulations can have legal effect. We begin with the definition of "regulation" set forth in the CDL:

> "Regulation" means any rule or regulation or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency. 45 P.S. §1102(12).

Promulgation of a regulation is essentially a legislative function. Redmond v. Commonwealth, Milk Marketing Board, 26 Pa.Cmwlth 368, 363 A.2d 840 (1976).

The definition of a regulation must be contrasted with that of a "statement of policy" which the CDL defines as follows:

> "Statement of Policy" means any document, except an adjudication or a regulation, promulgated by an agency which sets forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public or any part thereof, and includes, without limiting the generality of the foregoing, any document interpreting or implementing any act of Assembly enforced or administered by such agency. 45 P.S. §1102(13).

The basic distinction between a regulation and a policy statement is that the former establishes a "binding norm", i.e., a standard of conduct which has the force of law. A policy statement, by contrast, simply "announces the agency's tentative intentions for the future." Pa. Human Relations Commission v. Norristown Area School District, 473 Pa. 334, 374 A.2d 671, 679 (1977) (quoting Pacific Gas and Electric Company v. FPC, 506 F.2d 33 (D.C.Cir. 1974). While a regulation must be promulgated pursuant to rule-making requirements, an agency's interpretation of a legislative enactment or its own regulations is simply "policy" and thus not subject to such requirements. Chemclene Corp. v. Commonwealth, DER, Pa.Cmwlth , 497 A.2d 268, 275 (1985). A regulation, once promulgated, must be followed by the agency. Rochez Brothers v. DER, 18 Pa.Cmwlth 137, 334 A.2d 790 (1975). General Electric Landfill Opposition Committee v. DER, 1982 EHB 63 (Adjudication dated April 28, 1982).

The Pennsylvania Supreme Court recently has established a criterion for distinguishing between policies and regulations. In Lopata v. Unemployment Compensation Review Board, 507 Pa. 570, 493 A.2d 657 (1985), the Court held that when the standard being applied by the agency is "completely and unequivocally determinative" of the rights or duties of a particular portion of the public, the standard, in effect, is a regulation and must be published in accordance with the requirements of the Commonwealth Documents Law. 493 A.2d at 660.

The Chemclene decision, supra, concerned factual circumstances very similar to those of the instant appeal. There the appellant had challenged various aspects of DER's administration of SWMA as applied to hazardous waste transporters. One of the issues raised concerned DER's use of unpublished internal memoranda in setting the amount of the bond a transporter must post as a condition for receiving a license. The appellant contended that the memoranda were of general application and future effect and therefore should be subject to the publication requirements of the CDL.

In rejecting this contention the Commonwealth Court noted that DER had not employed the internal memoranda in a manner which set a hard and fast rule or as criteria by which the amount of the bond would be established in every case. While the DER policy would provide a baseline of sorts from which DER employees could begin in determining the proper bond amount, the preliminary assessment reached after applying the policy was subject to change depending upon a variety of other factors, such as the compliance history of the applicant. In other words, the policy was not "completely and unequivocally determinative" of the issue. Lopata, supra.

We conclude that this rationale is equally applicable to the facts of the instant appeal. DER's policy concerning civil penalties under SWMA essentially is interpretive of the requirements of section 605, 35 P.S. §6018.605. That section requires DER to consider the willfulness of the violation, costs of restoration or abatement, damage to the Commonwealth's natural resources or their uses, savings to the violator as a consequence of the violation, and "other relevant factors". The policy simply defines these factors more fully. In addition, its application is necessarily a case-by-case determination in that, for example, the policy requires an evaluation of the severity of the particular violations at issue. The policy does not provide an inflexible

rule of law or "binding norm" which DER must apply in a particular fashion to each case and which if so applied would dictate a particular result. It simply provides guidance to DER personnel in determining the amount of the penalty which will be assessed. Therefore, the policy need not be published in accordance with the requirements of the Commonwealth Documents Law.

An unpublished DER policy does not enjoy the presumption of validity to which properly promulgated regulations are entitled, however. Western Hickory Coal Company v. DER, 1983 EHB 89, 102 (Adjudication dated June 2, 1983) aff'd 86 Pa.Cmwlth 562, 485 A.2d 877 (1984). DER must establish that its assessment of the civil penalty based upon its policy guidelines was a proper exercise of its discretion.

