Environmental Hearing Board

Adjudications
and
Opinions

1991

Volume II

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COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

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ENVIRONMENTAL HEARING BOARD

1991

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FORWARD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1991.

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

1991

ADJUDICATIONS

OPINIONS AND ORDERS

1991 DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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M. DIANE SMITH
SECRETARY TO THE BOARD

WILLOWBROOK MINING COMPANY	:	
	:	
v.	:	EHB Docket No. 90-346-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 1, 1991

OPINION AND ORDER
DEPARTMENT OF ENVIRONMENTAL RESOURCE'S
MOTION TO LIMIT ISSUES

By: Richard S. Ehmann, Member

Synopsis

A Motion To Limit Issues seeking judgment for a party on the merits of fourteen separate issues in dispute in the appeal is in reality fourteen separate motions for partial summary judgment and will be treated as such. Where material facts are in dispute, motions for summary judgment will not lie. A motion seeking fourteen partial summary judgments will be denied without prejudice as untimely pursuant to Pa. R.C.P. 1035(a) on the issues raised therein when filed too close to the date for the hearing on the merits.

OPINION

On July 16, 1990, the Department of Environmental Resources ("DER") denied Permit Application 43900101. This application had been submitted the prior January by Willowbrook Mining Company ("Willowbrook") for a proposed surface coal mine in Findlay and Wolf Creek Townships, Mercer County.

On February 27, 1991, DER filed a motion captioned Motion For Summary Judgment/Motion To Limit Issues in this matter, and on March 19, 1991, we

received Willowbrook's response thereto. Because this matter is scheduled for a hearing on its merits to begin on April 15, 1991, we bifurcated our ruling on DER's alternative motions. By Opinion and Order dated March 27, 1991, we denied DER's Motion For Summary Judgment. The instant opinion deals only with DER's "Motion To Limit Issues" and Willowbrook's response thereto.

As soon as one reads DER's Motion To Limit Issues, it becomes obvious that its fourteen subparts are in fact fourteen motions for partial summary judgment. While the line between motions for partial summary judgment and motions to limit issues is sometimes hazy, this is not one of the times it is. A motion to limit issues generally seeks to exclude a particular issue's consideration because of a procedural or evidentiary defect in its assertion. It is a procedural tool for pre-trial elimination of an issue's consideration. Thus, for example, DER might move to eliminate a specific challenge to an effluent limitation in a permit where the appellant had failed to challenge the imposition of that limitation in a prior unappealed DER order. A motion for partial summary judgment, on the other hand, goes to the merits of a particular contention and asserts a party is entitled to a pre-trial ruling in its favor on that issue. DER's Motion asks the Board "to find for the Department on the following issues". The following fourteen issues deal with such questions as "(a) [t]he wetlands at [Willowbrook's proposed mine] are important as defined by 25 Pa. Code §105.17(d)" or "(g) [t]he Department's action does not deprive Willowbrook of equal protection under the United States or Pennsylvania Constitutions". Clearly, a request for judgment in favor of DER on issues such as these is an attempt to secure summary judgment on each such issue. In reviewing DER's Motion To Limit Issues, we thus apply all of the standards for judging motions for summary judgment.

DER's alternative motions are contained in a twenty-eight page Motion to which DER has attached Exhibits A through W, which are reproduced serially on pages copied on both sides. The documents range in size from a two page letter (Exhibit E) to Exhibit D (Willowbrook's application for permit), which is over two hundred pages in length. In addition, DER has attached affidavits from its lawyer, a Wildlife Biologist, a Hydrogeologist, the director of DER's review of Willowbrook's application, a mining engineer, a Pennsylvania Game Commission Land Management Officer and a Game Commission Wildlife Impact Review Coordinator. Five of these seven affidavits offer expert witness opinion on issues raised by the Notice Of Appeal. Finally, DER has added in a separate binding a sixty-eight page Brief to argue the legal contentions advanced in support of this assemblage of information.

In response, Willowbrook's Cross Motion For Summary Judgment And For A Ruling In Limine And Answer In Opposition To The Department of Environmental Resource's Motion For Summary Judgment/Motion To Limit Issues was filed with us on March 19, 1991. Willowbrook's Motion is only six pages long.[1] It has attached to it only seventeen exhibits, which include six affidavits (four of which offer expert opinion). Willowbrook's Brief, however, takes eighty-five pages to set forth its legal position.

With this volume of material before us, we are disappointed with the waste of time occasioned by its preparation and our review thereof. Plainly,

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[1]Willowbrook's Cross Motion For Summary Judgment was denied because Willowbrook waited until too near the merits hearing date (April 15, 1991) to file it, contrary to Pa. R.C.P. 1035(a). Insofar as its Motion is also a motion for a Ruling In Limine, it is pending before this Board and not addressed herein.

DER's Motion To Limit Issues cannot and should not be granted for the reasons set forth below.

When DER's Motion For Summary Judgment is added to these fourteen motions for partial summary judgment, the first question to appear is whether there is a misapprehension on DER's behalf of the nature of practice before this Board and the use of such pre-trial motions. This is particularly true here because DER's group of Motions asks first for the whole pie (summary judgment) and then (if that request is unsuccessful) seeks summary judgment on each of the fourteen slices which appear to make up the whole pie from DER's perspective. Proceedings before this Board are not Trial by Summary Judgment or Trial by Motion. The norm is that a party is entitled to a hearing on the merits of his or her contentions. The exception is when a pre-trial motion allows us to dispose of a matter without a hearing. Such pre-trial motions for summary judgment, if the party filing same expects serious consideration thereof, should only be filed when the issues raised in the motion are relatively clear and free from defect or doubt. Pre-trial Motions should not be reflexive reactions volleyed forth in all cases. A group of Motions such as that before us, instantly, unfortunately suggests the latter.

Viewing this Motion to Limit Issues in this light and as fourteen motions for partial summary judgment, two significant obstacles thereto are immediately apparent. The first defect deals with the mandate that summary judgment on an issue only be granted when there is no dispute between the parties as to any facts material to this issue. Palisades Residents In Defense Of The Environment (P.R.I.D.E.) v. DER, EHB Docket No. 86-265-E (Opinion issued June 27, 1990). Of course, the burden of proving this is on the movant, here, DER. Penn Center House, Inc. v. Hoffman, 520 Pa. 171, 553

A.2d 900 (1989). Here, most of the fourteen issues on which DER seeks summary judgment relate directly to whether DER properly concluded 25 Pa. Code §105.17 as to important wetlands applies to this mine site and then properly interpreted the section by imposing a two-tiered test in reviewing and rejecting Willowbrook's application. DER contends that §105.17 applies because the mine site's wetlands are important wetlands, that Willowbrook failed to furnish DER adequate information to balance the impact on wetlands against public benefits from mining, and that DER is not required to consider Willowbrook's wetlands damage mitigation plan because of the lack of sufficient information from Willowbrook. Willowbrook contends it has provided DER sufficient information to conduct this balancing, the wetlands in question are not important wetlands, and that in undertaking the required balancing, DER must consider the damage mitigation plan. DER's Brief even concedes submission of information by Willowbrook on at least some of the points raised by Section 105.17 but denigrates the quality and quantity of that information. The point made by these assertions and counter assertions, however, is that material facts remain in dispute, so summary judgment does not lie.

As we have written previously, Pa. R.C.P. 1035(a) only allows motions for summary judgment if filed "within such time as not to delay trial". This appeal arose on August 15, 1990. In January of 1991, after the parties filed their Pre-Hearing Memoranda, there was a conference telephone call with counsel for both parties about the scheduling of this matter for hearing. In that conference, DER's counsel advised this Board of his intent to file his Motion For Summary Judgment on DER's behalf in this matter. Willowbrook's counsel advised us that he intended a similar course of conduct on behalf of his client. We advised both attorneys to do so promptly because we would soon

schedule this matter for trial. Over a month passed before DER filed its instant group of summary judgment motions with us on February 27, 1991. Because of what are fifteen separate motions for summary judgment by DER, we gave Willowbrook a full twenty days to respond thereto, with the result that its response was received less than thirty days prior to the date (April 15, 1991) on which trial on the merits of this matter is scheduled to begin. In County of Schuylkill et al. v. DER et al., EHB Docket No. 90-124-W (Opinion issued November 6, 1990), this Board's Chairman wrote:

> "Motions for Summary Judgment must be filed at least 60 days prior to a hearing to allow opposing parties to respond and to enable the Board to prepare an opinion, and, if necessary, in the case of an opinion granting the motion, circulate the draft opinion amongst the Board Members".

It should be obvious from our Order of March 20, 1991, denying Willowbrook's Cross Motion For Summary Judgment because of its untimely nature relative to the hearing date, that we subscribe to the Board Chairman's rationale and thus respond to DER's Motion To Limit Issues in similar fashion. Our denial of DER's Motion To Limit Issues is without prejudice to DER as to the contentions therein just as our denial of Willowbrook's Motion For Summary Judgment was without prejudice to Willowbrook as to the contentions therein.

ORDER

AND NOW, this 1st day of April, 1991, DER's Motion To Limit Issues is denied without prejudice to DER's raising the contentions in its Motion at an appropriate subsequent point in this appeal.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 1, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Steven Lachman, Esq.
Western Region
For Appellant:
Stephen G. Allen, Esq.
Philadelphia, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

C & L ENTERPRISES, INC. and CAROL RODGERS :
:
v. : EHB Docket No. 86-626-MJ
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: April 2, 1991

ADJUDICATION

By Joseph N. Mack, Member

Synopsis

In this appeal of an order and amended order directing the appellants to take corrective action with respect to a discharge of gasoline which occurred in the vicinity of the appellants' gasoline station, we find that the Department of Environmental Resources has met its burden of showing by a preponderance of the evidence that its order was authorized by statute and did not constitute an abuse of discretion. Although much of the evidence relied upon by the Department in determining the cause of the discharge was circumstantial in nature, nevertheless, there was substantial and competent evidence showing the appellants to be the most probable cause of the discharge.

Background

This matter arose on October 14, 1986 when the Department of Environmental Resources (the Department) investigated a report of a gasoline

discharge along Route 8 in Richland Township, Allegheny County, in the vicinity of a Citgo gasoline station (gas station) owned and operated by C & L Enterprises, Inc. (C & L). The gas station is located on property owned by Carol Rodgers (Ms. Rodgers), the president of C & L.

In determining the source of the gasoline discharge, the Department investigated the gas station, two other gasoline stations in the immediate area, and a trucking company located on property adjacent to that of Ms. Rodgers. Through its investigation, the Department determined the C & L gas station to be the source of the problem. On October 25, 1986 and October 27, 1986, the Department issued to C & L and Ms. Rodgers an Order and Amended Order (collectively referred to as "the Order"). The Order found that gasoline was emanating from the C & L gas station and Ms. Rodgers' property in violation of the Clean Streams Law and the Solid Waste Management Act. The Order required, inter alia, that C & L and Ms. Rodgers maintain a collection ditch to contain the gasoline, hire a hydrogeologist, and submit a written plan to the Department determining the extent of the pollution and providing for abatement thereof.

C & L and Ms. Rodgers (hereinafter sometimes collectively referred to as "the Appellants") appealed the Order and Amended Order on November 10, 1986 and filed a Petition for Supersedeas. A supersedeas hearing was held before Former Board Member William A. Roth on November 24 and 25, 1986 and December 2, 1986. On February 12, 1987, Mr. Roth denied the Petition for Supersedeas, concluding that the Appellants had failed to show a likelihood of prevailing on the merits.

Following two continuances, a hearing on the merits was held on October 15 and 16, 1990. Prior to the hearing, on October 12, 1990, the

parties stipulated that the entire transcript of the supersedeas hearing, including exhibits, would be incorporated into the record. The parties also stipulated that the Petition for Supersedeas, minus all exhibits except the curriculum vitae of Hydrogeologist James King, would also be incorporated into the record.

Prior to proceeding on October 15, 1990, Appellants' counsel advised the Board that he would not be representing the Appellants at the hearing. Ms. Rodgers concurred and appeared pro se throughout the hearing on her own behalf and as president of C & L.

The Department filed its Post-Hearing Brief on November 23, 1990. C & L and Ms. Rodgers failed to file a Post-Hearing Brief and, therefore, all arguments raised by them in this appeal have been deemed waived. Laurel Ridge Coal, Inc. v. DER, EHB Docket No. 86-349-E (Adjudication issued May 11, 1990).

After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. The Appellants are C & L Enterprises, Inc., a corporation which owns and operates a gasoline station situated on the east side of Route 8 in Richland Township, Gibsonia, Pa., and Carol Rodgers, the president of C & L and the landowner of the property on which the gas station is located. (Notice of Appeal)

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which is the agency authorized to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987 as amended, 35 P.S. §691.1 et seq., the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., Section 1917-A of the

Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, and the rules and regulations promulgated thereunder.

3. The gas station is located in Richland Township on the eastern side of Route 8 on property owned by Ms. Rodgers. (Notice of Appeal, Ex. C-7)

4. The Richland Hotel is also located on Ms. Rodgers' property and to the north of the gas station. (Ex. C-7)

5. Tesone Trucking Company (Tesone) is located approximately 250 yards north of the gas station, also on the eastern side of Route 8. (ST. 20; Ex. C-7)

6. At the time of the supersedeas hearing, an Amoco gasoline station was located to the southwest of the C & L gas station, on the western side of Route 8. (Ex. C-7)

7. Also at the time of the supersedeas hearing, a Pennzoil gasoline station was located in the Richland Mall above Pioneer Road, west of the immediate area in question. (Ex. C-7)

8. On October 14, 1986, a gasoline leak was discovered in the vicinity of the gas station and the above-named businesses. (ST. 31, 107, 135, 438)[1]

9. On that date, two buildings across the street from the gas station, "Downtown Optics North" (Optics Building) and "Gibsonia Medical Practice" (Medical Building), were evacuated because of gasoline fumes. (ST. 23, 32)

10. On October 14, 1986, gasoline was discovered seeping from a hillside out of a pipe located approximately 2 1/2 to 3 feet south of the Medical Building. (ST. 23-26, 32; Ex. A-1; Ex. C-7)

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[1]A reference to "ST." followed by a number is a reference to a page in the transcript for the supersedeas hearing; "T." followed by a number is a reference to a page in the transcript of the hearing on the merits.

11. Mark Johnson, a Department hydrogeologist, began an investigation of the gasoline problem on October 14, 1986. (ST. 438)

12. Also present at the site on October 14, 1986 were the Allegheny County Fire Marshal and representatives from the Richland Township Police Department, the Richland Township Volunteer Fire Department, and the natural gas company. (ST. 439)

13. Norman Wirth, Fire Chief, Richland Township Volunteer Fire Department, was involved in the investigation at the Optics Building and the Medical Building on October 14, 1986. (ST. 135, 147-148)

14. Mr. Wirth arrived at the Optics Building after it was evacuated. (ST. 140) At that time, there was a strong gasoline smell in the building. (ST. 140)

15. The utilities in the Medical Building and Optics Building were turned off on or about October 14, 1986 and remained off when Mr. Wirth visited the site one week prior to the supersedeas hearing. (ST. 142)

16. On October 14, 1986, Ms. Rodgers and C & L were ordered by the local fire marshal, the Allegheny County Fire Marshal, and the Department to shut down the gas station. (ST. 52-53, 60-61)

17. Between October 14 and 16, 1986, the manager of the gas station, Steward Maynard, and employees of C & L dug a collection ditch at the pipe near the Medical Building where the gasoline seep was occurring in order to collect and contain the gasoline. (ST. 17, 23-26; Ex. A-1)

18. Every 3 to 3 1/2 hours, C & L employees pumped the gasoline and water from the ditch into 55-gallon drums, periodically removed the drums, and cleaned the street. (ST. 41-42)

19. C & L and Ms. Rodgers handled clean-up and removal of the gasoline

from October 14, 1986 to October 22, 1986, at which time responsiblity for clean-up and removal was turned over to the Department. At the time of the supersedeas hearing, 217 drums of collected material remained on the site. (ST. 71-72)

20. On October 14, 1986 the gasoline discharge coming out of the pipe alongside the Medical Building was black and remained that way for a couple of weeks afterward. (ST. 55, 63, 105) A sample of the discharge that Mr. Maynard took approximately two weeks before the supersedeas hearing had a petroleum film on it. (ST. 67-68) By the time of the supersedeas hearing, the discharge looked like clear water. (ST. 63, 105) However, samples of the discharge taken from December 18, 1986 to November 7, 1988 showed that it still contained gasoline. (Ex. C-22)

21. On October 20 or 21, 1986, gasoline was discovered in the manhole on the northwest corner of the gas station. On the morning of December 2, 1986, the last day of the supersedeas hearing, the gasoline was no longer present. (ST. 45-46, 70)

22. On October 25 and 27, 1986, the Department issued to Ms. Rodgers and C & L an order and amended order finding that gasoline was emanating from the gas station and Ms. Rodgers' property and requiring, inter alia, that Ms. Rodgers and C & L hire a hydrogeologist, maintain a collection ditch, and submit a plan for determination of the extent of the gasoline pollution and for abatement. (Jt. Stip. - Feb. 23, 1990)

<u>Storm Sewers In The Vicinity Of The Spill</u>

23. A storm sewer runs between the gas station and the Richland Hotel. (ST. 448; Ex. C-7) This storm sewer runs in a westerly direction, crosses Route 8, and continues underneath the Optics Building to an open grating

manhole. The sewer then continues south and exits at an open storm ditch which flows to an unnamed tributary of Crews Run. (ST. 445, 449; T. 22, 24; Ex. C-19, C-20)

24. There is a storm sewer which runs in front of the gas station along the C & L property. It originates south of the gas station at two inlet boxes on the north and south corners of Vista Vue Drive. These flow into a manhole and then into the storm system under Route 8. (T. 17, 18; Exs. C-7 and C-20)

25. There are two inlet boxes for surface drainage at the Amoco station located across Route 8 southwest of the C & L gas station. One inlet box is located immediately in front of the Amoco station on Route 8; the other is on the Amoco site. (T. 20; Exs. C-7 and C-20) The inlet boxes flow into a storm pipe which exits onto Pioneer Road. (T. 20; Ex. C-20)

26. There are no underground storm sewers on the Tesone property. (T. 20-21)

27. Surface flow from the Tesone property travels north on Route 8 to an inlet box at the intersection of Cook Road and Route 8. (T. 21)

28. Surface storm drainage from properties on Route 8 directly across from the C & L site flows into an inlet box that travels east under Route 8. (The storm drainage appears to flow through the storm sewer referred to in Finding of Fact No. 41.) (T. 27)

29. Flow from the storm sewer in front of the gas station and the storm sewer on the north side of the gas station combine at the manhole on the northwest corner of the gas station. This manhole also receives flow from the west side of Route 8. (T. 26, 27; Ex. C-7) This combined drainage flows

under the Optics Building to an open storm grate on Pioneer Road, then south on Pioneer Road to an unnamed tributary of Crews Run. (ST. 445; T. 22; Ex. C-7)

30. The storm sewer on Pioneer Road is at a lower elevation than the storm sewer on the east side of Route 8. (T. 25-26)

The Department's General Investigation

31. The Department's investigation of the source of the gasoline leak included the gas station, Tesone, the Amoco station, and the Pennzoil station. (ST. 449)

32. Prior to beginning his investigation for the Department, Hydrogeologist Mark Johnson reviewed actual blueprints of the storm sewers in the area. (ST. 447-448)

33. When Mr. Johnson first arrived at the scene, he went to a utility junction box located in a manhole in front of Tesone, where the County Fire Marshal and the utility company were attempting to remove the manhole cover. When the cover was removed, he smelled gasoline fumes emanating from the junction utility box. (ST. 440-441; Ex. C-7)

34. Mr. Johnson next investigated the manhole located at the northwest corner of the gas station. (ST. 441; Ex. C-7) He smelled gasoline and saw a gasoline sheen on the liquid in the bottom of the manhole. (ST. 442)

35. Mr. Johnson then crossed Route 8 and went into the Medical Building and the Optics Building, which had been evacuated by that time. He smelled gasoline fumes in both buildings. (ST. 442-443)

36. Next, Mr. Johnson went to the area where the collection ditch was later dug. There was a small amount of gasoline seeping out of the hillside. (ST. 443)

37. Mr. Johnson then went to the area marked "Open Storm Ditch" on Ex. C-7. Mr. Johnson saw gasoline flowing out of a storm pipe into the drainage ditch which flows to an unnamed tributary of Crews Run. The smell of gasoline was very strong. (ST. 443-445; Ex. C-7, C-17) He placed absorbent booms and pads in the drainage ditch to collect the gasoline. (ST. 445; Ex. C-17)

38. On October 14, 1986, a tanker from Guttman Oil, also known as Mid Penn Oil, pumped out the gasoline from the underground storage tanks at the gas station. (ST. 472) Mr. Johnson observed that there was a noticeable decrease in the volume of gasoline flowing out of the storm pipe draining to the tributary of Crews Run when the underground storage tanks at the C & L gas station were being pumped out. (ST. 472-473)

39. After the tanks were pumped out, the township flushed the storm sewer line. When this took place, Mr. Johnson observed a dramatic increase in the volume of water flowing out of the storm pipe to the open storm ditch. (ST. 473)

40. Also on October 14, 1986, Mr. Johnson both smelled gasoline and saw it flowing at a manhole covered by an open grate on Pioneer Road (shown on Ex. C-7 as a circle covered in red and designated as "Manhole-Open Grating"). (ST. 446-447; Ex. C-7)

41. That same day, Mr. Johnson also smelled gasoline at the storm sewer on Route 8 in front of the Optics Building (shown on Ex. C-7 as two rectangles on Route 8 with an arrow between them pointing east, and designated as "Storm Sewer"). (ST. 446; Ex. C-7)

42. Also on October 14, 1986, Mr.Johnson smelled gasoline fumes but did not see gasoline in the open storm grating of the storm sewer running between

the gas station and the Richland Hotel (designated as "Storm Grating Open" on Ex. C-7). (ST. 467; Ex. C-7)

43. On October 15, 1986 there were still gasoline fumes and a sheen of gasoline on the water discharging from the open storm ditch which empties into Crews Run. (ST. 474-475)

44. On October 15, 1986 Johnson smelled gasoline fumes at the open storm grating behind the gas station and at the open grating manhole on Pioneer Road. (ST. 474-475) He also saw gasoline in the manhole with the open grating on Pioneer Road. (ST. 476)

45. Mr. Johnson determined that the groundwater flow in the area of the gas station is from east to west in a southerly direction. (ST. 469; Ex. C-7)

46. The Department analyzed samples of material taken on October 22, 1986 from the sewer between the gas station and the Richland Hotel and from the terra cotta pipe next to the Medical Building. The lab analysis showed that the samples contained relatively fresh gasoline and came from the same source. (ST. 482-486, 357-358; Exs. C-8, C-9, C-11, C-12)

47. The Department also analyzed actual samples of pure unleaded gasoline, regular gasoline, super unleaded gasoline, and kerosene from the gas station. (ST. 487-488; Exs. C-15 and C-16)

48. A sample of gasoline taken from the terra cotta pipe near the Medical Building on October 25, 1986 was strongly similar to the samples of pure regular and unleaded gasoline taken from the gas station. However, it was impossible to determine with absolute certainty whether the sample from the terra cotta pipe was from the same source as the pure gasoline. It was also impossible to determine whether the sample was regular or unleaded gasoline. (ST. 411-413, 425-430; Exs. C-14, C-15 and C-16)

49. Based on his investigation of October 14 and 15, 1986, Mr. Johnson believed that the gas station was the cause of the gasoline problem. (ST. 469)

50. At the time of the incident in question, there was a Scheetz gasoline station located approximately 1/4 mile from the C & L gas station along the eastern side of Route 8. Mr. Johnson did not investigate the Scheetz station since he detected no fumes further along the road in that direction. (ST. 497)

The Pennzoil Station Investigation

51. The Pennzoil station was located in the Richland Mall above Pioneer Road. (Ex. C-7) At the time of the discharge in question, Pennzoil had underground storage tanks containing oil and waste oil but none containing gasoline. (ST. 463)

52. On October 14, 1986, there was no oil or gasoline flowing out of the storm pipe which drains from the area of the Pennzoil station. (ST. 463-464)

The Amoco Station Investigation

53. At the time of the incident in question, an Amoco station was situated on a hill above Pioneer Road on the west side of Route 8. The Amoco station was located southwest of the C & L gas station and south of the gasoline seep at the side of the Medical Building. (ST. 450; Ex. C-7)

54. On October 14 and 15, 1986 there were no visible surface spills at the Amoco station. (ST. 463)

55. During his investigation on October 14, 1986, Mr. Johnson observed no gasoline seeping out of the hillside behind the Amoco station, nor did he detect the presence of gasoline fumes in the Blackstone Body Shop located near the Amoco station. (ST. 450, 452)

56. On October 15, 1986, James Twigg, an employee of Petroleum Equipment Services (PES), conducted a Petro-Tite test on four underground storage tanks and appurtenant lines at the Amoco station. (T. 35, 38, 46)

57. Mr. Twigg is certified to perform the Petro-Tite Tank Test, and estimated that by 1986 he had tested approximately 700-800 tanks and lines using the Petro-Tite Test. (T. 37-38)

58. The purpose of a Petro-Tite test is to determine whether a tank or line leaks. (T. 37)

59. The National Fire Prevention Association (NFPA) standards for tightness are as follows: no higher than .050 for tanks and no higher than .010 for lines. (T. 39) This is measured in units of thousandths/gallon leakage per hour. (T. 40-41)

60. All four of the Amoco underground storage tanks passed the Petro-Tite Tank test with results well below the NFPA tolerance levels and were certifiable as not leaking. (T. 46-47; Ex. C-21)

61. The lines associated with the four underground storage tanks at the Amoco station also were certifiable as not leaking. (T. 49-50, 53)

62. The Amoco station was no longer in operation at the time of the hearing on the merits. (T. 52)

Tesone Trucking Company Investigation

63. Tesone is located north of the gas station on the eastern side of Route 8. The Richland Hotel separates the two operations. (Ex. C-7)

64. On October 14, 1986, the date the leak was discovered, Tesone stick tested all of its underground storage tanks on an hourly basis. They showed no loss of product. (ST. 464)

65. Tesone's Controller testified that during the thirty-four years prior to 1986, Tesone had had only three underground storage tanks on its property which contained gasoline. (T. 29-31) These storage tanks were located behind a building on the Tesone property. (Ex. C-7)

66. Tesone had not stored gasoline in the three tanks for at least fifteen years prior to October 14, 1986. (T. 31)

67. The three underground tanks had been removed on June 10, 1986. (T. 30; Ex. C-4)

68. Records on file with the Allegheny County Fire Marshal's office contained applications for installation of a total of five underground storage tanks for gasoline on Tesone's property. This included the three removed in 1986. The other two were registered in 1950 and were believed to have been placed in between the Richland Hotel and Tesone's building. Edward Babyak, Deputy Fire Marshal for Allegheny County, did not know if or when the two unaccounted for tanks were removed. (ST. 264, 275-284, 319, 539; Ex. C-5A,B,C,D)

69. Mr. Babyak testified there were at least three underground storage tanks on Tesone's property which were not registered with the Allegheny County Fire Marshal. They were located south of a motor oil tank and antifreeze tank near the Tesone garage. (ST. 318, 325, 329; Ex. C-7) A Tesone supervisor advised Mr. Babyak that the unregistered tanks did not contain gasoline but, rather, that one tank contained oil and two contained hydraulic oil. Mr. Babyak did no further investigation to determine the contents of these tanks, but did require Tesone to take action to register the tanks with the County Fire Marshal. (ST. 329-330)

70. At the time of the supersedeas hearing and prior thereto, Tesone operated a steam jenny in the rear of its property which was used to wash grease and oil from trucks. (ST. 20-21, 78-79; Ex. A-1; Ex. C-7)

71. Waste material from the steam jenny and oil and chemicals from the trucking operation ran into a ditch which flowed into the sewer line between the Richland Hotel and the gas station. (ST. 20, 78; Ex. A-1; Ex. C-7)

72. Max Wilkinson, an employee of Tesone, as well as vice-president of C & L and Ms. Rodgers' son, testified that approximately 25 feet south of the steam jenny building there was an area, approximately 25 feet by 30 feet in size and 16 to 18 feet deep, which contained a buildup of grease, gravel and sediment from at least eight years of activity by Tesone. (ST. 231-232, 236-237) This waste material consisted of fifth wheel grease, rear end grease, 90 weight engine oil and acid. (ST. 240)

73. Mr. Wilkinson testified that in 1986 some of the grease and sediment material were removed and replaced with clean fill. (ST. 232) In April 1986, Mr. Wilkinson and Tesone's foreman laid approximately 65 feet of pipe and connected it to the storm sewer running between the gas station and the Richland Hotel. (ST. 232-233, 236, 237) They burned holes into the pipe so that runoff from the ditch and the steam jenny would drain into the pipe. (ST. 119, 234-235)

74. At the time of the supersedeas hearing, Tesone was continuing to put waste material into the waste area, but as of October 14 or 15, 1986 had ceased draining it into the storm sewer. (ST. 238-240)

75. The day after the gas station was ordered to close, the gas station's manager, Steward Maynard, observed Tesone employees filling the ditch by the steam jenny with rock and other material. (ST. 47)

76. Immediately following discovery of the gasoline discharge, Max Wilkinson was instructed by his foreman at Tesone to put gravel on top of the dirt in the waste area. (ST. 239-240)

77. For a period of 2 to 3 days during investigation of the gasoline discharge, Steward Maynard observed Tesone flush the surrounding area with its steam jenny. The waste water drained into the storm drain leading to the manhole along Route 8. (ST. 56)

78. On October 23 and 24, 1986, the Department dug five trenches in an effort to determine from where gasoline was draining. (ST. 539-544; Designated as Ditch 1, Ditch 2, etc. on Ex. C-7)

79. Ditch No. 1 was dug on October 23, 1986. It was dug adjacent to the area where the two previously mentioned unaccounted for underground gasoline storage tanks were shown to be located on the Tesone property. (ST. 539; Ex. C-7)

80. Ditch No. 1 was excavated to approximately 15 feet. It was not deep enough to intercept the water table, but there was some moisture in the excavated material. (ST. 540, 547)

81. Department Hydrogeologist James Sturm inspected all the material excavated from Ditch No. 1. He did not smell any gasoline fumes. (ST. 540)

82. Also on October 23, 1986, the Department dug Ditch No. 2, in order to determine if there had been any contamination entering the storm drain from the three underground tanks Tesone had removed in June 1986. (ST. 541)

83. Ditch No. 2 was excavated alongside the storm drain between the Richland Hotel and the gas station to a depth just below the storm sewer. (ST. 541; Ex. C-7) Mr. Sturm neither saw nor smelled any gasoline at this location. (ST. 541)

84. On October 24, 1986, Ditch No. 3 was dug at the request of Ms. Rodgers and Steward Maynard in an attempt to discover whether petroleum products were draining from Tesone's property. It was dug behind an open storm grating which leads into the storm sewer and was located in a fill area where water seeped into it from the south side. (ST. 49, 542) Although Mr. Maynard observed a dark substance resembling oil or grease in the ditch, Mr. Sturm neither saw nor smelled gasoline at this location. (ST. 49, 542, 548)

85. Ditch No. 4 was dug on October 24, 1986 adjacent to Route 8 between Tesone and the Richland Hotel. (ST. 542; Ex. C-7) This ditch was dug to see if gasoline was traveling along the sanitary sewer line along Route 8. It was dug to a depth of 11 to 12 feet, several feet below the sewer line. (ST. 543) Mr. Sturm was lowered into the ditch and neither smelled nor saw gasoline. (ST. 543) He did detect a slight sheen, which was later analyzed and identified as oil. (ST. 543)

86. On October 24, 1986, Ditch No. 5 was dug to the south of the storm sewer between the gas station and the Richland Hotel near the manhole at Route 8. (ST. 544; Ex. C-7) The ditch was dug at this location in an attempt to intercept gasoline prior to its seeping into the manhole and to see if gasoline was coming from the gas station and hitting the sewer line. (ST. 544, 545) However, the ditch collapsed at 12 feet six inches, and it was not possible to get deep enough to intercept the gasoline. (ST. 544-545) Mr. Sturm neither saw nor smelled gasoline in the ditch. (ST. 545) In Mr. Sturm's opinion, Ditch No. 5 produced inconclusive results. (ST. 550)

<u>The Gas Station</u>

87. Ms. Rodgers opened the gas station (a Citgo station in 1986) six months prior to the supersedeas hearing. (ST. 18)

88. Steward Maynard managed the gas station from its opening and was the manager at the time of the incident in question. (ST. 17, 18)

89. Prior to the tanks being removed, C & L and Ms. Rodgers were required to dip-test the tanks every hour. Ms. Rodgers testified that the dip-tests revealed no loss of product. (ST. 122-123)

90. On October 15 or 16, 1986,[2] Nick Lewis and Company removed the underground gasoline tanks at the gas station and replaced them with new tanks. (ST. 33, 582)

91. Steward Maynard was present when the tanks were removed. (ST. 33, 36)

92. The first tank to be removed was the unleaded gasoline tank. (ST. 34)

93. Mr. Maynard testified that liquid flowed into the excavation from its western side when the first tank was removed. (ST. 34-35)

94. Chief Wirth was present after removal of the first tank. He did not recall smelling gasoline in the excavation from the first tank. (ST. 146-147)

95. Mr. Maynard testified that he may have smelled a bit of an odor of gasoline when the second tank was removed. However, he attributed the odor to gasoline spilled when the lines connecting the tanks were cut. (ST. 36)

96. Mr. Johnson observed the removal of the first two tanks and smelled gasoline fumes in the excavation following their removal. (ST. 36, 477, 479)

97. Prior to the removal of the first two tanks, the line from the pump to one of the tanks was cut, allowing gasoline to flow into the excavation pit. (ST. 478)

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[2]The testimony is unclear as to whether the tanks were removed on October 15, 1986 or October 16, 1986. (ST. 33, 476-477)

98. After removal, the tanks remained above ground on the corner of the gas station for approximately seven days. (ST. 37)

99. The tanks were covered with dirt, rocks and debris. (ST. 480) Mr. Johnson observed that the dirt surrounding the tanks was moist and smelled from gasoline. (ST. 481)

100. Mr. Maynard observed no leakage from the tanks while they were above ground but examined only the sides of the tanks. (ST. 37, 82) In Mr. Maynard's opinion, the dirt removed from the underground area of the tanks was dry and hard, like clay. (ST. 42)

101. Mr. Maynard was present during the testing of lines still attached to underground tanks after the tanks were out of the ground. He did not know if any test had been performed on the lines that were cut from the dispensers and tanks. He testified that no leaks were detected in the lines with 50 pounds of pressure. (ST. 40, 85, 86)

102. Ms. Rodgers engaged the services of James King, a hydrogeologist, who visited the site on October 29, 1986. (ST. 564) He was not present at the site when the trenches were dug or when samples were taken. (ST. 578-579)

103. Mr. King stated that he could not draw any conclusions about the source of the gasoline leak based on the Department's December 2, 1986 testimony at the supersedeas hearing. (ST. 575-576) He further stated that he could not conclude that the gas station, C & L, or Ms. Rodgers' property were the source of the gasoline contamination. (ST. 566)

104. On October 23, 1986, as part of the investigation, the Allegheny County Deputy Fire Marshal, Edward Babyak, performed an inventory of

gasoline at the gas station in order to determine if the gas station had lost any product as of October 14, 1986, the date of the incident in question. (ST. 285-286, 293-299; Ex. C-6, Ex. C-23)

105. Through his calculations, Mr. Babyak determined that a possible 440 gallons of inventory of regular gasoline were unaccounted for at the gas station as of October 14, 1986. He found no loss in unleaded or super unleaded gasoline. (ST. 298; Ex. C-6)

106. Edward Tanski, a parts supervisor for Tesone, testified that on the morning of October 14, 1986, Max Wilkinson, who was vice-president of C & L, and who was involved in the operation of the gas station, made the statement that he was "about four hundred gallons short." (ST. 229, 253, 254)[3]

107. Mr. Babyak was advised by the laboratory which did testing for C & L that samples of gasoline taken from C & L's tanks showed the presence of an octane booster not found in samples of the leakage. (ST. 344-345) However, the results of this testing were not introduced into evidence by C & L or Ms. Rodgers.

DISCUSSION

In this appeal of the Department's Order, the Department has the burden of proving by a preponderance of the evidence that its Order was authorized by statute and was an appropriate exercise of its discretion. 25 Pa.Code §21.101(b)(3); Samuel B. King v. DER, EHB Docket No. 87-111-M (Adjudication, September 25, 1990).

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[3]This testimony is admissible under the rules of evidence as an exception to the hearsay rule since it involves an admission by an agent of C & L who participated in the operation of the gas station and who, as vice-president of C & L, was authorized to make statements on its behalf. DeFrancesco v. Western Pennsylvania Water Co., 329 Pa.Super. 508, 478 A.2d 1295, 1303 (1984).

The Order which is the subject of this appeal found that C & L and Ms. Rodgers had caused an unauthorized discharge of gasoline into the waters of the Commonwealth in violation of Sections 3, 301, 307, 401, and 611 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., at §§691.3, 691.301, 691.307, 691.401, 691.611. The Order also cites Sections 401, 601, and 610 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., at §§6018.401, 6018.601, and 6018.610, which prohibit the unauthorized disposal of hazardous waste.

The Clean Streams Law prohibits the unauthorized discharge of industrial waste or any pollution into the waters of the Commonwealth. 35 P.S. §§691.301, 691.307, 691.401. Section 3 of the Clean Streams Law provides in relevant part that "[t]he discharge of...industrial waste...into the waters of this Commonwealth, which causes or contributes to pollution...or creates a danger of such pollution is hereby declared...to be against public policy and to be a public nuisance." 35 P.S. §691.3.

Under Sections 5 and 610 of the Clean Streams Law the Department is authorized to take such action and issue such orders as may be necessary to enforce the provisions of that Act. 35 P.S. §§691.5, 691.610. Furthermore, under Section 316, the Department may order a landowner or occupier to correct a condition on his or her land where such condition is resulting in pollution or the danger of pollution. 35 P.S. §691.316.