Relevant Factors in Assessing the Civil Penalty

DER bears the burden of proof on the civil penalty issue. Black Fox Mining and Development Corp. v. DER, EHB Docket No. 84-114-G (Adjudication dated April 29, 1985). As discussed above, section 605 requires DER to consider "the willfulness of the violations, damage to the air, water, land or other natural resources of the Commonwealth or their uses, cost of restoration and abatement, savings resulting to the person in consequence of such violation and other relevant factors." The parties have stipulated that the violations at issue here did not result in any harm to the Commonwealth's natural resources or their uses and that there were no associated costs of restoration or abatement.

Appellant did gain some financial benefit as a consequence of the violations. DER requires that transporters of reactive waste post a larger bond than that required of transporters of the waste types which the DER license authorized appellant to transport. Appellant accepted one shipment of reactive waste for transport on January 19, 1984 without having posted the higher bond. No admissible evidence[8] was presented, however, to establish the actual amount which appellant saved by not having to put up the larger bond. Therefore, we have no basis for altering the civil penalty assessment one way or another to take into account the savings to appellant.

Section 605 of SWMA requires DER to consider the willfulness of the violations in determining the amount of the civil penalty to be assessed. Although

8. Appellant has attached an affidavit to its post-hearing brief which goes to this issue. We cannot consider evidence which is dehors the record, however. Appellant has not filed a petition to reopen the record. 1 Pa. Code §35.231.

the terms "willful" or "willfulness" generally connote the presence of intention or deliberate choice, the Board repeatedly has construed the term "willfulness" in the civil penalty provisions of the Clean Streams Law,[9] 35 P.S. §691.1 et seq. and the Surface Mining Act,[10] 52 P.S. §1396.1 et. seq., to include a broad spectrum of mental states. In DER v. Rushton Mining Company, 1976 EHB 117, Board Member Denworth explained the concept of "willfulness" as follows:

> The Board has previously stated that the concept of willfulness for purposes of §605 [of the Clean Streams Law] can be likened to the similar concepts in tort law and criminal law. Commonwealth, DER v. Froelke, [1973 EHB 118] . . . Without binding the Board absolutely to tort law (where the law has developed to deal with direct injuries to the person rather than the environment), that law does provide an analysis of degrees of knowing or willful conduct that is useful in considering this

9. Section 605 of the Clean Streams Law provides:
Civil Penalties
a. In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or a condition of any permit issued pursuant to this act, the department, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was willful. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000) per day for each violation. In determining the amount of the civil penalty, the department shall consider the willfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration and other relevant factors. 35 P.S. §691.605(a).

10. Section 18.4 of the Surface Mining Act provides:
Civil Penalties
In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or a condition of any permit issued pursuant to this act, the department may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was willfull. The civil penalty so assessed shall not exceed five thousand dollars ($5000) per day for each violation. In determining the amount of the civil penalty the department shall consider the willfulness of the violation, damage or injury to the lands or to the waters of the Commonwealth or their uses, cost of restoration and other relevant factors. 52 P.S. §1396.22.

> element for purposes of civil penalties. For instance, there is clearly a difference between deliberate, intentional acts, which are the most "willful" . . . and accidental, unintentional, unknowing negligence,[11] which is in no sense willful. See Restatement of Torts, 2d., Vol. 2, §282. In between are degrees of negligence or misconduct with varying degrees of knowledge attached, which may make an act more or less willful, although not amounting to "willful misconduct" in tort law. Thus, although an act may not be willful in the deliberate or intentional sense, there may be a degree of willfulness evident from knowledge that certain consequences are likely to result if that act is done in this manner or from failure to take the care that is required to avoid likely injurious consequences from that act. 1976 EHB at 133.

This statement has been repeatedly affirmed by the Board. See, DER v. Donald Cox, 1982 EHB 282 (Adjudication dated December 10, 1982); DER v. Jefferson Township, 1978 EHB 134 (Adjudication dated August 17, 1978) DER v. Trevorton Anthracite, 1978 EHB 8 (Adjudication dated January 24, 1978); aff'd 42 Pa. Cmwlth 84, 400 A.2d 240 (1979).