There is no dispute in this case that an unauthorized discharge of gasoline did in fact occur on October 14, 1986 in Richland Township in the vicinity of the C & L gas station. Fumes from the gasoline leak and the presence of hydrocarbons caused the evacuation of two buildings in the area.

Gasoline flowed through a storm sewer along Pioneer Road which drains to an unnamed tributary of Crews Run. This unauthorized discharge clearly constitutes a violation of Sections 3, 301, and 307 of the Clean Streams Law. 35 P.S. §§691.3, 691.301, 691.307.

The question on appeal is whether the Department acted arbitrarily or abused its discretion in charging the Appellants with responsibility for the discharge and correction of the problem.

In its Post-Hearing Brief, the Department contends that, based on the results of its investigation, it properly concluded that the Appellants' gas station was the likely cause of the gasoline spill and that issuance of its Order was authorized by Sections 5 and 610 of the Clean Streams Law, 35 P.S. §§691.5, 691.610. Since the Appellants failed to file a Post-Hearing Brief, all arguments previously raised by them in this appeal have been waived. Laurel Ridge, supra.

As outlined in the discussion below, we find that the Department conducted a thorough investigation and properly determined that C & L and Ms. Rodgers were the source of the gasoline discharge, and that the Department acted on proper authority and did not abuse its discretion in issuing the Order in question to the Appellants.

The Department's Investigation

The Department was assisted in its investigation by the Allegheny County Fire Marshal's Office as well as the Richland Township Police Department and the local volunteer fire department. Four sites were targeted and investigated as possible sources of the discharge: Pennzoil gasoline station, Amoco gasoline station, Tesone Trucking Company, and the C & L gas station.

Pennzoil

The Department properly ruled out the Pennzoil gasoline station as a possible source of the problem since it had no underground storage tanks containing gasoline. In addition, there was no gasoline discharging from the storm sewer which drained the area of the Pennzoil station into Crews Run.

Amoco

Although the Amoco gasoline station did have underground storage tanks on site containing gasoline, its tanks and lines were tested by an independent tank testing company on October 15, 1986, the day after the gas leak was discovered. The results of a Petro-Tite test certified the tanks and lines as not leaking. Furthermore, the Amoco station sits south of the Medical Building where gasoline was found to be discharging. Since groundwater in the area flows in a southerly direction, it is unlikely that any discharge at the Amoco site could have drained toward the Medical Building.

Tesone Trucking

Tesone was the only operation, other than the gas station, which could be seen as a likely source of the problem. Tesone's Controller, Mr. Vitullo, testified that Tesone had several underground storage tanks located at its site. Although none of the tanks on site contained gasoline at the time of the spill, in June 1986, Tesone had removed three underground tanks which had been used to store gasoline. However, Mr. Vitullo testified that these tanks had not been used to store gasoline for at least 15 years prior to 1986. Since the lab results of the gasoline discharges showed it to

be relatively fresh, the three Tesone tanks removed in June 1986 were not a likely source of the problem. Furthermore, the trench dug by the Department at this location revealed no gasoline or fumes in the excavation.

Applications on file with the Allegheny County Fire Marshal's office showed that in 1950 two other underground tanks had been registered for the storage of gasoline on Tesone's site. The applications showed the placement of the tanks between Tesone's building and the Richland Hotel. It was unknown whether these tanks had been excavated or whether they remained on site at the time of the discharge.

In addition to the tanks registered with the Allegheny County Fire Marshal's Office, the Deputy Fire Marshal testified that at least three unregistered underground storage tanks were located on Tesone's property. The tanks were situated south of a motor oil tank and antifreeze tank located near the Tesone garage. The Deputy Fire Marshal was advised by a supervisor for Tesone that one of these tanks contained oil and two contained hydraulic oil. No further investigation was done with respect to these tanks other than to require Tesone to register them with the Fire Marshal's office.

At this point of the investigation, the only possible evidence linking Tesone to the problem would have been the three unregistered tanks said to contain oil, but which were not investigated further, and the two gasoline tanks registered in 1950.

As part of the investigation of Tesone, a total of five ditches were dug in order to determine whether any gasoline was draining from the site. Ditch No. 1 was dug adjacent to the location of the two underground gasoline storage tanks which had been registered in 1950. No gasoline or fumes were detected in the ditch or excavated material. The second ditch was dug near a

storm drain between the Richland Hotel and the gas station in order to determine whether any gasoline contamination may have entered the storm drain from the three gasoline storage tanks removed in June 1986. As stated previously, no presence of gasoline or fumes was detected at this location.

Ditch No. 3 was dug behind an open storm grating which leads into the storm drain discussed in the previous paragraph. This ditch was excavated at the request of Ms. Rodgers. Although Steward Maynard, the manager of the gas station, observed a dark substance resembling oil or grease, no gasoline was found at this location.

The fourth ditch was dug adjacent to Route 8 between Tesone's building and the Richland Hotel. This ditch was dug to a depth several feet below the sanitary sewer line traveling along Route 8 in order to determine whether gasoline was traveling along the sewer line. Although no gasoline was detected at this location, Department Hydrogeologist James Sturm observed a slight sheen in the ditch. This was subsequently analyzed and identified as oil.

Ditch No. 5 was dug near the manhole on Route 8 in an attempt to intercept gasoline before it seeped into the manhole. However, because the ditch collapsed before reaching the necessary depth, it produced no conclusive results.

In addition to having ditches dug on its property, Tesone was ordered by the Fire Marshal to stick-test all of its tanks hourly on October 14, 1986, the date the leak was discovered. The tests revealed no loss of product.

Before proceeding to the Department's investigation of the C & L gas station, we note that a great deal of testimony was elicited at hearing with respect to oil and other waste material which Tesone was allegedly draining

from its steam jenny and a nearby ditch into the storm sewer located between the C & L gas station and the Richland Hotel. There was also testimony about the ditch near the steam jenny which contained years of buildup of waste matter, and how, the day after the spill was discovered, Tesone employees filled the ditch with dirt and gravel. Although this may have been evidence of improper disposal of oil and other waste material, it provides no evidence linking Tesone to the gasoline discharge which is the subject of this appeal.

C & L Gas Station

Following the day on which the gasoline leak was discovered, four underground storage tanks were removed from the C & L gas station, pursuant to orders of the Department and other investigating authorities. The storage tanks were replaced with new tanks. Prior to the tanks being removed they were dip-tested hourly. Ms. Rodgers testified that the dip-tests revealed no loss of product. However, no Petro-Tite test or other tightness testing was performed on the tanks or lines.

Although no leakage or flow of gasoline was observed during excavation of the tanks, there was conflicting testimony as to whether gasoline fumes were apparent. Department Hydrogeologist Mark Johnson, who observed the removal of the first two tanks, testified that he smelled gasoline fumes following their excavation. The gas station manager detected "a little bit of an odor of gas" during removal of one of the tanks, but attributed it to gasoline being spilled when lines connecting the two tanks were cut. The chief of the local volunteer fire department, who was present following removal of the first tank, did not recall smelling gasoline.

There was also conflicting testimony as to the condition of the dirt removed from the outside surface of the tanks following their excavation.

Steward Maynard, the gas station manager, observed that it was hard and dry like clay, whereas the Department's Hydrogeologist, Mr. Johnson, observed that dirt surrounding the tanks was moist and smelled like gasoline.

Despite the conflicting testimony, additional evidence points more clearly to the C & L gas station as being the most likely source of the problem. Mr. Johnson testified that in his investigation he observed gasoline flowing out of a storm pipe into a drainage ditch which flows to an unnamed tributary of Crews Run. Drainage from Ms. Rodgers' property and the gas station flowed through the sewer line leading to this storm pipe. Mr. Johnson noted that the volume of gasoline flowing out of the pipe decreased when C & L started pumping the gasoline out of its underground tanks prior to their removal. This indicated a relation between the gasoline discharge and the gas station's tanks.

In addition, results of testing done at the Department's laboratory (Ex. C-14, 15, 16) also showed a relation between a sample of gasoline being discharged from the terra cotta pipe near the Medical Building and samples of pure regular and unleaded gasoline taken directly from the gas station's tanks. According to the lab, the sample taken from the terra cotta pipe was "strongly similar" to the samples of pure gasoline taken from the gas station tanks, although it was impossible to determine if the discharge was unleaded or regular gasoline.

Finally, using data obtained from Ms. Rodgers, C & L's accountant, an employee of C & L, and C & L's bulk supplier, the County Deputy Fire Marshal was able to calculate the gas station's gasoline inventory. His calculations showed that approximately 440 gallons of regular gasoline were unaccounted for as of October 14, 1986, the date the leak was discovered. That morning,

Ms. Rodgers' son, Max Wilkinson, who was vice-president of C & L and who assisted in operation of the gas station, had made the statement that he was "about four hundred gallons short." (ST. 253)[4]

In support of its position that substantial evidence pointed to the Appellants' gas station as the source of the discharge, the Department, in its Post-Hearing Brief, refers us to the case of A. H. Grove & Sons, Inc. v. DER, 1981 EHB 138, aff'd 70 Pa.Cmwlth. 34, 452 A.2d 586 (1982). That case involved the Department's investigation of domestic water supply wells which were found to be contaminated with gasoline and oil contaminants. The Department considered possible sources of the pollution in the area and determined that Grove's automobile service station and dealership was the most probable cause. This determination was reached based on the following information: Grove stored petroleum products on its property, prior investigations conducted by the Department had revealed discarded waste oil on Grove's site, and the flow of groundwater was from Grove's property toward the affected wells. The Department issued an order directing Grove to abate the discharge of any gasoline or oil from its site and to perform certain testing in an effort to obtain more information on the cause and cure for the problem. Grove appealed, contending that the Department had no authority to require it to perform testing at its own expense without definitive proof that it, indeed, had caused the pollution. The Board upheld the Department's authority to order Grove to submit to testing, but limited the amount of testing to that clearly mandated by the evidence.

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[4]See Footnote 3.

In requiring Grove to comply with at least part of the Department's order, the Board held that where "groundwater contamination is proven and where substantial evidence establishes a probable source and need for additional testing, DER may require the person responsible for apparently related discharges to conduct reasonable tests at his own expense to allow a determination of the extent of the contamination or pollution." 1981 EHB at 149.

On appeal, the Commonwealth Court affirmed the Board's decision. In so holding, the Court determined that, although much of the evidence relied upon by the Department was circumstantial in nature, it was nevertheless substantial and competent to support the finding that Grove was logically the most probable source of the contamination. Grove, 70 Pa.Cmwlth 39, 452 A.2d 588.

In the case at bar, the Department asserts that the evidence pointing to C & L and Ms. Rodgers as the source of the gasoline discharge is even more compelling than that in Grove.

We find that, although much of the evidence relied upon by the Department was circumstantial in nature and involved the process of eliminating other possible sources, nevertheless, there was substantial and competent evidence linking the Appellants to the unauthorized discharge.

Although the Appellants' expert hydrogeologist testified that he could not conclude from the information presented by the Department that the C & L gas station was the source of the gasoline discharge, he did not visit the site until October 29, 1986, more than two weeks after the problem was first discovered and after C & L's tanks were removed. Nor did he testify as to taking any samples or produce any independent testing of the discharges.

On the other hand, the Department did produce analyses of the discharge showing it to be either regular or unleaded gasoline. The only other possible sources of the problem in the area--Tesone, Pennzoil, or Amoco--either had no underground storage tanks containing gasoline or had gasoline tanks which were certifiable as not leaking. The C & L gas station was the only site with underground gasoline storage tanks which had not been certified as not leaking. Furthermore, the Deputy Fire Marshal's calculations showed that approximately 440 gallons of regular gasoline was unaccounted for on October 14, 1986, the day the discharge was discovered. Perhaps the most compelling evidence pointing to the C & L gas station as the source of the leak is Hydrogeologist Johnson's observation that the flow of gasoline discharging out of the pipe into the storm drain leading to Crews Run diminished as C & L's tanks were being pumped.

We hold that the evidence supports the Department's finding that the C & L gas station was the source of the unauthorized discharge of gasoline discovered on October 14, 1986. Once the Department determined that the gas station was the source of the gasoline leak, it was authorized by Sections 3, 5, 307, 610, and 611 of the Clean Streams Law, 35 P.S. §§691.3, 691.5, 691.307, 691.610, and 691.611, to issue an order to C & L, the owner and operator of the gas station, to take remedial action to correct the problem. Further, since Ms. Rodgers is the landowner of the property containing the source of the contamination, she was properly named in the Order requiring abatement of the problem, pursuant to Sections 316 and 402 of the Clean Streams Law. 35 P.S. §§691.316, 691.402; National Wood Preservers, Inc. v. Commonwealth, Department of Environmental Resources, 489 Pa. 221, 414 A.2d 37 (1980), appeal dismissed 449 U.S. 803.

In conclusion, we find that the Department acted within the scope of its discretion and according to law in issuing the subject Order to the Appellants.

CONCLUSIONS OF LAW

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

2. The Department has the burden of proving by a preponderance of the evidence that it acted within the scope of its discretion and according to law when it issued to the Appellants the Order which is the subject of this appeal.

3. It is a violation of the Clean Streams Law to permit the unauthorized discharge of gasoline into the waters of the Commonwealth. 35 P.S. §§691.3, 691.301, 691.307, 691.611.

4. The Department may issue such orders as are necessary to enforce the provisions of the Clean Streams Law. 35 P.S. §691.610.

5. Where the Department finds that pollution or a danger of pollution is resulting from a certain condition, it may order the landowner of the property on which the condition exists to correct the condition. 35 P.S. §691.316.

6. An unauthorized discharge of gasoline into waters of the Commonwealth occurred in Richland Township on October 14, 1986 in violation of the Clean Streams Law.

7. There is sufficient evidence to conclude that the Appellants' gas station is the source of the unauthorized gasoline discharge.

8. The Department acted within the scope of its discretion and according to law in finding C & L and Ms. Rodgers to be the most likely cause

of the gasoline discharge and in ordering them to take the action outlined in the Department's Order of October 25, 1986, as amended on October 27, 1986.

9. The Department properly named C & L as a responsible party as owner and operator of the gas station which caused the discharge.

10. The Department properly named Ms. Rodgers as a responsible party as she is the landowner of the property on which the gas station sits and on which the underground storage tanks were located.

11. The Department has met its burden of proof in this appeal.

O R D E R

AND NOW, this 2nd day of April, 1991, it is ordered that the appeal of C & L Enterprises, Inc. and Carol Rodgers at EHB Docket No. 86-626-MJ is dismissed.

ENVIRONMENTAL HEARING BOARD

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TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Richard S. Ehmann has recused himself in this matter.

DATED: April 2, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
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Zelda Curtiss, Esq.
Western Region
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rm

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M. DIANE SMITH
SECRETARY TO THE BOARD

BOARD OF SUPERVISORS OF MIDDLE PAXTON TOWNSHIP	:	
V.	:	**EHB Docket No. 89-084-M**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 3, 1991**

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

By Robert D. Myers, Member

Syllabus:

On-site sewerage disposal systems not meeting DER's regulatory requirements were installed in a residential development and produced numerous malfunctions. The municipality issued permits for repair systems that perpetuated the substandard systems initially installed, acting pursuant to its interpretation of DER's "best technical guidance" policy despite the fact that many of the sites would accommodate elevated sand mounds or holding tanks. DER's Order limiting the type of repair systems the municipality could authorize in the development is held to be authorized by law and to be an appropriate exercise of DER's discretion.

Procedural History

The Board of Supervisors of Middle Paxton Township, Dauphin County (Township) filed a Notice of Appeal on March 30, 1989 seeking review of an Order dated February 28, 1989 (Order), issued by the Department of Environmental Resources (DER).

After a Board Order of February 23, 1990, assigning the burden of proof to DER, a hearing was held in Harrisburg on June 12 and 13, 1990 before Administrative Law Judge Robert D. Myers, a Member of the Board. Both parties were represented by legal counsel and submitted evidence in the form of testimony and exhibits.

DER's post-hearing brief was filed on September 6, 1990 and the Township's post-hearing brief was filed on October 4, 1990. The record consists of the pleadings, a transcript of 395 pages and 21 exhibits.

After a full and complete review of the record, we make the following.

FINDINGS OF FACT

1. The Township is a Pennsylvania municipal corporation (Order, ¶B).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Pennsylvania Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.* ; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations adopted pursuant to said statutes.

3. Stony Creek Manor (SCM) is a residential subdivision in the Township located north of Stony Creek and about 1/2 mile east of the Borough of Dauphin (Exhibit C-1).[1]

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[1] DER's exhibits are numbered C-1 through C-12; C-12A; and C-13 through C-16. The Township's exhibits are numbered A-1 through A-6.

4. SCM was developed in the early 1970s. The residences are served by public water and by individual conventional on-site sewage disposal systems. These conventional systems generally are not appropriate for the existing soil and topographic conditions and are considered substandard by DER (N.T. 8-10, 19-20, 82).

5. The Township's Official Plan, adopted by the Board of Supervisors on July 2, 1973 and approved by DER on March 6, 1975, provided for the installation of sewers in SCM and for the conveyance of sewage from SCM to a treatment plant in the Borough of Dauphin (N.T. 25-29; Exhibits C-4, C-5 and C-9).

6. On November 20, 1985 DER notified the Township that the Borough of Dauphin was upgrading its sewage treatment plant, advised the Township to negotiate for capacity in the upgraded plant, and directed the Township to update its Official Plan within 120 days since the provisions relating to the installation of sewers in SCM had not been implemented (N.T. 224-226, 254-257; Exhibit A-1).

7. On January 9, 1986 DER notified the Township that, pursuant to section 7(b)(4) of the SFA, 35 P.S. §750.7(b)(4), it must cease issuing permits for individual or community sewage systems until it implements or updates its Official Plan (N.T. 224-225; Exhibit C-9).

8. On April 30, 1986 DER and the Township entered into a Consent Order and Agreement (CO&A) providing, *inter alia*, for the updating and implementation of the Official Plan and for continuing the limitations on permit issuance in SCM in the meantime (N.T. 12-16, 224, 226-229, 258; CO&A, attached as Exhibit A to DER's brief).

9. Over the course of the following years, the Township adopted and submitted to DER for its approval several versions of an updated Official

Plan, some prepared by Dresdner Associates, Pa., Inc. (Dresdner) and some prepared by R.E. Wright Associates, Inc. (Wright). All of these versions were unacceptable to DER because they did not address, to DER's satisfaction, the need for sewers in SCM. After the Township notified DER on January 9, 1989 that it would make no further revisions to its submittal, DER disapproved the Official Plan update on February 24, 1989 (N.T. 16, 234; Exhibits C-6 through C-9 and C-11).

10. DER is convinced that sewers are an immediate need in SCM. The Township acknowledges that sewers will be needed someday but maintains that they are not needed now (N.T. 38-39, 105-107, 239-240, 261-263).

11. All versions of an updated Official Plan submitted by the Township to DER reported that, since 1981, the greatest concentration of on-site sewage disposal system malfunctions was in SCM. Malfunctions were attributed primarily to undersized absorption areas, then to excessive slope, poor permeability and small lot size, and finally to high water table, shallow depth to bedrock and marginal soils (Exhibits C-6 through C-8 and C-11).

12. The July 1988 version of an updated Official Plan, prepared by Wright, adopted by the Township on August 1, 1988 and submitted to DER on August 26, 1988, contained, *inter alia*:

(a) Appendix A, which detailed a study of all repair permits issued for on-site sewage disposal systems in SCM from June 19, 1981[2] to September 22, 1987; and

(b) Appendix B, which detailed a study of groundwater and surface water quality in the vicinity of SCM

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[2] The beginning date of the study was chosen to coincide with the Township's appointment of Grove Associates as Sewage Enforcement Officer (SEO), a relationship that still existed at the time of the hearing (N.T. 273; Exhibits C-11 and A-2).

(N.T. 329, 335-337; Exhibits C-11 and A-4).

13. Appendix A represented, *inter alia*,

(a) that 19 repair permits had been issued for 18 sites in SCM, of which 4 involved minor repairs;

(b) that the major causes of malfunction were the use of poor materials and the use of poor construction methods in the original installation of the systems;

(c) that 5 of the sites were unsuitable for in-ground systems under DER regulations;

(d) that repair permits were issued for the unsuitable sites using "best technical guidance";

(e) that the repair systems were functioning well;

(f) that it was reasonable to expect other systems to malfunction in the future because of poor original installation; and

(g) that future malfunctions could be remedied by properly designed and installed repair systems

(Exhibit C-11).

14. Appendix B represented, *inter alia*,

(a) that the soils in the SCM area generally are unsuitable for conventional on-site sewage disposal systems but are suitable for sand mound systems;

(b) that most discharges from the on-site sewage disposal systems in SCM infiltrate to the water table, mix with groundwater and discharge into unnamed tributaries to Stony Creek that flow along the east and west perimeters of SCM;

(c) that the remaining portion of the discharges very likely flow through a deeper groundwater system and discharge into Stony Creek (located

about 1,000 feet south of SCM) and, possibly, into the Susquehanna River (located about 1 mile west of SCM);

(d) that surface water samples were obtained by Herbert E. Fry, a hydrogeologist employed by Wright, from the unnamed tributaries at a total of 5 locations upstream and downstream of SCM;

(e) that groundwater samples were obtained by Fry from 5 existing wells located upgrade and downgrade of SCM;

(f) that groundwater samples were obtained by Fry from 1 monitoring well drilled at a location downgrade of SCM;

(g) that the surface water samples revealed nitrate-nitrogen concentrations not exceeding safe drinking water limits of the United States Environmental Protection Agency (EPA) and low levels of fecal coliform and fecal streptococci with no statistically significant differences between upstream sampling points and downstream sampling points;

(h) that the groundwater samples revealed nitrate-nitrogen concentrations not exceeding EPA safe-drinking water limits, a total absence of fecal coliform and a near total absence of fecal streptococci; and

(i) that the sampling results do not indicate contamination emanating from SCM to the extent that sewers are needed (N.T. 329-333, 338-349; Exhibits C-15, A-3 and A-4).

15. After DER's receipt on August 26, 1988 of the July 1988 version of an updated Official Plan, DER hydrogeologist Mark J. Sigouin conducted two water sampling expeditions to SCM, obtaining samples from 10 locations, of which 8 involved surface water from the unnamed tributaries and 2 involved seeps draining to the unnamed tributaries (N.T. 125-126, 127-138; Exhibits C-13 and C-14).

16. Sigouin's surface water samples revealed nitrate-nitrogen concentrations exceeding EPA safe drinking water limits in one instance and coming close to exceeding them in several other instances; low levels of fecal coliform; and several instances of high concentrations of fecal streptococci (N.T. 129-138; Exhibit C-14).

17. Sigouin's seep samples, taken at locations close to on-site sewage disposal systems for which repair permits had been issued in 1985 and 1986, revealed nitrate-nitrogen concentrations not exceeding EPA safe-drinking water limits but high concentrations of fecal coliform and fecal streptococci and trace amounts of ammonia and nitrates (N.T. 133, 135-136; Exhibits C-13 and C-14).

18. Sigouin's investigation of the unnamed tributaries for the possible presence of optical brighteners (derived from laundry detergents where they are used to make clothes whiter) produced negative results (N.T. 161-162; Exhibit C-13).

19. Convinced that on-site sewage disposal system malfunctions in SCM posed a public health risk, DER issued the Order on February 28, 1989 (N.T. 76-78, 233-236; Exhibit C-13; Notice of Appeal).

20. After reciting DER's determinations (1) that substandard on-site sewage disposal systems are malfunctioning in SCM and discharging sewage into waters of the Commonwealth where it represents a public health threat, (2) that attempts to correct the malfunctions by the issuance of permits for substandard repair systems has perpetuated rather than resolved the problems, (3) that substandard repair systems in SCM cannot be considered "best technical guidance" under 25 Pa. Code §73.3, and (4) that holding tanks or other alternate technology must be used, the Order required the Township to cease issuing permits for substandard repair systems in SCM and to comply with

25 Pa.Code Chapter 71 prior to issuing permits for holding tanks (Notice of Appeal).

21. Prior to the effective date of the CO&A, none of the repair permits issued by Grove Associates for sites in SCM required the installation of a sand mound system or a holding tank. Other alternatives were authorized in the exercise of the SEO's "best technical guidance" (N.T. 289-321; Exhibit C-11).

22. After the effective date of the CO&A, Grove Associates was required to obtain approval from DER prior to issuance of repair permits for sites in SCM (N.T. 314).

23. The 3 major repair permits issued for sites in SCM after the effective date of the CO&A involved the following facts:

repair permit #E16257 - met the regulations for use of subsurface sand filter

repair permit #E16297 - SEO, on DER's advice, denied application for pressurized inground bed and advised that holding tank was necessary. Applicant filed an appeal with the local agency (Township) and the application was approved.

repair permit application #J64861 - installation of sand mound. An inground system repair permit had been issued for this same site on June 19, 1981 (#16829). Applicant replaced it with sand mound in order to sell property.

(N.T. 190-195, 282-286, 293-296, 313-318; Exhibits C-11 and C-16).

24. During March, April and May 1989, Timothy Finnegan, Water Quality Specialist Supervisor in DER's Harrisburg Regional Office, obtained water samples from locations in the vicinity of SCM. Two locations, seeps discharging into the west tributary below two dwellings about 750 feet apart, showed nitrate-nitrogen concentrations not exceeding EPA safe drinking water

limits, but some high concentrations of fecal coliform, fecal streptococci and ammonia.[3] A third seep, on the east side of SCM, contained traces of ammonia and nitrate-nitrogen concentrations near to or above the EPA safe drinking water limits (N.T. 43-72; Exhibits C-1 through C-3).

25. Sampling done by Fry on June 12, 1989 of groundwater in the monitoring well downgrade of SCM and of surface water at a location on the west tributary upstream of SCM revealed nitrate-nitrogen concentrations not exceeding EPA safe drinking water limits, low levels of fecal coliform and fecal streptococci in the surface water but no trace of them in the groundwater (N.T. 349-350; Exhibits C-12, A-3 and A-4).

26. After reviewing all surface water and groundwater samples, Louis A. Kaplan, an expert in stream ecology and microbiology serving as Assistant Curator of the Stroud Water Research Center in the Academy of Natural Sciences of Philadelphia, recommended to Wright a supplemental sampling program designed to determine:

(a) whether SCM had an impact on the surface water in the unnamed tributaries;

(b) whether the values for chemical and microbiological parameters from the unnamed tributaries were different from those in undeveloped watersheds; and

(c) whether the variability between replicate samples at a given site at a single point in time was greater than or less than the variability between two different sites

(N.T. 370-374; Exhibit A-5).

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[3] One of these dwellings was the subject of repair permit #E16297 (see Finding of Fact 23) issued on September 17, 1986 (N.T. 50-59).

27. Pursuant to Kaplan's recommendation, a site examination was conducted by Kaplan, Fry and Robert D. Pody (also employed by Wright) on November 7, 1989. During this examination, Kaplan obtained water samples from the unnamed tributaries, for the purpose of measuring dissolved organic carbon, and devised a sampling program to be carried out by Wright (N.T. 374-378; Exhibit A-4).

28. On November 14 and 29, 1989 Pody obtained surface water samples in triplicate at 4 locations in the west tributary upstream and downstream of SCM, at 5 locations in the east tributary upstream and downstream of SCM, and at 2 locations in an unnamed tributary about 2200 feet east of the east tributary in an undeveloped watershed of similar size (N.T. 350-352, 377-378; Exhibit A-4).

29. Land in the vicinity of the undeveloped tributary is wooded, fallow, in brush or in hay and corn. Land in the vicinity of the east and west tributaries (excluding that in SCM) is wooded, fallow or in hay and corn (N.T. 354-356; Exhibits C-12A and A-4).

30. Kaplan's statistical analysis of the water samples revealed:

(a) that when the data for the east and west tributaries are analyzed, SCM has no impact on the levels of dissolved organic carbon, nitrates, fecal coliform and fecal streptococci; and

(b) that when the data for the east and west tributaries are analyzed with the data for the undeveloped tributary, there are no statistically significant differences in the levels of nitrates, fecal coliform and fecal streptococci.

(N.T. 380-386; Exhibits A-4 and A-6).

31. Records maintained by Dauphin Consolidated Water Supply Company, a public water supplier to portions of Dauphin, Perry, Cumberland and York

Counties and with an intake structure in Stony Creek, about 1/2 mile downstream of SCM, reflect wide fluctuations in the bacteriological density of the water during the period from March 1985 to January 1990 (N.T. 215-221; Exhibit C-10).

DISCUSSION

Our Order of February 23, 1990 placed the burden of proof on DER. While the situation presented by DER's February 28, 1989 Order does not fit precisely within the parameters of our procedural rule at 25 Pa. Code §21.101, it resembles the situations described in §21.101(b)(2) and (3) more closely than any of the others. Accordingly, we affirm our prior Order and impose on DER the burden of proving by a preponderance of the evidence that its February 28, 1989 Order was authorized by law and was an appropriate exercise of its discretion.

Section 7 of the SFA, 35 P.S. §750.7, requires a property owner, before installing or altering an individual sewage system, to obtain from the local municipality a permit indicating that the site and the plans and specifications of the proposed system are in compliance with the SFA and the standards adopted pursuant to the SFA. In order for the municipality to issue the permit, it also must appear that the proposed system agrees with the Official Plan and that the municipality is adequately implementing the Official Plan.

DER is given oversight responsibility by section 10 of the SFA, 35 P.S. §750.10, including the power to order revisions to Official Plans, to order implementation of Official Plans and to

> order a local [municipality] to undertake actions deemed by [DER] necessary to administer effectively section 7 of this act [SFA] in conformance with the rules and regulations of [DER].

The Township's Official Plan has proposed sewers for SCM since at least 1973. When that had not occurred by 1985, DER ordered that the Official Plan be updated and that permit issuance be suspended in SCM in accordance with section 7(b)(4) of the SFA, 35 P.S. §750.7(b)(4). DER had clear statutory authority for taking this action, and the Township recognized that authority by agreeing to the CO&A which contained basically the same terms. Since no updated Official Plan had received approval from DER, the permit ban continued to apply to SCM on February 28, 1989 when the Order was issued.

In order to issue a permit, the Township had to meet one of the exceptions in section 7(b)(5) of the SFA, 35 P.S. §750.7(b)(5). Exception (iii), dealing with the abatement of pollution and/or correction of health hazards, is the only one that appears to cover the issuance of repair permits in SCM. Both the Township in processing permit applications and DER in reviewing them acted pursuant to this exception (N.T. 92; Exhibit C-16).

A permit indicates that the site and the proposed system comply with the standards adopted pursuant to the SFA: section 7(a), 35 P.S. §750.7(a). This applies to permits for repair systems as well as permits for systems being initially installed. Standards for Sewage Disposal Facilities are set forth in DER's regulations at 25 Pa.Code Chapter 73. Requirements and specifications are established there for site locations, absorption areas, building sewers, treatment tanks, dosing and distribution facilities, retaining tanks, and experimental and alternate systems. DER's policy, set forth at 25 Pa.Code §73.3, provides, in part, as follows:

> (b) When considering corrective measures for malfunctioning sewage disposal systems which have been constructed in accordance with this chapter or applicable regulations at the time of construction, the efforts of the sewage enforcement officer or [DER's] staff shall not be restricted by this chapter. It will be the policy of [DER] and sewage enforcement officers

> administering this chapter to first consider all individual and community sewage systems described in this chapter in the correction of existing malfunctions and, when the systems are not physically possible, to provide the best technical guidance possible in attempting to resolve existing pollution or environmental health problems.
> (Emphasis added)

The Township's SEO testified candidly that many of the repair permits issued by him for sites in SCM were justified under "best technical guidance." No elevated sand mound systems, authorized by 25 Pa.Code §73.55, or holding tanks, authorized by 25 Pa.Code §73.61 and §73.62, were ever required by these permits. After the CO&A went into effect, requiring prior DER approval on repair permits, a holding tank was mandated in one instance (but overruled by the Township supervisors) and an elevated sand mound system was installed in another (at the owner's election). The information available to DER was sufficient to call into question the SEO's interpretation of the regulations and application of "best technical guidance." DER's oversight authority in section 10(7) of the SFA, 35 P.S. §750.10(7), quoted earlier, provided adequate statutory basis for the February 28, 1989 Order.

It is not enough that the Order was authorized by law; it must also constitute an appropriate exercise of DER's discretion. The introductory paragraphs of the Order justify its issuance on (1) malfunctions that have occurred in SCM, (2) repair permits issued for substandard systems under the guise of "best technical guidance," (3) sewage contamination and public health threats that have not been corrected by the repair systems, and (4) availability of alternate technology. There is little controversy over items (1), (2) and (4). The Township readily acknowledges the malfunctions and the

employment of "best technical guidance." While it maintains that alternate technology is not practical from a cost standpoint, it doesn't dispute the fact that such technology exists.

The controversy surrounds item (3) and most of the evidence dealt with surface water and groundwater sampling and interpretation. While DER and the Township both argue that the evidence is conclusive, our assessment fails to reach that level of certainty. The sampling results are too variable, in our judgment, to show definitively whether or not the on-site sewage disposal systems in SCM are contaminating the waters of the Commonwealth.

Despite this incertitude, we are unwilling to label DER's action an abuse of discretion. All of the evidence points to the general unsuitability of the SCM home sites for conventional sewage disposal systems. The potential health and environmental problems inherent in the installation of such systems on these sites are compounded by the fact that the systems were not properly installed. Numerous malfunctions have occurred since 1981; and, while no evidence was presented to document the specific impacts of these malfunctions, it is common knowledge that they threaten the public health and the environment.

The evidence also is clear that, prior to the CO&A, the repair systems authorized by the Township's SEO were a continuation of the systems initially installed. While the SEO asserts that none of these repair systems has malfunctioned, it may be that sufficient time has not elapsed since they were put in.

The SEO's authorization of many of these repair systems was a misapplication of the policy of "best technical guidance." That policy, as quoted above, is to "first consider all individual and community sewage systems described in this chapter [73] in the correction of existing

malfunctions and, when the systems are not physically possible, to provide the best technical guidance possible..." It is apparent from this language that "best technical guidance" is to be a last resort to be employed after determining that the systems described in Chapter 73 are not physically possible. The systems described in Chapter 73 include elevated sand mounds and holding tanks. Despite the fact that these systems were physically possible at many of the repair sites, they were passed over in favor of repair systems determined by the SEO to be acceptable under "best technical guidance." The SEO's approach was to use "best technical guidance" as a first option rather than the last option.

After the CO&A went into effect and DER's prior approval became necessary, the SEO mandated a holding tank for the first time. The Township supervisors overruled this decision and authorized an inground repair system. Water samples obtained by DER from a seep near the site of this repair system suggest that it is not performing adequately on some occasions. How frequently it malfunctions and how severely it may contaminate the groundwater are uncertain, but the evidence is enough to indicate that the authorized repair system was inappropriate.

Because the Township was not issuing repair permits for SCM in accordance with the requirements of Chapter 73, DER was authorized by Section 10(7) of the SFA to order the Township to take actions which would assure that it would adhere to Chapter 73. Thus, it was reasonable for DER to curtail a perpetuation of the problems in SCM by limiting the discretion of the SEO and the Township with respect to their application of "best technical guidance." The Order is restricted to that aspect of the situation and is limited to SCM. It involves no other interference with the Township's administration of the SFA.

CONCLUSIONS OF LAW

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

2. DER has the burden of proving by a preponderance of the evidence that the Order is authorized by law and is an appropriate exercise of DER's discretion.

3. DER has statutory authority to issue the Order under sections 7 and 10 of the SFA, 35 P.S. §750.7 and §750.10.

4. Under the circumstances, DER's issuance of the Order was an appropriate exercise of discretion.

ORDER

AND NOW, this 3rd day of April, 1991, it is ordered that the Township's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 3, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

TOWNSHIP OF POTTER	:	
	:	
v.	:	**EHB Docket No. 90-112-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 3, 1991
and HANOVER BRANDS, INC., Permittee	:	

OPINION AND ORDER SUR
MOTION FOR ALLOWANCE OF APPEAL
***NUNC PRO TUNC* AND MOTION TO DISMISS**

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for leave to file an appeal *nunc pro tunc* is denied where the petitioning party bases its motion on the allegation that no other interested parties would be prejudiced by allowance of an appeal *nunc pro tunc*. A motion to dismiss is granted where it is established that the appeal was not timely filed and grounds for an appeal *nunc pro tunc* are not present. One party's timely appeal of a Department of Environmental Resources (DER) action does not toll the appeal period for third parties wishing to appeal the same action.

OPINION

This proceeding was initiated by the filing of a Notice of Appeal and a Motion for Allowance of Appeal *Nunc Pro Tunc* by the Township of Potter, Centre County, Pennsylvania (Township) on March 13, 1990. The Township seeks to appeal the Department of Environmental Resources' issuance of a solid waste permit to Hanover Brands, Inc. (Hanover), which operates a cannery in the

Township.

In both the notice of appeal and the motion, the Township states that it received written notice of the permit on January 19, 1990. In its motion, the Township urges that the Board allow the appeal because the Township's environmental consultant, Professor G. Lynn Miller (Miller), filed an informal written notice of appeal of the same permit on February 13, 1990. Although Miller's appeal was filed on his own behalf, the Township urges that, because of Miller's employment with the Township, his filing a Notice of Appeal gave the Board and Hanover "de facto" notice of the Township's forthcoming appeal as of February 13, 1990. The Township adds that, because Hanover knew as of February 13, 1990 that its permit was being contested, no party would be prejudiced by the Township's "slight delay" in filing its appeal.

On March 27, 1990, Hanover filed an answer to the Township's motion, as well as a Motion to Dismiss.[1] Hanover objects to the allowance of an appeal *nunc pro tunc* because the Township has not alleged grounds sufficient to allow the appeal, and because Miller's notice of appeal was filed on his own behalf - not on behalf of the Township.[2]

This Opinion and Order addresses both the Motion for Allowance of Appeal Nunc Pro Tunc and the Motion to Dismiss. We will deny the Motion for Allowance of appeal *Nunc Pro Tunc*, and grant the Motion to Dismiss.

It is not disputed here that the Board's regulations provide that, in order to secure jurisdiction of a matter before the Board, an appeal must be filed within 30 days after the appellant has received written notice of the

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[1] Pursuant to its policy in third party appeals, the Department of Environmental Resources chose not to actively participate in this matter.