Under Pennsylvania precedents, willful conduct is synonymous with intentional conduct. In Rapoport v. Sirott, 418 Pa. 50, 209 A.2d 421, 424 (1965) the Court held that "willful" conduct is "deliberate and intentional". And, more recently, the Commonwealth Court has stated that the term willful "obviously suggests the presence of intention and at least some power of choice." Lucciola v. Commonwealth, Secretary of Education, 25 Pa.Cmwlth 419, 360 A.2d 310, 311 (1976). Intentional conduct, as defined by the Restatement (2d) of Torts, §8A, "implies that the actor intends or desires to cause the consequences of his act, or that

11. Use of the phrase "accidental . . . negligence" is somewhat misleading. As discussed more fully, infra, negligence implies that the harm at issue could have been prevented by the exercise of reasonable care. An accident, by contrast, is "an occurrence which . . . could not have been foreseen or prevented with the exercise of reasonable precautions." W. Prosser, Hornbook of the Law of Torts, (1971) §29. Thus, by definition, there cannot be "accidental negligence".

he believes that the consequences are substantially certain to occur." Thus, intentional conduct is, within the language of Rushton, supra, the "most willful", for the purposes of assessment of civil penalties.

Reckless conduct is action taken in conscious disregard of its probable consequences, or of the fact that harm is likely to result. LaMarra v. Adam, 164 Pa.Super.268, 63 A.2d 497 (1949). Black Fox Mining and Development Corporation v. DER, EHB Docket No. 84-114-G (Adjudication dated April 29, 1985). Black's Law Dictionary (5th. ed.1979) defines recklessness as "conduct which evinces disregard of or indifference to consequences under circumstances where harm may result, regardless of whether harm was intended." Reckless conduct differs from intentional conduct in that the actor need not have a desire or intent to cause the harm. It is enough if the actor "knows or should realize that there is a strong possibility that harm may result, even though he may hope or expect that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results." Restatement (2d) Torts §500, comment f.

Negligent conduct is conduct which "falls below the standard established by law for the protection of others [e.g., the public] against an unreasonable risk of harm." Restatement (2d) Torts, §282. Conduct is negligent if it causes harmful consequences which could have been foreseen and prevented by the exercise of reasonable care. Lerro v. Wynne, 451 Pa. 37, 301 A.2d 705 (1973). Prosser notes that "in negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, suffic-

iently great to lead a reasonable man in his position to anticipate them, and to guard against them." W. Prosser, Hornbook of the Law of Torts (1971) §31. In other words, whereas recklessness and intentional conduct both focus upon the actual knowledge of the actor via à vis the probable consequences of his actions, a finding of such knowledge is not a prerequisite to concluding that conduct is negligent. It is enough if, under the circumstances, a reasonable person would have recognized that harm could result.

The reliance upon tort principles in the foregoing discussion of "willfulness" goes only so far, however. It is important to recognize that whereas in tort law one deals with actual injuries to persons or property and that such injuries are the "harm" which the actor intends to cause (intentional or "willful" conduct), consciously disregards (reckless conduct), or should have recognized (negligent conduct), for purposes of assessing civil penalties under the Commonwealth's environmental statutes, the "harm" at issue can be simply a statutory violation. No proof of actual injury to person or property is required, apart from that which is necessary to establish the statutory violation itself.

Basically, in determining the degree of willfulness of a violator's conduct, we must focus upon the violator's recognition (or lack thereof) of the fact that its conduct may cause a violation of law. Applying the foregoing standards to the facts of this case we conclude that none of the violations at issue were willful, in the sense of deliberate or intentional. The record does not support a finding that appellant was aware of and deliberately chose to ignore DER's requirements limiting it to transport of certain types of hazardous waste. Nor has there been any showing that appellant was aware that it was accepting waste for

transport without properly completed manifests.

The record, however, does support our conclusion that the shipments which took place prior to the date appellant received DER's first Notice of Violation were the result of negligence on appellant's part. As we discussed, supra, in the context of our discussion of finality and issue preclusion, appellant should have known that DER had imposed conditions upon its transporter license limiting the types of waste which it was authorized to accept. We are willing to accept that appellant, however, did not actually appreciate this fact until it received notice from DER on February 8, 1984 — via the first Notice of Violation — that it was violating the conditions of its license. Therefore, we find that the 119 shipments of waste types for which appellant was not licensed which occurred prior to February 8, 1984 constitute negligent violations of SWMA.

The license condition violations occurring after February 8, 1984 are of a different character, however. The Notice of Violation received by appellant on that date clearly and unequivocally informed appellant that transport of types of waste which appellant's license did not authorize was a violation of SWMA. Appellant does not dispute that it received this Notice of Violation on February 8, 1984; Becky Perlaky, appellant's safety secretary, was aware of the Notice of Violation as of that date. A corporation is charged with knowledge of all material facts which its officers and agents acquire while acting within the scope of their employment and authority. C.J.S. Corporations §1078; A. Schulman, Inc. v. The Baer Company, Inc. 197 Pa.Super.429, 178 A.2d 974 (1962). Therefore, we conclude that appellant had actual knowledge, as of February 8th, that transport of toxic waste was a violation of SWMA. Despite this fact, appellant transported 17 shipments of toxic waste after that date (excluding the Sun Oil shipments in November,

1984, which were not considered in assessing the civil penalty). These 17 shipments constitute reckless violations of SWMA.