[2] Miller's appeal, which was docketed at EHB Docket No. 90-075-F, was dismissed on procedural grounds (failure to perfect) on May 2, 1990.

action, or within 30 days after notice of the action has been published in the Pennsylvania Bulletin, 21 Pa.Code §21.52(a). An exception to filing within the 30 day period is via an appeal *nunc pro tunc*, 25 Pa.Code §21.53. The general rule is that an appeal *nunc pro tunc* will only be allowed upon a showing of fraud or some breakdown in the Board's procedure which caused the delay. American States Insurance Co. v. DER, EHB Docket No. 89-187-F (Slip Opinion, April 2, 1990), Pierce v. Penman, 357 Pa. Super. 225, 515 A.2d 948 (1986), or upon certain non-negligent failure of counsel to file an appeal where unique or compelling circumstances are present. Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979), In Re Interest of C.K., 369 Pa. Super. 445, 535 A.2d 634 (1987), Guat Gnoh Ho v. Unemployment Compensation Board of Review, 106 Pa. Commw. 154, 525 A.2d 874 (1987). Nothing in the law supports the Township's contention that a lack of prejudice to any party serves as grounds for allowing an appeal *nunc pro tunc*.

We also disagree with the Township's argument that, because the purpose of a notice of an appeal is to apprise the appellee and the Board of an appeal, one party's appeal of an action tolls the appeal period for other potentially interested third parties. No law was cited to support this argument, and for good reason: there is none. To the contrary, the Board's regulation, as stated above, provides that filing within the appeal period is a jurisdictional requirement.

We find, therefore, that the Township's notice of appeal was untimely filed and the Township is not entitled to appeal *nunc pro tunc*.

ORDER

AND NOW, this 3rd day of April, 1991, it is ordered that:

1) The Motion for Leave to File Appeal *Nunc Pro Tunc* filed by the Township of Potter is denied;

2) The Motion to Dismiss filed by Hanover Brands, Inc. is granted;

3) This appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
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Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 3, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
:
v. : EHB Docket No. 90-540-CP-E
:
MONESSEN, INC. : Issued: April 3, 1991

OPINION AND ORDER SUR
PRELIMINARY OBJECTIONS

By: Richard S. Ehmann, Member

Synopsis

In this civil penalties matter, the Department of Environmental Resources' ("DER") preliminary objection in the form of a motion to strike for failure to conform to rules of court is sustained as to Monessen, Inc.'s (Monessen) failure to attach a copy of a consent decree to its new matter, in violation of Pa. R.C.P. 1019(h), with Monessen ordered to amend its new matter by attaching a copy of the consent decree. The remaining preliminary objections in the form of a motion to strike based upon Monessen's alleged failure to conform to rules of court are overruled where the Answer and New Matter admits or denies each averment contained in the complaint and provides a sufficiently clear basis from which DER can prepare its reply to the New Matter. DER's preliminary objection in the form of a motion for a more specific pleading is also sustained as to paragraphs 67, 69, 70, 71, 74, and 75 of Monessen's New Matter, with Monessen ordered to amend those paragraphs. DER's preliminary objections in the nature of a motion to strike impertinent matter contained in Monessen's New Matter is overruled because DER has failed

to show any prejudice will result from the challenged paragraphs. DER's alternative demurrers are also overruled. Monessen's request for costs, including attorney's fees, to be borne by DER is denied.

OPINION

This matter was commenced on December 12, 1990 by DER filing with us a complaint for civil penalties pursuant to Section 605 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605 ("CSL"). The first three counts of the complaint alleged that Monessen had discharged industrial waste from its waste treatment facility at its coke and coke by-products manufacturing facility in the city of Monessen, Westmoreland County, into the Monongahela River in willful violation of its amended NPDES Permit No. PA 0001554[1] and various provisions of the CSL. The fourth count alleged Monessen had willfully failed to comply with an administrative order of DER, in violation of that order and several provisions of the CSL.

On January 4, 1991, Monessen filed its Answer and New Matter, asserting eleven affirmative defenses. Subsequently, on January 28, 1991, Monessen sent us two replacement pages to substitute into its Answer and New Matter. On February 5, 1991, DER filed preliminary objections in the nature of a motion to strike the Answer and New Matter for failure to conform to rule of court, a motion for a more specific pleading, a motion to strike impertinent matter and a demurrer. On February 22, 1991, DER filed a memorandum in support of these preliminary objections. Also on February 22, 1991, Monessen filed a motion to strike DER's memorandum or, in the alternative, for enlargement of time to respond and for attorney's fees and costs in making the response. By an order dated February 25, 1991, we denied

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[1]There are two amendments to NPDES No. PA 0001554 to which the parties refer as Amendments Nos. 1 and 2.

Monessen's motion to strike, granted its counsel the requested extension, and denied its request for attorney's fees and costs subject to the production of legal authority for this request for fees and costs. Also on February 25, to overrule DER's preliminary objections with costs, including attorney's fees, to be borne by DER, and a memorandum in support thereof. Thereafter, on March 1, 1991, Monessen sent us a response (in the form of a letter) to DER's memorandum. In this letter, among other things, Monessen expressed its agreement with the Board's conclusion that the Board is not specifically empowered to award costs or attorneys' fees to Monessen for work performed in responding to DER's memorandum.

Motion To Strike For Failure To Conform To Rules Of Court

DER's motion to strike for failure to conform to rules of court requests that we strike Monessen's Answer and New Matter in their entirety or, alternatively, strike paragraphs 8 and 37 of the Answer, and Paragraph 68 of the New Matter. Pursuant to Pa. R.C.P. 1017(b)(2), a preliminary objection in the form of a motion to strike is permitted when the pleading does not conform to a rule of court. Regarding the request that the Answer and New Matter be entirely stricken, DER asserts that these pleadings fail to conform to the requirements of Pa. R.C.P. 1022 and 1019(a) and that meaningful response by DER to the Answer and New Matter is impossible due to the confusing surplusage and lack of organization in the pleadings. In particular, DER asserts that paragraphs 42-66 of the New Matter present lengthy recitations of irrelevant matter, rather than concise statements of facts in simple paragraph form.

Pa. R.C.P. 1022 states in pertinent part: "[e]ach paragraph shall contain as far as practicable only one material allegation." The Commonwealth Court in General State Authority v. Sutter Corp., 24 Pa. Cmwlth. 391, 304, 356

A.2d 377, 380 (1976), quoting 2A Anderson, Pennsylvania Civil Practice, §1022.3, stated:

> This standard must be applied with great flexibility, not only because of the express direction of the rule that, 'the standard be followed as far as practicable,' but also because there is no set standard as to what constitutes a material allegation. Mere length, complexity, and verbosity do not in themselves violate Rule 1022 if the subsidiary facts averred fit together into a single allegation.

The Court added that generally, the test of compliance is the difficulty or impossibility one has in answering the complaint. In this case, rather than a complaint, we are dealing with affirmative defenses, but the test remains the same. See DER v. Texas Eastern Gas Pipeline Co., Texas Eastern Transmission Corp., 1989 EHB 1. In Texas Eastern we said, "violations of this rule [1022] will be ignored if no real prejudice is shown".

Rule 1019(a) of the Pa. R.C.P. provides that the material facts on which a cause of action or defense is based shall be stated in a concise and summary form. Rule 1019(a) requires a complaint to set out the material facts in a succinct but sufficiently descriptive manner to allow a defendant to prepare a defense, and, similarly, a defense must be stated in a concise and summary form. Texas Eastern, supra.

After carefully reviewing each of paragraphs 42-66 according to the standards set by Rules 1022 and 1019 set forth above, we do not perceive any violation of these rules which would justify striking the Answer and New Matter in its entirety. Although some of the paragraphs contained within paragraph 42-66 could be said to be complex and lengthy, we do not believe that it is impossible for DER to respond to them, especially since DER is permitted by the rules of civil procedure to make partial admissions and

denials where appropriate. Moreover, the factual allegations are concisely worded and set forth facts from which DER can prepare to meet the allegations contained in the affirmative defenses. Thus, no real prejudice to DER has been demonstrated. Accordingly, DER's Motion to strike the Answer and New Matter in their entirety is overruled.

We next address DER's alternative motion to strike only paragraphs 8 and 37 of the Answer, and paragraph 68 of the New Matter. DER asserts that in paragraphs 8 and 37, Monessen admits facts averred in the Complaint and follows the admission with what DER believes to be lengthy and irrelevant recitation of other matters, contrary to Pa. R.C.P. 1029. Paragraph 8 of DER's Complaint averred that Monessen did not petition for grant of supersedeas of either of two amendments to its NPDES permit. Paragraph 8 of Monessen's Answer admits the averments of fact in paragraph 8 of the complaint and goes on to explain why Monessen did not petition for supersedeas. Paragraph 37 of DER's Complaint states that Monessen has failed to comply with the directives of DER's Order in manners which are described in five subsections to that paragraph. Monessen's Answer to paragraph 37 responds to the five subsections separately, and, in each, it either admits, denies, or both admits and denies the allegations contained in the Complaint and follows that admission or denial with explanatory material.

Pa. R.C.P. 1029 provides in pertinent part: "[a] responsive pleading shall admit or deny each averment of fact in the preceding pleading or any part thereof to which it is responsive." Monessen's Answer, at both paragraphs 8 and 37, does this. The fact that it has offered explanations for its answers to these paragraphs has not been shown by DER to interfere with DER's presentation of issues. See Goodrich Amram 2d §1029(b):1. We are not,

at this point, ruling on whether this explanatory material is legally irrelevant.

Paragraph 68 of the New Matter avers DER's Complaint is barred by the doctrine of collateral estoppel because the Western District Court has previously approved and entered a Consent Decree, involving Monessen and the NRDC,[2] which determined the amount of the assessment of civil penalties for alleged violations by Monessen of its NPDES permit. DER seeks to have us strike paragraph 68 because Monessen has not attached to its Answer and New Matter a copy of the Consent Decree, which it urges is contrary to the requirement of Pa. R.C.P. 1019(h). Pa. R.C.P. 1019(h) reads, "A pleading shall state specifically whether any claim or defense set forth therein is based upon a writing. If so, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to him, it is sufficient so to state, together with the reason, and to set forth the substance of the writing."

Monessen does not dispute that the affirmative defense in paragraph 68 is based upon a writing. The explanation given by Monessen for its failure to attach the Consent Decree is that DER had previously indicated in a letter to the judge who entered the consent decree that it was in receipt of a copy of the proposed consent decree (Exhibit D to New Matter), that this letter was from the same DER counsel who is involved in the present action, and that paragraph 66 of the New Matter states that the Consent Decree was signed and entered as it was proposed and executed. Citing Burnside v. Abbott

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[2]Paragraph 61 of the New Matter says that the NRDC is the Natural Resources Defense Council, Inc., which sought to bring a citizens' suit against Monessen in late 1989.

Laboratories, 351 Pa. Super. 264, 505 A.2d 973 (1985), and Herring v. Arnold's Book Bindery Co., 74 Berks L.J. 259 (1982), Monessen argues the purpose of Pa. R.C.P. 1019(h) is to make sure the opposing party is aware of the nature of the claim or defense. Monessen contends Pa. R.C.P. 1019(h) may be ignored when it is known that the opposing party is in possession of the writing, citing Herring supra; Iountas v. Kohr, 100 York Leg. Rec. 130 (1986); and Leiby v. New Hampshire Ins. Co., 51 D&C 2d 643 (1971). It also asserts that it would be inconsistent with Pa. R.C.P. 126 for us to strike paragraph 68 solely because it failed to attach a Consent Decree which it previously had forwarded to DER.

We reject Monessen's argument on two grounds. We cannot accept at face value Monessen's allegation that the Consent Decree was signed and entered in the same form as it was proposed and provided to DER. We are in no position to rule that the two Consent Decrees are the same, where they have not been put before us. Even if we could rule that DER has possession of the Consent Decree, Monessen should have attached a copy of the Consent Decree to the New Matter because it has not shown that it can bring itself within the exception to the requirement that it provide the writing which is set forth in Pa. R.C.P. 1019(h).[3] We need not strike paragraph 68, however, since Monessen's failure to attach the Consent Decree may be cured by amendment. See McBride v. Weis Markets, Inc., 83 York Leg. Rec. 92 (1969); Goodrich Amram, 2d §1019(h):3. We will, therefore, order Monessen to amend its Answer and New Matter by attaching a copy of the entire Consent Decree.

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[3]We note that the purpose of the requirement of attaching the writing to the pleading is not only to give the opposing party notice, but also to enable the Board to review the pleading. See Goodrich Amram 2d §1019(h):3, note 69.

Motion For More Specific Pleading

DER also moves for a more specific pleading regarding the matters raised in paragraphs 67, 69, 70, 71, 74 and 75 of the New Matter. In deciding whether to grant such a motion, we examine the pleading to see if it is sufficiently specific, that is, if it provides the adverse party with enough facts to enable it to frame a proper response. DER v. WAWA, Inc., 1989 EHB 1224; Commonwealth ex rel. Milk Mkt. Bd. v. Sunnybrook Dairies, 29 Pa. Cmwlth. 210, 370 A.2d 765 (1977).

Paragraph 67 of the New Matter reads: "The averments in DER's Complaint fail to state a claim upon which relief can be granted." In Texas Eastern, supra, an affirmative defense stated in paragraph 125 of Texas Eastern's New Matter was virtually identical to paragraph 67 of Monessen's New Matter. We sustained DER's preliminary objection to paragraph 125, which was based on Pa. R.C.P. 1019(a), citing 5 Pa. Practice 2d §25:55. Likewise, in the instant matter, we sustain DER's preliminary objection to paragraph 67 because that paragraph does not provide DER with enough material facts to be able to respond. Monessen is directed to amend its New Matter to make paragraph 67 specific.

Paragraph 69 of the New Matter states:

> The unexpected and disruptive occurrences which frequently rendered the Water Treatment Plant and related facilities inoperable as set forth above constituted force majeure events which in many instances excuse Monessen from performing its obligations to achieve the effluent limitations under its Permit.

Paragraph 70 of the New Matter is very similar to paragraph 69. It reads:

> The incidents described above which frequently resulted in Monessen's unintentional non-compliance with the effluent limitations of the Permit are exceptional and were caused by

> factors beyond Monessen's reasonable control which in many instances excuse Monessen from performing its obligations to achieve the effluent limitations under its Permit.

DER's motion for a more specific pleading asserts that DER cannot respond to paragraphs 69 and 70 because Monessen does not specify what these events were, when they occurred, or the legal basis for its assertion that these occurrences excuse compliance with NPDES effluent limitations. We believe that paragraphs 69 and 70 do not provide DER with enough facts to allow it to properly respond to them. In merely stating, "as set forth above" and "described above", Monessen has not made it clear which incidents pled in preceding paragraphs in its Answer and New Matter constitute the alleged force majeure events and upsets, nor, by stating, "in many instances", has it made clear to which events it is referring. We therefore sustain DER's preliminary objections and Order Monessen to amend paragraphs 69 and 70 of its New Matter to plead those affirmative defenses with specificity.

Next, DER seeks a more specific pleading of paragraph 71 of the New Matter, which states:

> Under federal and state statutes and regulations, the Monessen Coke Plant, due to the facts described above and in particular by virtue of the course of conduct of the parties as described in paragraphs 59 and 60 above, Monessen has been and will be operating in a "start-up" status until the biological treatment facility described in paragraphs 59, 60, 64 and 77 herein is brought into a stable operation.

Again, Monessen has neither specified "the facts described above" nor which status it believes applicable so that DER can prepare its Reply to New Matter. We therefore sustain DER's preliminary objection and order Monessen to amend its New Matter to make this affirmative defense more specific.

As to DER's motion for a more specific pleading regarding paragraphs 74 and 75 of the New Matter, DER objects that it cannot respond to Monessen's broad allegations. Paragraph 74 states: "Monessen has reason to believe that many of the effluent limitations set by DER in Amendments Nos. 1 and 2 to the NPDES permit were based upon inaccurate assumptions about the magnitude of the flows to Outfalls 103, 106, and 203; these inaccurate assumptions were reflected in effluent limitations which Monessen had great difficulty in meeting, given the actual flows through those Outfalls." We agree with DER's objection that this paragraph is so unspecifically pled that DER cannot properly reply to it. By stating, "many of the effluent limitations," Monessen has indicated that it is not challenging all of the effluent limitations contained in its permit, however, it has not indicated which effluent limitations it is alleging were incorrectly set and which violations alleged by DER's complaint would be affected thereby.

Paragraph 75 states: "Monessen has reason to believe that DER's water quality based limitations were computed using incorrect models of the Monongahela, or upon incorrect applications of correct models; these incorrect models or inaccurate applications of correct models were reflected in effluent limitations which Monessen had great difficulty in meeting and which were unnecessarily stringent, given the actual conditions in the Monongahela. Again, Monessen has not specifically pled this alleged defense. This paragraph of Monessen's New Matter is too unspecific as to which effluent limitations on which Outfalls are being challenged, how DER's model was incorrect, or how DER incorrectly applied a correct model. As with paragraph 74, we order Monessen to amend its Answer to specifically plead these alleged affirmative defenses. Although we do not ask Monessen to plead its evidence,

we cannot permit Monessen to be so unspecific in its pleading that DER cannot properly reply to the contentions raised by paragraphs 74 and 75. We will not force DER to undertake exhaustive discovery in an effort to define what Monessen is attempting to allege in these paragraphs. Discovery is a tool only to put flesh on the pleading's bones, not to find the bones themselves.

Motion To Strike Impertinent Matter/Demurrer

DER moves to strike paragraphs 69, 70, 71, 72, 73, 74, 75, 76, and 77 from Monessen's New Matter as impertinent, and, alternatively, demurs to those paragraphs. We not we need not address paragraphs 69, 70, 71, 74, and 75, however, in light of our ordering Monessen to amend those paragraphs, supra.

Pursuant to Pa. R.C.P. 1017(b)(2), a motion to strike is permitted when the pleading contains impertinent matter or scandalous matter. "To be scandalous and impertinent, a pleading's allegations must be immaterial and inappropriate to the proof of the cause of action." Commonwealth, DER v. Peggs Run Coal Co., 55 Pa. Cmwlth. 312, 423 A.2d 765, 769 (1980). See also DER v. U.S. Wrecking, EHB Docket No. 90-034-CP-W (Opinion issued November 21, 1990). In order for us to sustain this preliminary objection, DER must prove to us both that the challenged paragraphs contain impertinent matter and that DER is prejudiced by that matter. DER v. Terry E. Scatena, 1982 EHB 333; Galloway v. Cameron Auto, Inc., 73 D&C 2d 104 (1974); Southeastern Pa. Transportation Authority v. Philadelphia Transportation Co., 38 D&C 2d 653 (1966). DER has failed to allege any prejudice will result from the challenged paragraphs. Thus, we overrule its motion to strike impertinent matter and we examine DER's demurrer.

On its demurrer to the Answer and New Matter,[4] DER admits the allegations for the purpose of the demurrer. Goodrich Amram 2d §1017(b):12. The Supreme Court in Lewin v. Commonwealth, Board of Medicine, 112 Pa. Cmwlth. 109, 535 A.2d 243 (1987), in describing the test for sustaining a demurrer said, "The test is not whether the applicable law is clear and free from doubt, but whether it is clear and free from doubt from the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief." The Commonwealth Court has stated that any doubt as to whether the demurrer should be sustained should be resolved in favor of refusing to enter it. Paratransit Association of Delaware Valley, Inc. v. Yer-usalim, 114 Pa. Cmwlth. 279, 538 A.2d 651 (1988); Peggs Run, supra.

In paragraph 72 of the New Matter, Monessen alleges that it "over-reported" certain information because it misapplied the definitions set forth in Part A of its permit and consistently erroneously reported on its monthly DMRs [5] any grab sample measured in that month which exceeded the mass unit discharge limitation for oil and grease stated in the amendments to the permit, rather than the average of three grab samples taken in the 24-hour-period.

DER's preliminary objections assert that "over-reporting" of violations of NPDES permit effluent limitations is not a defense as a matter of law, citing Connecticut Fund for the Environment v. Upjohn Co., 660 F. Supp. 1397 (D.C. Conn. 1987). Monessen's Answer to DER's Preliminary Objections responds by urging this Board is not bound by the Upjohn decision

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[4]We have previously ruled that a demurrer may be used to attack the sufficiency of New Matter in an answer. U.S. Wrecking, supra.

[5]DMR is the abbreviation for Discharge Monitoring Report.

and alleging that paragraph 72 sets forth a legitimate defense to the allegation in DER's complaint that Monessen's alleged violations were willful.

In Lower Paxton Township v. DER, 1987 EHB 282, we had before us DER's motion for partial summary judgment requesting us to find that the appellant Lower Paxton Township had failed and continued to fail to comply with the effluent limitations in its NPDES permit based upon exceedances reported in Lower Paxton's DMRs and flow data. Lower Paxton's DMRs submitted to DER reported 155 exceedances of permit conditions, and we found that each of Lower Paxton's exceedances constituted a violation of certain provisions of the CSL and regulations thereunder. We thus granted DER partial summary judgment as to the violations of Lower Paxton's NPDES permit. The Upjohn decision cited by DER similarly concluded that the permittee therein could be held to have violated its NPDES permit on the basis exceedances reported in its DMRs.[6] The Upjohn Court ruled that the permittee-defendant could not preclude summary judgment by relying on the claim that its DMRs contained overstated amounts. While we might eventually reach the same conclusion as was reached by the Upjohn court at the appropriate time in this appeal, we do not do so upon ruling on DER's demurrer because a reason exists why we must overrule it. Monessen has indicated that it is asserting the defense that it over-reported its exceedances of its NPDES permit in relation to the wilfulness of its

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[6]Upjohn was an action brought in the United States District Court of Connecticut by a citizens' group against a chemical manufacturer pursuant to 33 U.S.C. §1365, seeking a declaratory judgment that Upjohn had exceeded its NPDES permit's pollution discharge limits, in violation of the Federal Water Pollution Control Act ("FWPCA"), and an order that the defendant pay civil penalties pursuant to 33 U.S.C. §1319(d), among other things. The Upjohn Court noted that the plaintiffs' motion was for partial summary judgment, and would not resolve the question of relief to which the plaintiffs were entitled.

violation. In assessing the amount of a civil penalty for a violation of the CSL, under §605 of the CSL, we are directed to consider the wilfulness of the violation, the damage or injury to the waters or the use of the waters of the Commonwealth, the costs of restoration, and other relevant factors. See DER v. Canada - PA, Ltd., 1989 EHB 319. Our Supreme Court has instructed, "If the facts as pleaded state a claim for which relief may be granted under any theory of law, then a demurrer must be denied." Mazzagatti v. Everingham by Everingham, 512 Pa. 266, ___, 516 A.2d 672, 675 (1986). Thus, we do not sustain the demurrer to paragraph 72.

Paragraph 73 of the New Matter states:

> Pursuant to 40 C.F.R. §122.45 and 25 Pa. Code 97.94, Monessen is entitled to but has not received any credits for amounts of pollutants present in the Monongahela River which the Coke Plant utilizes in its Water Treatment Plant.

DER alleges Monessen's averment regarding intake water credits is an impermissible collateral attack on a final action of DER, i.e., the effluent limitations in Monessen's NPDES permits. DER states that Monessen withdrew its appeals of Amendments Nos. 1 and 2 to its NPDES Permit and that those appeals were closed by our Order of June 1, 1990 at Monessen, Inc. v. DER, EHB Docket No. 88-486-E (consolidated). DER has also attached exhibits to its memorandum which are copies of Monessen's Motion to withdraw its appeals of Amendments 1 and 2 of its permit, a stipulation upon which that motion was based, and an unsigned Order granting the withdrawal. DER's memorandum makes it clear that by collateral attack, DER means the propriety of this issue being brought before us in this proceeding in view of Monessen's withdrawal of its appeals from its NPDES permit amendments. We have two problems with sustaining DER's demurrers to paragraphs 73. First, in alleging that Monessen

previously withdrew its appeals of its NPDES permit amendments, DER is relying on facts outside of Monessen's Answer and New Matter to establish its demurrer. The Commonwealth Court has ruled that a demurrer cannot aver the existence of any facts not apparent from the face of the challenged pleading. Wells v. Southeastern Pennsylvania Transportation Authority, 105 Pa. Cmwlth. 115, 523 A.2d 424 (1987). Second, while it is true that we have held that issues which could have and should have been raised in a timely appeal of a permit cannot later be raised in an appeal where they would amount to a collateral attack on the permit, this prohibition against collateral attacks of permits is based upon our lack of jurisdiction to hear an untimely appeal. See Schuylkill Township Civic Association v. DER et al., EHB Docket No. 90-541-E (Opinion issued March 27, 1991); James R. Sable v. DER, EHB Docket No. 86-686-E (Adjudication issued June 22, 1990). See also Toro Development Co. v. Commonwealth, DER, 56 Pa. Cmwlth. 471, 425 A.2d 1163 (1981). A demurrer merely challenges the sufficiency of the pleading to state a cause of action against the demurring party; it does not question the authority of the court to hear and decide the controversy. See Clay v. Advanced Computer Applications, 370 Pa. Super. 497, 536 A.2d 1375 (1988), reversed in part on other grounds, 518 Pa. 647, 559 A.2d 917 (1989). Perhaps paragraph 73 of Monessen's New Matter is an impermissible collateral attack of its NPDES permit; however, it would be inappropriate for us to sustain DER's demurrer to that paragraph. This ruling does not, however, foreclose the possibility of our sustaining DER's collateral attack objection if brought before us in an appropriate motion.

DER also demurs to paragraph 76 of the New Matter, as reflected in the amended page 26 received by us on January 28, 1991. Paragraph 76 reads:

> The testing procedures prescribed by DER to gauge oil and grease measurements (EPA Method 413.1) have led to values which do not accurately reflect oil and grease discharges. As indicated in some of the recent DMR's, an alternative but more precise analytical method using infrared testing (EPA Method 413.2) yields significantly lower oil and grease measurements for both monthly and daily maximum values at Outfall 106.

DER asserts that as a matter of law, the inaccuracy of the testing procedure used by Monessen in its DMRs is not a defense and is a collateral attack of its permit. For this proposition, DER cites National Resources Defense Council, Inc. v. Outboard Marine Corp., 692 F. Supp. 801 (N.D. Ill. 1988). Monessen's Answer to DER's Preliminary Objections responds that the Board is not bound by the Outboard Marine decision and argues that the defense set forth in paragraph 76 bears upon DER's allegation that Monessen's alleged violations were wilful.

The United States District Court for the Northern District of Illinois' decision in Outboard Marine involved a motion for summary judgment on the issue of a manufacturer's liability for violating its NPDES permit and The Clean Water Act, 33 U.S.C. §§1251-1376. Although we might decide to follow the reasoning set forth in that Opinion at the appropriate time in this appeal, we cannot say for purposes of DER's demurrer that the alleged inaccuracy of Monessen's testing procedure, as alleged in paragraph 76, is not a defense as a matter of law. Further, the defense set forth by Monessen in paragraph 76 might be an appropriate defense to DER's wilfulness allegations. Again, DER's "collateral attack" objection depends on facts outside the challenged pleading, leading us to overrule the demurrer. See Wells, supra.

Also, DER's "collateral attack" argument goes to our jurisdiction to hear the defense, and it would not be appropriate for us to sustain its demurrer on that ground. See Clay, supra.

Finally, DER's preliminary objections assert that paragraph 77 of the New Matter is not a defense to either Monessen's violations of its NPDES permit or its failure to comply with DER's administrative Order. Paragraph 77 avers that Monessen has been committed to constructing and operating a biological treatment facility, that such construction is required under the Consent Decree with NRDC, and that the cost of the facility will be significant. Since this item may be offered by Monessen as a mitigating factor in our assessment of the civil penalty, Canada-PA, supra, and we have doubt as to whether we should sustain the demurrer, we overrule DER's demurrer at this early stage in these proceedings.

Monessen's request for costs to be borne by DER cites no legal authority for granting the request. In the letter written by Monessen to this Board, received by us on March 1, 1991, Monessen concedes that the Costs Act, Act of December 13, 1982, P.L. 1127, No. 257, 71 P.S. §2031 et seq., only authorizes the award of fees and expenses after a final adjudication has been rendered. Clearly, this Opinion is not such an adjudication. See Lawrence Blumenthal v. DER, EHB Docket No. 89-230-F (Opinion issued March 1, 1991). U. S. Wrecking, supra.

According to the foregoing discussion, DER's preliminary objections are sustained in part and overruled in part. Monessen's request for costs, including attorneys' fees, to be borne by DER is denied.

ORDER

AND NOW, this 3rd day of April, 1991, it is ordered that:

1) DER's preliminary objection in the nature of a motion to strike for failure to conform to rules of court is sustained as to paragraph 68 of Monessen's New Matter, and Monessen is ordered to amend paragraph 68 by attaching a copy of the entire Consent Decree or the material part thereof to its New Matter within twenty days of this Opinion; DER's preliminary objection for failure to conform to rules of court is otherwise overruled;

2) DER's preliminary objection in the nature of a motion for a more specific pleading is sustained as to paragraphs 67, 69, 70, 71, 74, and 75 of Monessen's New Matter, and Monessen is ordered to amend those paragraphs to more specifically plead the averments contained therein within twenty days of this Opinion;

3) DER's preliminary objection in the nature of a motion to strike impertinent matter is overruled;

4) DER's preliminary objection in the nature of a demurrer is overruled;

5) Monessen's requests for costs, including attorneys' fees, to be borne by DER is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 3, 1991

cc: **Bureau of Litigation**
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S. H. BELL COMPANY	:	
	:	
v.	:	EHB Docket No. 90-521-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 4, 1991

OPINION AND ORDER
SUR CROSS-MOTIONS FOR
SUMMARY JUDGMENT

By Richard S. Ehmann, Member

Synopsis

Partial summary judgment is granted to both the appellant in this matter, S. H. Bell Company ("Bell"), and to the Department of Environmental Resources ("DER") on their cross-motions for summary judgment. Under Act 109 of 1990, a "transfer facility" is a facility which receives and processes or temporarily stores municipal or residual waste at a location other than the generation site, and which facilitates the transportation or transfer of the municipal or residual waste to a processing or disposal facility. DER did not abuse its discretion in finding Bell was temporarily storing residual waste/petroleum-contaminated soil at its facility and was operating a transfer facility without a permit, and in ordering Bell, in a Notice of Violation, to take certain actions regarding the petroleum contaminated soil. DER did, however, unreasonably interpret "temporarily stores" so broadly as to include Bell's placement of this soil on a pad to allow a "clam shell" bucket to transfer it to a waiting barge.

OPINION

On November 28, 1990, Bell commenced an appeal with us challenging two letters from DER to Bell. The first letter was a Notice of Violation ("NOV"), dated October 30, 1990, regarding Bell's bulk material handling facility located in Braddock, Allegheny County ("Braddock facility"). The NOV stated that under the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. §6018.101 et seq., and the rules and regulations thereunder, Bell was operating a transfer facility without a permit; explained how Act 109 of 1990 (amending §103 of the SWMA, 35 P.S. §6018.103) had redefined the term "processing" and had defined "transfer facility"; and instructed Bell that under §301 of the SWMA, if the waste were not transferred directly from trucks to barge, it would require a permit to continue to operate. Had DER's NOV stopped here, it would only have informed Bell that in DER's opinion, Bell was violating the SWMA. DER's NOV did not stop here, however; it went on and directed Bell to cease storing additional residual waste/petroleum-contaminated soil on the site and to remove all of the residual waste from the storage pad. In addition, the NOV stated that no more residual waste could be stored on the site without Bell's first obtaining a permit. Bell's appeal claims DER's actions, as reflected by its NOV, are unreasonable, arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

Bell's appeal also challenges a letter dated November 21, 1990 from DER to Bell. The November 21, 1990 letter stated that "storage" and "staging" of the waste are defined the same and that neither "storage" nor "staging" would be permitted on the site without a permit. Bell's notice of appeal asserts that DER unreasonably defines "storage" to include "staging" of

materials for loading and unloading purposes, and that DER is incorrect, since the two activities are fundamentally different. Bell's notice of appeal claims DER's action has unreasonably affected its ability to continue to operate, since under DER's definition of "storage", Bell must obtain a permit for storage of materials and is effectively required to cease all materials handling at the Braddock facility until it receives a permit.

In a conference call with the Board, the parties proposed to submit this matter to the Board with a Stipulation Of Facts and Cross-Motion For Summary Judgment. This agreement is reflected in our Order of January 28, 1991. On February 15, 1991, the parties filed a joint stipulation of facts. Thereafter, on February 19, 1991, DER filed a motion for summary judgment and a supporting brief, and Bell also filed a motion for summary judgment and supporting brief. Responses to the opposing motions were filed by Bell and DER on March 1, 1991 and March 4, 1991, respectively.

Before going further in this matter, we digress here to review the question of whether DER's issuance of this NOV, as interpreted by the November 21, 1990 letter, is an appealable action. Neither party has raised this point, although traditionally, a mere notice of a violation is not appealable and this NOV states, "This letter shall not be construed as a final action of [DER]." We conclude that despite this "boilerplate" statement, this NOV is clearly an Order. DER also characterizes it as an Order in paragraph K of its Motion For Summary Judgment when it reflects that "DER ordered Bell to cease storing residual waste..." Paragraph Q of DER's Motion also concludes that: "...DER properly issued the October 30, 1990 Order." Even the DER Motion's Prayer for Relief asks us to uphold this DER Order. However, even if DER had not conceded that at least a portion of the NOV was an Order, thus in part

eliminating this issue for us, it is clear from the NOV's language that it contained within it a DER administrative order to Bell issued under the SWMA. M. C. Arnoni Company v. DER, 1989 EHB 27. With the fact that this is an NOV plus an Order comes Bell's ability to appeal same.

DER's motion requests us to enter summary judgment upholding the October 30, 1990 Order, which it says required Bell to cease operation of its transfer facility without a valid permit. Bell's motion asks us to find DER's interpretation of storage to include staging is unreasonably broad, to rescind, revoke, or set aside DER's actions in ordering Bell to "cease staging" petroleum-contaminated soil at its Braddock facility, and to enter an order requiring Bell to submit a staging preparedness plan, among other things. We may grant summary judgment only when there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law. Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978); County of Schuylkill v. DER, 1989 EHB 918. Further, summary judgment is appropriate when the interpretation of a statute is at issue. Hepburnia Coal Co. v. DER, 1988 EHB 1190; Pa. Mfgrs'. Ass'n Ins. Co. v. Sheppard, 30 Pa. Cmwlth. 186, 373 A.2d 760 (1977).

As DER states in its motion, §301 of the SWMA, 35 P.S §6018.301, provides that no person shall own or operate a residual waste processing facility unless such person has first obtained a permit for such facility from DER. We recognized in Decom Medical Waste Systems (N.Y.) Inc. v. DER, EHB Docket No. 89-358-F (Opinion issued November 28, 1990), that Act 109[1] amended the definition of "processing" set forth in §103 of the SWMA, 35 P.S.

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[1]1990 Pa. Legis. Serv. 109 (Purdon's)

§6018.103, and that under the new definition, the term "processing" includes "transfer facilities". We also stated that the Act 109 definition provides that the activities at a "transfer facility" are, in and of themselves, activities which constitute "processing". Moreover, we recognized that Act 109 added to §103 a definition of "transfer facility". That definition, in pertinent part, is:

> "Transfer facility". A facility which receives and processes or temporarily stores municipal or residual waste at a location other than the generation site, and which facilitates the transportation or transfer of municipal or residual waste to a processing or disposal facility....

Act 109, §1. While recognizing the incongruities of the definitions in Act 109, we determined that the Decom facility met the current definition of "transfer facility", since there was no dispute that Decom received and temporarily stored medical waste and facilitated the transfer of that waste for disposal.

In the present matter, the parties have stipulated that Bell has never applied for or received a permit for the Braddock facility. The parties have stipulated that from September 17, 1990 through November 2, 1990, Bell's Braddock facility received residual waste at a location other than the generation site, and that from September 17, 1990 through November 30, 1990, the Braddock facility facilitated the transportation or transfer of the residual waste to a processing or disposal facility. The parties dispute whether Bell's activities regarding the contaminated soil constituted "temporarily stores" within the meaning of "transfer facility" under the SWMA. Thus, the single question in this appeal, raised by both motions, is whether DER's interpretation of "temporarily stores" is proper.

Although neither §103 nor Act 109 contains a definition of "temporarily stores", the term "storage" is defined in §103.

> "Storage." The containment of any waste on a temporary basis in such a manner as not to constitute disposal of such waste. It shall be presumed that the containment of any waste in excess of one year constitutes disposal. This presumption can be overcome by clear and convincing evidence to the contrary.

35 P.S. §6018.103. The term "temporary" in this definition implies a limited duration to the containment. The definition also implies that the containment for this imprecise period of time will be followed by some other activity regarding the waste, such as movement to another site.

The parties have stipulated to the following facts which explain Bell's activities regarding the contaminated soil and bear upon whether Bell "temporarily stores" the waste. Beginning on September 17, 1990 through November 30, 1990, Bell utilized the Braddock facility for the transfer of petroleum-contaminated soil from truck to barge. In order to facilitate the transfer of the petroleum-contaminated soil, Bell installed an approximately 40,000 square foot asphalt pad ["staging pad"], which includes an 8-inch curbed berm for the purpose of preventing water run-off from the pad area. The petroleum-contaminated soil arrived by truck or trailer and was transferred to either the clamming pad (approximately 85 feet by 30 feet) to be immediately transferred onto a barge or to the asphalt pad area. Bell placed petroleum-contaminated soil on the asphalt pad area if a barge was not immediately available to receive the petroleum-contaminated soil. (A typical truck load of petroleum contains between 22 and 25 tons; a barge load contains

approximately 1,500 tons of petroleum-contaminated soil.) From September 17, 1990 through November 30, 1990, Bell placed petroleum-contaminated soil on its asphalt pad for up to twenty working days.

DER takes the position that if the soil touches the ground at the facility, Bell is temporarily storing it and needs a permit. On the other hand, Bell argues that given the nature of the bulk handling industry, it is not always possible to transfer the material from the transportation vehicle in which it arrives to the vehicle in which it will be shipped out without an intervening "staging" step. In this staging step, Bell says that bulk material is unloaded from the first vehicle and is repositioned, and sometimes accumulated, so that it can be placed in the second vehicle.