Appellant's contention that it thought it had corrected the problem of unlicensed shipments by requesting a license amendment lacks any reasonable basis in fact. As of the date appellant received the first Notice of Violation, appellant had requested that DER amend its existing license. While the Notice of Violation cited appellant for transport of toxic and reactive waste without a properly conditioned license, however, appellant's request for license amendment applied only to ignitable waste and made no mention of the waste types for which the Notice of Violation had been issued. Under these circumstances it would not be reasonable for appellant's employees to conclude that they had remedied the problem. It could not reasonably have been expected that simply by submitting a request for license amendment to DER the terms and conditions of the license automatically would be altered. DER must approve an amendment to a license before it has legal effect. Appellant did not receive the amended license until after it had received the Notice of Violation.

Appellant also accepted waste for shipment on five occasions (again excluding the Sun Oil shipments) without a properly completed manifest. There is no indication in the record that appellant (via its drivers or otherwise) had any conscious appreciation of the fact that the manifests were incomplete at the time the waste was to be transported. Such a finding would be necessary in order to find that appellant's conduct with regard to these five shipments was reckless or intentional. It is clear, however, that appellant should have been aware that the manifests were not properly completed. Appellant is under a duty — pursuant to 25 Pa.Code §75.263(d) — to ascertain that the manifest

accompanying a shipment of hazardous waste contains all of the proper entries. The failure to make such a check is indicative of negligence. Therefore, we conclude that the five shipments of hazardous waste without proper manifests constitute negligent violations of SWMA.

In addition to willfulness, section 605 of SWMA requires DER to consider "other relevant factors" in assessing a civil penalty. In the instant case, DER considered as relevant the severity of the violations and deterrence. In addition, DER considered it important to establish a penalty amount which was consistent with the penalty assessed other transporters for similar types of violations.

DER considered the violations at issue here to be "serious". DER's post-hearing brief sets forth the following as a justification for the imposition of the $82,000 assessment:

> The primary difference between specific licenses are the number and combination of hazard codes to which a transporter is limited and the amount of the bond posted. The amount of the bond is related to the quantity and types of waste the transporter is licensed to accept. Without the hazard codes all licenses would be identical — and virtually meaningless as part of the cradle-to-grave system of which they are a part. If the Department were forbidden to issue transporter licenses with conditions related to the applicant's circumstances, anyone could haul anything — and if the Legislature had intended that, surely it would not have bothered to create the licensing requirements. DER brief at 25.

While we are willing to agree that the limitation of transporter licenses by hazard code is reasonably related to DER's policy concerning the amount of a bond which a transporter must post in order to obtain a license, DER's contention that without the hazard code limitation the transporter license

would be meaningless is entirely lacking in merit. Neither SWMA nor DER regulations explicitly contemplate that DER will limit licenses by hazard code. DER's authority for imposing such a limitation derives from section 502 of SWMA, which provides that DER may "impose such other terms and conditions as it deems necessary or proper to achieve the goals and purposes of the act." 35 P.S. §6018.502(f). DER admits that a transporter may be authorized to haul all types of hazardous waste; indeed, shortly prior to the denial of the license renewal application, DER apparently was prepared to grant appellant such authorization. If such authorization were granted the transporter would in effect have no limitations (by waste type) placed upon its license. It could "haul anything", yet we would have no difficulty holding that such authorization would be entirely consistent with the intent of the Pennsylvania Legislature in enacting the transporter license requirement of SWMA.

The requirement that a transporter obtain a license before conducting hazardous waste transport operations within Pennsylvania is an important part of the Commonwealth's "cradle-to-grave" tracking system for hazardous waste management. It enables DER to monitor the persons responsible for assuring that the waste arrives at a treatment, storage or disposal facility and that the facility is one which has the authorization to handle that type of waste. This function is served regardless of the limitation of the license by waste type. DER regulations require that a hazardous waste number be entered on the manifest for each type of waste being transported. 25 Pa.Code §75.262(e). These numbers — which are listed in the EPA regulations, 40 CFR Part 261, Subpart D and incorporated by reference in 25 Pa. Code §75.261(h) — govern whether a particular treatment, storage or disposal facility can accept the waste from the transporter.

See, e.g., 25 Pa.Code §75.264(c)(1) and (m)(1)(i)(E). The entry of the hazard code on the manifest and the limitation of transporter licenses by hazard code do not serve this purpose.

In addition, the limitation of the license by hazard code cannot be justified on the basis of transportation safety considerations. While different types of equipment may be required for transport of different varieties of hazardous waste, DER is not the administrative agency which monitors such requirements. The Pennsylvania and United States Departments of Transportation have promulgated extensive regulations governing the equipment to be used in hazardous material transport. See generally, 49 CFR Parts 271 and 272; 67 Pa.Code Chapter 403. These regulations likewise impose requirements concerning the marking and labeling of hazardous material for shipment, 49 CFR §§171.300 - 171.450, and the use of placards on the transport vehicle during shipment. 49 CFR §§172.500 - 172.558. Nowhere in any of these regulations is any reference made to the use of hazard codes.

As we stated above, however, the limitation of licenses by hazard code does serve the legitimate purpose of enabling DER to set greater bond amounts for those transporters who wish to undertake transport of more dangerous varieties of hazardous waste, e.g., reactive as opposed to toxic. This is the sole justification offered by DER in support of the license limitations which we find persuasive. The only harm which resulted from these violations was that appellant was able to transport types of hazardous waste without posting a bond amount greater than that which it had posted. This is an important consideration but it does not justify the amount of the penalty which DER has assessed.

In light of the foregoing, we do not share DER's view of the severity of these violations. While we do not mean to suggest that a transporter is not under a duty to exercise diligence in complying with the requirements imposed upon it by DER pursuant to SWMA, we find that appellant's shipments of types of hazardous waste without a license authorizing the same should be characterized as a having a low degree of severity. No environmental harm resulted from the violations, and indeed, it does not even seem possible that any such harm could have resulted.

The final factor which we will consider in reviewing DER's assessment of the civil penalty is deterrence. The Board has repeatedly recognized that deterrence to the operator and to the industry in general is a legitimate consideration in determining the proper amount of a civil penalty. Western Hickory Coal Company v. DER, 1983 EHB 89 (Adjudication dated June 2, 1983); DER v. Donald Cox, 1982 EHB 282 (Adjudication dated December 10, 1982); DER v. Jefferson Township, 1978 EHB 141 (Adjudication dated August 17, 1978).

One consideration in figuring the deterrent effect of the penalty is the profit -- if any — generated by the operator in connection with the violations. The testimony on the profit which appellant has made from its hazardous waste transporting operations in Pennsylvania was equivocal. Although it was established that, on the whole, appellant has not made a profit in its hazardous waste transport activities, the actual dollar figures for the transports at issue here were not made part of the record. Consequently, we are unable to calculate a specific figure which would eliminate any profit which appellant may have generated. Such figures, however, are not a necessary prerequisite to establishing a civil penalty in an amount which does have a deterrent effect. The basic consideration in civil penalty assessments is that

the penalty be calculated to "reasonably fit" the violation. Trevorton Anthracite Company v. DER, 42 Pa.Cmwlth 84, 400 A.2d 240, 243 (1979).

Computation of the Amount of the Penalty

With this standard in mind, we now turn to the actual computation of the penalty. First we consider the shipments, prior to February 8, 1984 (the date appellant received the first Notice of Violation) of waste types for which appellant did not possess a proper license. For reasons we have explained, each of these shipments constitutes a violation of SWMA, but the resulting violations were no more than negligent and of low severity. DER assessed a penalty of $500 for each of 118 shipments solely involving violations of appellant's license conditions yielding a total penalty of $59,000. For one shipment during this period (that from Keystone Stamping on January 9, 1984) DER assessed a penalty of $1000, because in addition to the fact that appellant lacked a license which authorized transport of the type of waste shipped, the manifest accompanying the shipment was incomplete; thus DER assessed $500 for the license violation and $500 for the incomplete manifest violation. The total penalty assessed by DER for the 120 violations which occurred prior to appellant's receipt of the Notice of Violation was $60,000.