Examining Bell's activity regarding the contaminated soil, we note that Bell's Braddock facility has two separate pads: the asphalt staging pad and a clamming pad. Bell's brief states that Bell intended for the soil placed on the asphalt staging pad to remain there for up to ten working days prior to being moved to a barge; that Bell, in fact, placed petroleum-contaminated soil on the asphalt pad for up to twenty working days; and that the soil at the bottom of the pile on that pad may, in fact, have been there for more than twenty working days, since it is not always possible to determine whether the soil was shipped out on a first-in, first-out basis. There is no question that "containment" of the contaminated soil on a temporary basis occurs at the asphalt staging pad and thus that Bell "temporarily stored" this residual waste without a permit.

The issue is murkier as to the clamming pad. Bell's brief states that Bell had anticipated contaminated soil on the clamming pad would remain there for approximately 15 minutes, because once it was placed on that pad, it

would immediately be "clammed" (by a derrick with a clam shell bucket) into a waiting barge. DER interprets "temporarily stores" very broadly, and takes the position that Bell needs a permit if it transfers the soil from the truck to the ground and then from the ground to the barge, but does not need a permit if the residual waste is transferred directly from truck to barge, without touching the ground. By DER's interpretation, anything touching the ground, however briefly, is temporarily stored. Would this mean soil dislodged from the truck and accidently falling to the ground, only to immediately be picked up, was temporarily stored? Under DER's definition the answer is yes. We do not believe that such an interpretation of "temporarily stores" is appropriate, where Bell does not store the contaminated soil, but, rather, engages in a continuing transferal process, moving it from truck to clamming pad to waiting barge.[2] It is the continuous movement of the contaminated soil which distinguishes "staging" from "temporarily stores". Thus, in dumping a load of contaminated soil onto the clamming pad and, in a continuous movement, clamming this soil onto a barge, Bell is not temporarily storing the contaminated soil, whereas in dumping contaminated soil onto either pad and leaving it there or allowing it to accumulate, without continuously clamming this soil to a barge, Bell is temporarily storing the residual waste. Accordingly, DER's definition of "temporarily stores" is unreasonable where DER interprets that term to encompass such continuous movement of the residual waste.

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[2]Obviously, from DER's letters, it is not concerned with the temporary storage of this residual waste inside a truck carrying the contaminated soil or the storage occurring while a barge, tied up at Bell's facility and partially loaded, waits to receive enough truckloads of waste to fill it.

There is no material fact in dispute in this appeal. The parties have stipulated that from September 17, 1990 through November 30, 1990, Bell placed petroleum-contaminated soil on its asphalt pad for up to twenty working days. DER did not abuse its discretion in interpreting "temporarily stores" within the meaning of "transfer facility" under Act 109 to cover Bell's accumulation of this soil at its Braddock facility. The parties have stipulated that Bell's Braddock facility received residual waste at a location other than the generation site and the Braddock facility facilitated the transportation or transfer of the residual waste to a processing or disposal facility, without Bell's applying for or holding a permit to do so. Thus, DER did not abuse its discretion with regard to the NOV insofar as it ordered Bell to cease storing additional residual waste/petroleum-contaminated soil on site, to remove all residual waste/petroleum-contaminated soil from the storage pad, and to not store any more residual waste/petroleum-contaminated soil on site without first obtaining a permit from DER. We therefore grant DER partial summary judgment as to the propriety of its issuance of the NOV. However, insofar as DER, in the NOV, is interpreting "temporarily stores" as requiring Bell to obtain a permit to continue to operate if the waste is not transferred directly from trucks to barge, we deny summary judgment to DER on its motion, and we instead grant partial summary judgment to Bell on its motion. We do so based upon our finding that, as evidenced by the November 21, 1990 letter, DER has unreasonably defined "storage" to include Bell's unloading the contaminated soil on the pad for immediate clamming to a waiting barge as part of a continuous operation.

Accordingly, the NOV, as an enforceable DER Order, is sustained but the term "temporarily stores" in the definition of "transfer facility"

contained in Act 109 of 1990 is to be interpreted in accordance with this Opinion. Thus, to the extent that the October 30, 1990 letter prohibits Bell from storing contaminated soil on the asphalt staging pad without a permit and directs it to remove the contaminated soil within 30 days, it is not an abuse of discretion. However, to the extent that the DER letter prohibits the dumping of contaminated soil from a truck onto the clamming pad where it is transferred, within a matter of a few minutes, to a waiting barge, it is an abuse of discretion.[3]

ORDER

AND NOW, this 4th day of April, 1991, consistent with the foregoing opinion it is ordered that:

1) DER's motion for summary judgment is granted in part and denied in part; 2) Bell's motion for summary judgment is granted in part and denied in part; and 3) Bell's appeal is, thus, sustained in part and dismissed in part.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

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[3]Having reached this conclusion, we see no need to address Bell's argument that DER should interpret "storage", as now defined by the Act, in the way that Bell contends the federal regulations do, to wit: distinguishing between "short term" and "long term" storage. This Board does not make policy for DER and does not promulgate the statutes and regulations DER enforces. We cannot say that DER's decision to interpret this statutory language so there is no distinction between long term and short term is an abuse of discretion solely because concededly inapplicable federal regulations adopt a different position. Warren Sand and Gravel Company v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); Sanitary Authority of the City of Duquesne v. DER, 1984 EHB 635.

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 4, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Katherine S. Dunlop, Esq.
Western Region
For Appellant:
Ronald L. Kuis, Esq.
Pittsburgh, PA

Board member Terrance J. Fitzpatrick has recused himself from this matter.

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M. DIANE SMITH
SECRETARY TO THE BOARD

S. H. BELL COMPANY	:	
v.	:	**EHB Docket No. 90-521-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 4, 1991**

DISSENTING OPINION OF BOARD MEMBER TERRANCE J. FITZPATRICK

I respectfully dissent from the majority's decision because I do not believe we have jurisdiction over these appeals. The Board has power to review "orders, permits, licenses, or decisions" of DER. Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7514(a). In general terms, the Board is said to have authority to review "actions" of DER. 35 P.S. §7514(c). The Board has refined this further by stating that only final actions or determinations by DER may be appealed to the Board. Delta Excavating & Trucking Co., Inc. v. DER, 1987 EHB 319.

Neither the October 30, 1990 "Notice of Violation" (NOV), nor the November 21, 1990 letter clarifying it, are final actions of DER. The NOV reads, in relevant part:

> To abate this violation, cited under Act 97, Section 301 S. H. Bell Company shall cease storing additional residual waste/petroleum contaminated soil on site within three (3) days receipt of this letter. In addition, all residual waste/petroleum contaminated soil must

> be removed from the storage pad within thirty (30) days receipt of this letter. No more residual waste/petroleum contaminated soil may be stored on site, without first obtaining a permit from the Department.
>
> This letter does not waive, either expressly or by implication, the power or authority of the Commonwealth of Pennsylvania to prosecute for any and all violations of law arising prior to or after the issuance of this letter or the conditions upon which the letter is based, nor shall this letter be construed so as to waive or impair any rights of the Department of Environmental Resources, heretofore or hereafter existing.
>
> This letter shall also not be construed as a final action of the Department of Environmental Resources.

The first paragraph in this excerpt, when viewed in isolation, can be interpreted as a command - i.e. an appealable order - because of its use of words such as "shall" and "must." See Basalyga v. DER, 1989 EHB 388, 390. However, when the entire excerpt is read the language of the first paragraph can only be interpreted as advice from the Department as to how to remedy the alleged violation, and how to avoid future violations. The NOV must be read as a whole, and I certainly cannot say that the NOV is a final action of DER when the NOV itself states that it "shall ... not be construed as a final action of the Department of Environmental Resources."[1]

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[1]The fact that neither raised the appealability issue is irrelevant because jurisdiction cannot be created by agreement of the parties. See e.g., Percival v. DER, EHB Docket No. 83-094-W (September 13, 1990).

Since I believe that we lack jurisdiction over these appeals, I would dismiss the appeals without discussing the substantive issues addressed by the majority.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATE: April 4, 1991

cc: **Bureau of Litigation:**
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M. DIANE SMITH
SECRETARY TO THE BOA

F.A.W. ASSOCIATES	:	
	:	
v.	:	**EHB Docket No. 90-228-B**
	:	**(Consolidated Docket)**
COMMONWEALTH OF PENNSYLVANIA	:	
sEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 5, 1991

OPINION AND ORDER SUR
PETITION FOR RECONSIDERATION AND
PETITION TO AMEND NOTICE OF APPEAL

By Thomas M. Ballaron, Hearing Examiner

Synopsis

A Petition for Reconsideration is denied. FAW requested reconsideration of that part of an Opinion and Order dismissing its challenge to the Noncoal Mining Regulations for failure to preserve the issue in its notices of appeal. FAW has not presented "compelling and persuasive reasons" in accordance with 25 Pa.Code §21.122(a) that would justify reconsideration.

FAW's Petition to Amend Notice of Appeal is also denied. FAW will not be permitted to raise a regulatory challenge which could have been incorporated into either of its notices of appeal and was not dependent on discovery.

OPINION

As detailed in the Opinion and Order of December 31, 1990, denying FAW's Petition for Supersedeas, this case arose from two appeals taken by FAW from a series of compliance orders issued by DER which alleged that FAW's

excavation activities constituted surface mining without a permit in violation of the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 *et seq.* (Noncoal Act).

FAW's Petition for Supersedeas was denied because it failed to demonstrate the likelihood of prevailing on the merits of the underlying appeals; the evidence demonstrated that its excavation activity did not qualify for the construction excavation exception which is defined in the Noncoal Mining Regulations at 25 Pa.Code §77.1. In partial support of its argument, FAW had attempted to show that these regulations were invalid as being inconsistent with the Noncoal Act. This contention was dismissed without review in the Opinion and Order, since FAW had not preserved the issue in either of its two notices of appeal. FAW filed a timely petition seeking reconsideration of this determination, or in the alternative, leave to amend its appeal to include a challenge to the Noncoal Regulations.

FAW argues that reconsideration is warranted based upon its recent discovery (following the supersedeas hearing) of the specific elements of a DER draft policy which allegedly constitute new facts and raise two legal arguments not previously considered. FAW contends that the draft policy mandates that a developer obtain a building permit in order to qualify for the construction excavation exception; to that end it evidences DER's interpretation of the Noncoal Regulations which is unlawful and inconsistent with the Noncoal Act. As a result, FAW reasons that the regulations are invalid. FAW also argues that by compelling a developer to act in a manner not otherwise required by the Noncoal Act or regulations the draft policy has the impact of, and therefore must be considered, a regulation, though not promulgated in compliance with the Commonwealth Documents Law, the Act of July

31, 1968, P.L. 769, as amended, 45 P.S. §1102 *et seq.* If unable to meet the standards for reconsideration, FAW asserts that it should be granted leave to amend its notices of appeal to present these issues, because it was necessary to determine through discovery the existence and the elements of the draft policy.

Reconsideration

The Board's regulations at 25 Pa.Code §21.122(a) state that motions for reconsideration will only be granted for "compelling and persuasive reasons". To meet this standard the moving party must generally demonstrate that the decision rested upon a legal ground not considered by the parties or that crucial new facts, not available at trial through the exercise of due diligence, justify reversal. With interlocutory orders, such as the present decision denying FAW's Petition for Supersedeas, the party seeking reconsideration must also demonstrate "exceptional circumstances". Baumgarder v. DER, 1989 EHB 61. Applying these standards, FAW's Petition for Reconsideration must be denied.

In Baumgarder, the "exceptional circumstances" which justified reconsideration consisted of new evidence in the form of test results, not available to DER at the initial hearing, that directly refuted earlier key testimony regarding the danger of pollution from Baumgarder's recycling activity. The new evidence had a crucial impact upon this pivotal issue and resulted in reversal of the previous order. By contrast, FAW has not offered any crucial new facts or legal grounds justifying reversal of the order; it has simply presented the same basic arguments as offered at the supersedeas hearing. Both the essential elements of DER's draft policy as well as FAW's challenge to the validity of the Noncoal Regulations, were presented at the hearing, and addressed in FAW's briefs. FAW will not be permitted to use a

petition for reconsideration as a means of rearguing its case. New Hanover Corporation v. DER, EHB Docket No. 90-225-W (Opinion issued November 20, 1990). The proffered text of DER's draft policy does not add anything to these arguments, and certainly does not meet the standards necessary for reconsideration. Baumgarder v. DER, 1989 EHB 61. Accordingly, FAW's petition must be denied.

Amendment of Notice of Appeal

In the alternative, FAW has requested leave to amend its notices of appeal to include a challenge to the Noncoal Regulations. The Board's regulations at 25 Pa.Code §21.51(e) govern this procedure and state in relevant part that:

> An objection not raised by the appeal shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear such objection or objections. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

This regulation has been interpreted in Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), Aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989), and more recently in NGK Metals Corporation v. DER, EHB Docket No. 90-056-MR (Opinion issued August 21, 1990). These cases hold that specifying the grounds for a party's appeal is a jurisdictional requirement and that amendments to the notice of appeal after the expiration of the 30 day appeal period can only be allowed in circumstances where the right to amend was specifically reserved in the notice of appeal and where the party can show that discovery was necessary to frame the additional issue. Also see Raymark Industries Inc., et al. v. DER, EHB Docket No. 90-180-E (Opinion issued

December 28, 1990).

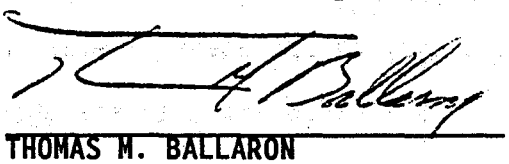
FAW filed its first notice of appeal on June 7, 1990, and essentially outlined its estoppel argument. FAW stated that DER had made an earlier determination that the excavation activities constituted preparation of a commercial site and did not constitute noncoal surface mining activities. FAW did not reserve the right to amend, pending discovery, and it is evident from the plain language of the appeal that FAW did not challenge the validity of the Noncoal Regulations in any manner. In its second notice of appeal filed August 21, 1990, FAW stated only: "Inspector was incorrect. No mining was done". Again FAW failed to reserve its right to amend the notice of appeal pending completion of necessary discovery, and it is equally clear that FAW did not choose at this time to challenge the regulations. FAW was aware of these regulations and of DER's consideration of a building permit as an indicator of a developer's intention to build on a site, well before the appeals were filed. FAW cannot at this late stage of the proceedings mount a regulatory challenge which could have been incorporated into either notice of appeal. These are issues for which discovery is not necessary since regulations and the manner in which they are promulgated are matters of public record. Nor can FAW correct this omission by contending that it needed to discover the elements of the draft policy in order to specify its objections, since it did not reserve this right at the time of its appeal.

Having failed to demonstrate good cause why it should be permitted to amend its notice of appeal, FAW's petition must be denied.

ORDER

AND NOW, this 5th day of April 1991, it is ordered that FAW's Petition for Reconsideration and Petition for Leave to Amend Notices of Appeal are denied.

ENVIRONMENTAL HEARING BOARD



THOMAS M. BALLARON
Hearing Examiner

DATED: April 5, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

WOOD PROCESSORS, INC., et al.	:	
	:	
v.	:	**EHB Docket No. 90-442-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 5, 1991

OPINION IN SUPPORT OF ORDER SUR
PETITION FOR SUPERSEDEAS

By Terrance J. Fitzpatrick, Member

Synopsis

The Board grants in part, and denies in part, a petition for supersedeas. The Department of Environmental Resources (DER) issued an Order to Wood Processors, Inc. (Wood) and Archie Joyner (Joyner) alleging that they were operating three solid waste processing facilities without the necessary permits. As a result, DER ordered Wood and Joyner to cease operations, to remove waste from the sites, and to file a remediation plan. The Board rejects the Appellants' argument that placing the burden of proof upon them at the supersedeas hearing deprived them of due process of law. Nonetheless, DER's Order is superseded as to Joyner, because the evidence did not justify imposing individual liability under the theory of "piercing the corporate veil." In addition, DER was precluded from raising the "officers participation" theory of individual liability because Joyner was not given adequate notice of this claim. The petition for supersedeas is denied as to Wood because the waste piles at the sites create a danger of environmental harm.

OPINION

This is an appeal by Wood Processors, Inc. and Archie Joyner (collectively, the Appellants)[1] from an Order and Civil Penalty Assessment of the Department of Environmental Resources dated September 21, 1990. In its Order, DER alleges that the Appellants operated unpermitted solid waste (construction/demolition waste) processing facilities in Norristown Borough, Colwyn Borough, and the City of Chester.[2] As a remedy for these alleged violations, DER ordered the Appellants to cease operations at the three sites, to remove the construction/demolition waste from the sites, to submit a plan for assessing and remedying any soil or groundwater contamination at the sites, and to pay a civil penalty of $96,000.

On March 1, 1991, the Appellants filed a petition for supersedeas of DER's Order. A hearing was held on the petition on March 7, 1991. On March 15, 1991, the undersigned issued an Order granting the petition as to Joyner and denying it as to Wood. This Opinion explains the reasoning behind that Order.

In ruling on a petition for supersedeas, the Board considers the following factors:

1) Irreparable harm to the petitioner.

2) The likelihood of the petitioner prevailing on the merits.

3) The likelihood of injury to the public

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[1] The Notice of Appeal also lists Art Foss as an Appellant - DER's Order and Civil Penalty Assessment was addressed to Wood, Joyner, and Foss. At the supersedeas hearing, counsel for the Appellants stated that, whatever the reason for including Foss on the Notice of Appeal (there had been a change of counsel since the Notice was filed), he did not represent Foss. Accordingly, we will not discuss Foss's liability in this Opinion.

[2] DER also alleged that the Appellants were responsible for the illegal use of construction/demolition waste as fill at several sites. DER rescinded these aspects of the Order at the Supersedeas hearing.

or other parties, such as the permittee in third party appeals.

Section 4(d) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7514(d)(1). In addition, the Board shall not issue a supersedeas where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. §7514(d)(2). Normally, a petitioner must show that all of the above factors warrant a supersedeas. Lower Providence Township v. DER, 1986 EHB 395. However, the petitioner need not demonstrate irreparable harm and likelihood of injury to the public if the petitioner shows that DER lacked authority to take the action at issue or if it is apparent that DER's action was unlawful. Westinghouse Corp. v. DER, 1988 EHB 857, East Penn Manufacturing Co. v. DER, EHB Docket No. 90-560-F (February 21, 1991).

1. Constitutionality of Placing the Burden of Proof on the Appellants.

The Appellants' first argument is that the regulatory scheme governing hearing procedures on DER orders violates their right to due process of law. Specifically, they contend that placing the burden of proof upon them in the supersedeas hearing violates due process in light of the impact of DER's order upon them, and because of the risk of erroneous deprivation of their property rights due to the fact that DER issues orders without a prior hearing, citing Mathews v. Eldridge, 424 U.S. 319 (1976).

We disagree with this argument. First, we note that the after-the-fact hearing process on DER orders has been upheld against due process challenges. See e.g., Borough of Carlisle v. Commonwealth, DER, 16 Pa. Commw. 341, 330 A.2d 293 (1974). Second, placing the burden of proof upon the petitioner in a supersedeas hearing does not create a great risk of erroneous deprivation of property interests. A petitioner may call the responsible DER official as a witness and inquire into the factual basis for DER's order.