From one point of view this total is not unreasonable. The maximum penalty per violation under section 605 of SWMA, 35 P.S. §6018.605, is $25,000 per violation. $500 is only 2% of $25,000. Thus, in assessing only $500 per violation, the penalty can be said to reflect the fact that the violations at issue were only negligent and of low severity. (DER, however, actually considered the violations to be "serious" when it determined this penalty amount). On the other hand, we do not think that the total magnitude of the penalty can be

ignored, even though this total is no more than 2% of the total DER might have assessed under the law. In particular, we hold that a total penalty of $60,000 for these negligent, environmentally inconsequential violations is too large to be a reasonably fitting penalty, since we conclude that all the violations of the license conditions occurring before February 8, 1984 stemmed from appellant's single negligent failure to properly appreciate the conditions of its license.

We emphasize that we do not regard a $500 penalty for any single one of these negligent violations as too large; our point is rather that DER's decision that the penalty for each such violation must be $500 is an abuse of its discretion in that it fails to take into consideration the cumulative effect of the assessment of the same dollar amount for each violation. In other words, the penalty was not calculated to reasonably fit the violations. Trevorton Anthracite, supra.

Since we have concluded that the assessed penalty of $60,000 for the aforesaid 120 violations was an abuse of DER's discretion, we proceed to substitute our discretion for DER's. Warren Sand and Gravel, Inc. v. DER, 20 Pa. Cmwlth 186, 341 A.2d 556 (1975). Specifically, we hold that a penalty of $500 per violation for the first ten violations of the conditions of appellant's license is not unreasonably large, and further hold that the $5000 total penalty for these ten violations will have a suitably deterrent effect on appellant and other hazardous waste transporters who may be or may have been careless about complying with the conditions of their licenses. Thus, we uphold the $500 penalty for the first ten license condition violations.

As noted above, the 120 violations which occurred prior to February 8, 1984 included two associated with a single shipment for which DER assessed $1000,

of which $500 was for the violation of appellant's license conditions and $500 was for the failure to ascertain that the manifest had been properly completed by the generator. We conclude that the $500 penalty for the incomplete manifest, which is only two percent of the maximum penalty allowed by section 605 is not unreasonable, since, as we concluded above, the violation was negligent and caused no environmental harm. Therefore, we sustain this $500 assessment.

Beyond the first ten violations of appellant's license conditions and the incomplete manifest violation discussed supra, we conclude that a penalty of $500 per violation is unreasonably severe; this series of violations stemmed from appellant's same basic negligent failure to appreciate its license conditions. We cannot wholly overlook these remaining 109 license condition violations, however. Section 605 specifically states that "each violation for each separate day shall constitute a separate and distinct offense" and we are bound by the clearly indicated intention of the legislature. Taking all these considerations into account, we hold that under the circumstances of this appeal, a penalty of $100 per violation for each of these remaining 109 violations is reasonable and also is suitably deterrent. In sum, for the 119 violations of appellant's license conditions which occurred prior to February 8, 1984, we assess a penalty of $15,900. For the failure to assure that the manifest for one of these shipments was complete we uphold DER's assessment of $500. Thus, for all the violations prior to February 8, 1984 we assess a total penalty of $16,400. We stress that this result is specifically based upon the facts of this appeal. We certainly do not imply that in any series of similar negligent violations of low severity, whether or not arising from similar negligent action on the part of the transporter, the penalty for each violation beyond the first ten should be only one fifth

the penalty per violation for the first ten.

We next turn to the violations which occurred after appellant received the first Notice of Violation on February 8, 1984. There were twenty-one such violations, seventeen for transport of waste types for which appellant did not possess a proper license and four for improperly completed manifests. DER assessed $1000 for each of the manifest violations, $1000 for the first sixteen license condition violations, and $2000 for the last license condition violation.

The four manifest violations occurred after appellant had received the Notice of Violation, and DER therefore concluded that these violations reflected a higher degree of willfulness than those which occurred beforehand. The Notice of Violation, however, makes no mention of appellant's failure to ascertain that manifests were complete before accepting waste for shipment and we therefore find no basis in the record for concluding that the post-February 8th manifest violations were the result of anything more than negligent conduct on appellant's part or that they should be treated differently than the manifest violation which occurred prior to February 8, 1984. Since we have upheld DER's $500 assessment for the latter violation, we therefore uphold an assessment of $500 for these four additional manifest violations, amounting to a total penalty of $2000 for the four which occurred after February 8th.

The seventeen license condition violations have been classified by us as reckless, for reasons described supra. DER assessed a total penalty of $18,000 for these violations. In determining this amount DER concluded that the last of these violations occurred after the conversation between employees of appellant and of DER on February 24, 1984 concerning a possible amendment of