Moreover, the Appellants do not - and realistically could not - contend that filing a petition for supersedeas with the Board is a futile act. The Board supersedes DER's orders when it finds DER committed an error of law or where the facts do not support DER's action. See e.g., Empire Sanitary Landfill, Inc. v. DER, EHB Docket No. 90-467-W (Opinion and Order dated January 30, 1991), East Penn Manufacturing Co. v. DER, EHB Docket No. 90-560-F (Opinion dated February 21, 1991).

Therefore, we disagree with the Appellants' assertion that placing the burden of proof upon them in the supersedeas hearing deprived them of due process of law.

2. Responsibility of Wood to Comply with DER's Order.

Before addressing the parties' arguments, it is necessary to describe, in general terms, Wood's operations at the Norristown, Colwyn, and Chester sites. Trucks loaded with construction/demolition waste dumped their loads at the sites. A bulldozer spread the loads out and the metals were removed for recycling (Exhibit P-4, para. 3, T. 91-92). Paper and plastic were also removed and placed in separate containers (I.). The remaining dirt, stone, and wood were subjected to varying degrees and methods of further handling - depending upon the time-frame and the site involved - before being shipped out-of-state for disposal.[3] (Exh. P-4, para. 4, T. 118-119.)

At some point, all three of the sites developed back-logs of waste materials because loads of construction/demolition waste came in more quickly than loads of the waste materials went out (T. 44, 147-148, Exh. P-1, P-5,

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[3] Wood began using a sifter to separate dirt from stone and wood at the Norristown site sometime in 1989 (T. 91-92). Wood also rented a "flotation bath" to separate wood and stone at the Norristown site in November or December of 1989 (T. 92-93). Wood also may have used a hammermill to crush waste at either the Norristown or Colwyn site (Minihan Direct Testimony - no page reference is given for reasons explained in Section 4 of this Opinion).

P-5, P-6). In December, 1990, the waste pile at the Norristown site caught fire, and DER expended $95,000 to have it extinguished (T. 221-222).

Wood argues that it has satisfied the criteria for granting a supersedeas. Wood contends that it will suffer irreparable harm in that it has been ordered to cease operations. Wood also argues that granting a supersedeas will not cause harm to the public during the period the supersedeas will be in effect because there is no evidence that either leachate will form and pollute waters of the Commonwealth or that a fire from spontaneous combustion will occur at the sites. Finally, Wood argues that it has established a prima facie case that it will succeed on the merits because its sites were not engaged in "processing" in that there was no reduction or conversion of the waste. See, Commonwealth, DER v. O'Hara Sanitation Co., 128 Pa. Commonwealth 47, 562 A.2d 973 (1989).

DER argues that Wood has not met the standards for granting a supersedeas. DER contends that conditions at the sites present a threat to public health and safety from both leachate emanating from the sites, and from spontaneous combustion due to the breakdown of organic materials in the waste piles. DER also argues that Wood is not likely to succeed on the merits of its appeal because Wood's activities constituted processing under either O'Hara, or under the standards of Act 109 of 1990.[4] Finally, DER asserts that Wood will not be irreparably harmed by DER's Order because, even in the absence of the Order, Wood would have an independent obligation to comply with the Solid Waste Management Act, Act of July 7,. 1980, No. 97, as amended, 35

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[4] Under O'Hara, reduction or conversion of waste must occur before DER may require a permit for a "transfer facility." Under Act 109 of 1990, reduction or conversion of the waste need not occur so long as the waste is temporarily stored. See Decom Medical Waste Systems (N.Y.), Inc. v. DER, EHB Docket No. 89-358-F (November 28, 1991).

P.S. §6018.101 et seq.

We agree with DER that Wood is not entitled to a supersedeas, because granting a supersedeas would create a threat to public health and safety during the period that the supersedeas would be in effect. Spontaneous combustion is a danger at sites where construction/demolition waste is stored because organic material, such as wood, creates heat when it is broken-down by bacteria (T. 74-75, 175, 192-193). Piles of construction/demolition waste are present at each of the sites. The danger these sites pose to public health and safety - not to mention finances - was demonstrated by the fire which broke out at the Norristown site in December 1990. DER had this blaze extinguished at a cost to the Commonwealth of over $95,000. (T. 222).

Wood attempted to refute the fire danger through the testimony of its expert, Dr. Fournier. He visited the Norristown site the day before the hearing and concluded that there were no "visually obvious" signs of imminent danger of significant environmental harm from either fire or leachate (T. 174, 181). This conclusion may be true, but it is too narrow for us to rely upon. The absence of "visually obvious signs" that heat is building up due to organic decomposition does not persuade us that there is no danger that spontaneous combustion will occur. Bruce Beitler, who has accumulated a wealth of experience with construction/demolition waste during his 21 years with DER, testified that the process of decomposition and heat build-up can occur without any outward warning signs (T. 194-195). Moreover, Mr. Beitler testified that this process can occur in isolated pockets throughout the pile of waste (T. 195). Therefore, it is entirely possible that Dr. Fournier simply did not encounter these pockets when he dug into the pile of waste.

Based upon the above reasoning, the petition for supersedeas must be denied as to Wood due to the danger of environmental harm during the period

when the supersedeas would be in effect.[5]

3. Liability of Archie Joyner

Paragraph 28 of DER's Order stated:

> Archie Joyner and Art Voss [sic] have maintained a degree of personal control over all aspects of Wood Processors, Inc. such that the Department has determined that Wood Processors, Inc. is and has been devoid of a separate and distinct corporate personality at all times relevant to this Order. Rather, Wood Processors, Inc. is and has been essentially an 'alter-ego' of Joyner and Voss [sic].

As a result of this finding, DER's Order makes Joyner (and Foss) jointly responsible with Wood for ceasing operations at the three sites, for removing and disposing of waste from the sites, and for filing an assessment and remediation plan (Exh. J-1, para. A, C, F).

Joyner contends that the evidence does not support a finding that he is individually liable. He argues that in order to "pierce the corporate veil" DER must show that the corporation is a sham which exists solely to avoid personal liability, citing Newlin Corp. v. DER, 1989 EHB 1106, 1125. Joyner contends that the corporation was not a sham because Wood had its own bank account, hired its own employees, used accountants, leased property, etc. In addition, Joyner argues that there was no evidence that Joyner was draining the corporation of funds; in fact, he contends that a separate company which he owned invested $55,000 into Wood.

Joyner also contends that he cannot be held individually liable under the "officer participation theory," which holds that a corporate officer may be held personally liable when his actions further a violation of the law.

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[5] Wood states in its Brief (footnote 20) that it expects that the supersedeas would be in effect for 4-6 months. This is unrealistic in light of the Board's workload - a year would be a better estimate. An adjudication could take longer if there are contested motions regarding discovery, etc.

See, Lucky Strike Coal Co., et al. v. DER, 1987 EHB 234, affirmed, 119 Pa. Commonwealth 440, 547 A.2d 447 (1988). Joyner argues, first, that DER may not rely upon this theory because DER's Order did not mention it. Thus, Joyner contends, he was not given notice that he had to defend against this theory, and finding him liable under this theory would violate his right to due process of law, citing Callahan v. Pennsylvania State Police, 494 Pa. 461, 431 A.2d 946 (1981). In the alternative, Joyner contends that the evidence does not justify holding him liable under this theory, because there is no evidence that he engaged in intentional neglect or misconduct, citing Kaites v. Commonwealth, DER, 108 Pa. Commonwealth 267, 529 A.2d 1148 (1987).

DER contends that Joyner should be held individually liable under either the "piercing the corporate veil" or the "participation" theory. DER contends that the corporate veil should be pierced because, after May of 1990, Joyner paid Wood's employees with his own funds, directed operations himself, continued to bring in waste despite warnings from DER that this was illegal, continued to accumulate waste into larger piles at the Colwyn site, and held himself out to the Borough of Colwyn as the operative of Wood. DER argues that Joyner should be held responsible under the participation theory because he had been put on notice by at least January of 1990 that Wood's operations required a permit, yet he continued to bring waste into the Colwyn site during the spring and summer of 1990.

In Newlin, the Board examined the following factors in determining whether the corporate veil had been pierced:

> Whether the corporation is grossly undercapitalized for its purpose ... failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records and the fact that the corporation is

> merely a facade for the operations of the dominant stockholder or stockholders.

Newlin Corp., et al. v. DER, 1989 EHB 1106, 1125, quoting from United States v. Pisani, 646 F.2d 83 (3rd Cir. 1981). Applying these factors to this case, the evidence does not warrant piercing the corporate veil. The fact that Joyner was in charge of Wood does not mean that Wood was Joyner's "alter ego." Joyner's assumption of the management of the Colwyn site after Foss' departure in May of 1990 (Exh. P-4, para. 5) was in keeping with his role as President of Wood. In addition, the fact that Joyner stepped in with a separate company he controlled, Demo-Carriers, Inc., and assumed some of Wood's responsibilities - such as paying employees, etc. (T. 156) - does not support piercing the corporate veil. Far from improperly siphoning funds from Wood, Joyner siphoned funds into Wood.[6] See, Newlin, 1989 EHB at 1127. Finally, there is no evidence to suggest that Wood was grossly under-capitalized. In summary, the evidence does not support piercing the corporate veil.

DER argues, in the alternative, that Joyner should be held individually liable under the officer participation theory. It is not necessary to address the merits of this issue because we agree with Joyner that he did not have adequate notice of this claim to allow him to prepare a defense. Under the due process clause, Joyner had a right to know the claims or charges which were being made against him. Goldberg v. Commonwealth, State Board of Pharmacy, 49 Pa. Commonwealth 123, 410 A.2d 413 (1980), Jacobs v. Commonwealth, DPW, 32 Pa. Commonwealth 101, 377 A.2d 1289 (1977). DER's Order asserts that Joyner's actions with regard to Wood warrant piercing the corporate veil (Order, para. 28), but the Order nowhere mentions the officer

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[6] The question whether Joyner might have violated the corporate status of Demo-Carriers, Inc. is not before us.

participation theory. DER first raised the officer participation theory on the day of the supersedeas hearing (T. 112-114, Response to Petition for Supersedeas, para. 7e).

DER's only argument on the notice issue was contained in its March 14, 1991 letter to the Board. DER asserts there that Joyner was put on notice as to the officer participation theory because DER's Order referred to Wood, Joyner, and Foss collectively as "Wood." We must disagree with this argument because there is nothing to indicate that referring to the parties collectively as "Wood" was done for any other reason than convenience - to avoid repeating "Joyner" and "Foss" throughout the Order. We do not see how anyone could anticipate that this innocuous collective reference would be deemed so pregnant with meaning. Moreover, the fact that DER spelled out the piercing the corporate veil theory in its Order would lead a reasonable person to assume that this was the only basis upon which DER was asserting individual liability.

In summary, the evidence does not justify holding Joyner liable under the piercing the corporate veil theory, and we will not consider the officer participation theory because to do so would violate Joyner's due process rights. Therefore, based upon the record developed at the supersedeas hearing, it appears that DER lacked the underlying authority to hold Joyner individually liable, and we need not consider the other factors relating to granting a supersedeas. East Penn Manufacturing Company v. DER, EHB Docket No. 90-560-F (February 21, 1991).

4. DER's Motion to Strike Appellants' Supplemental Brief.

This motion arose from a situation which developed after the Supersedeas hearing. On March 13, 1991, the undersigned initiated a conference call to inform the parties that part of the transcript of the

Supersedeas hearing had been lost during typing of the transcript, and to discuss what should be done to remedy this problem. The part which was lost was from the beginning of the hearing to the end of the direct testimony of the first witness - John Minihan. During the conference call, there was a brief discussion regarding the substance of Mr. Minihan's testimony, and the parties agreed that the best solution was for them to attempt to reach a stipulation as to what Mr. Minihan had stated, and to submit that stipulation to the Board.

On March 14, 1991, Appellants' counsel submitted a supplemental "letter brief" to the Board reciting his understanding of Mr. Minihan's testimony, and making various arguments based upon this testimony.[7] Also on March 14, counsel for DER filed a response asking the Board to strike Appellants' letter brief on grounds that, among other things, it was inappropriate in light of the agreement to attempt to reach a stipulation. Appellants' counsel submitted another letter on March 15, explaining once again why he felt it was necessary to submit the letter brief.

We will deny DER's motion to strike. The situation which caused Appellants to file the supplemental brief was extraordinary; thus, we do not attribute any sinister motives to the Appellants. Moreover, the problem regarding Mr. Minihan's direct testimony no longer seems significant because the Board only relies on Mr. Minihan's direct testimony once in this Opinion (see footnote 3, above), and the Board's conclusions did not turn on that

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[7] Counsel explained that since the conference call on the previous day, he had an opportunity to discuss Mr. Minihan's testimony with an associate in his firm who had taken notes during the hearing.

testimony. To that extent, Mr. Minihan's direct testimony may be moot.[8]

5. Summary.

Placing the burden of proof upon the Appellants at the supersedeas hearing did not deprive them of due process of law. Wood has not satisfied the standards for granting a supersedeas due to the danger of environmental harm resulting from its continued storage of solid waste at its Chester, Colwyn, and Norristown sites. Joyner is entitled to a supersedeas because the evidence did not warrant piercing the corporate veil, and because he did not have adequate notice that DER would seek to hold him responsible under an officer participation theory. Thus, we must conclude at this stage of the proceeding that DER lacks jurisdiction over Joyner. Finally, we will deny DER's motion to strike the Appellants' supplemental brief.

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[8] The parties may disagree with this statement to the extent that they disagree with the ruling on the petition for supersedeas. The undersigned no longer views the missing testimony as a problem, and the parties have the burden of pressing this issue if they disagree.

ORDER

AND NOW, this 5th day of April, 1991, it is ordered that:

1) The Order issued in this proceeding on March 15, 1991, granting the petition for supersedeas as to Joyner and denying it in all other respects, is reaffirmed.

2) DER's motion to strike filed on March 14, 1991 is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: April 5, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

THE CARBON/GRAPHITE GROUP, INC.	:	
	:	
v.	:	EHB Docket No. 90-524-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 10, 1991

OPINION AND ORDER
SUR MOTION TO COMPEL FILED
ON BEHALF OF THE DEPARTMENT OF
ENVIRONMENTAL RESOURCES

By: Richard S. Ehmann, Member

Synopsis

A Motion to Compel answers to interrogatories is granted as to an interrogatory seeking the curricula vitae of an expert witness and either an expert's report or a full summary of the expert's statement of facts and opinion and grounds for each opinion, because Pa. R.C.P. 4003.5 authorizes the seeking of this information. However, an interrogatory seeking the identity of every document consulted by an expert to render each opinion is overbroad, so it is modified to include every document having a significant impact on the formation of each of the expert's opinions.

OPINION

Our prior opinions and orders in this case adequately set forth this appeal's procedural history. We do not repeat it here. It suffices for our purposes in the instant opinion to point out that The Carbon/Graphite Group,

Inc. ("C/GG") is appealing the issuance by the Department of Environmental Resources ("DER") of C/GG's NPDES Permit because of certain effluent limitations imposed therein and C/GG is contending that compliance therewith requires C/GG to treat acid mine drainage for which it has no responsibility.

Before us, at this point, is DER's Motion To Compel, seeking responses to its Interrogatories to C/GG Nos. 6, 7, 8, 9 and 10. Also before us is C/GG's Response to DER's motion asserting it has previously provided all the information required of it or is providing same in C/GG's simultaneously filed Supplemental Responses To DER's First Set of Interrogatories And Request For Production Of Documents.[1]

As to Interrogatory No. 6, DER asks the substance of facts and opinion to which each expert will testify. Insofar as C/GG wishes expert opinion beyond the three simultaneously filed reports from these three witnesses or from other witnesses, it must have them prepare statements containing same. Clearly, the answer to Interrogatory 6 previously filed by C/GG does not comply with the requirements of Pa. R.C.P. 4003.5 because it is not each expert's statement of the substance of facts and opinions nor is it a summary of the grounds for each opinion. Moreover, C/GG does not appear to have furnished signed expert reports or signed answers to this Interrogatory from Raymond A. Miller or Herbert A. Ridgway, even though they are listed as experts in C/GG's answer to the Interrogatory. The comment in C/GG's supplemental response to Interrogatory 6, that "Ridway and Miller are listed as experts for the purpose of presenting and drawing conclusions from data collected by or on behalf of C/GG, copies of which have been provided to the Department", is also an inadequate response for the reasons DER alleges, and

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[1]These responses include a signed report by each of three persons identified as expert witnesses by C/GG.

because the information alleged to have been previously provided is not identified. Philadelphia Electric Company et al. v. DER, EHB Docket No. 88-309-M (Opinion issued August 31, 1990)

Accordingly, as set forth below, we grant DER's Motion as to this interrogatory. Moreover, from C/GG's answer to DER's Interrogatory Nos. 4, 6 and 9, it appears Miller and Ridgway may also be fact witnesses who are subject to discovery, even if otherwise protected to some degree as experts. New Hanover Township et al. v. DER, 1989 EHB 31; Concerned Citizens of Earl Township et al. v. DER, EHB Docket No. 88-516-M (Opinion issued June 15, 1990).

Interrogatory No. 8 in essence seeks the experts' curricula vitae. Pa. R.C.P. 4003.5 says an expert may be asked to specify the facts and opinions on which he will testify and a summary of his opinion. We believe this can include the curricula vitae materials DER seeks in this case, where C/GG's response to DER's motion says the parties have agreed to the deposition of these respective witnesses.

We cannot sustain DER's request for the identity of every document or communication relied on by each of C/GG's experts (Interrogatory No. 7). This request is overbroad. The expert is required to provide a summary of the grounds of his opinion and the substance of the facts and opinions to which he will testify, under Pa. R.C.P. 4003.5(a). This same issue was also before us recently in Municipal Authority Of The Borough Of St. Marys v. DER, EHB Docket No. 90-448-E (Opinion issued March 12, 1991). There, in footnote 2, we said describing all documents consulted to form an opinion is too broad a question, but identifying all documents of significant impact on the opinion's formation

is not. We see no reason to change our prior position for this appeal, since "every document relied upon" could include every college textbook and treatise.

C/GG's initial answer to DER's Interrogatory No. 7 also argues attorney-client privilege and/or the work product doctrine as bars to answer this question but, in its Response to DER's Motion and Memorandum of Law supporting same, C/GG advances no argument as to why this is so. We thus deem these contentions to be abandoned by C/GG and direct it to answer Interrogatory No. 7 as modified.

As to DER Interrogatories Nos. 9 and 10, C/GG has filed supplemental answers to these two interrogatories which we presume will adequately address DER's needs. In so doing, however, we caution C/GG regarding any non-expert witnesses it wished to identify in the future and attempt to use at trial that in Municipal Authority Of The Borough Of St. Marys, supra, we stated:

> In short, St. Marys must disclose its witnesses now to allow DER to depose same, if it wishes to do so before the close of discovery. We can not allow a party to thwart discovery by its opponent through a refusal to name the selected expert and non-expert witnesses until after discovery closes.

Accordingly, we enter the following order.

ORDER

AND NOW, this 10th day of April, 1991 it is ordered that DER's Motion To Compel is granted as to Interrogatories 6 and 8. It is further ordered that it is also granted as to Interrogatory 7 as modified in the foregoing opinion. Finally, it is ordered that we deny DER's Motion as to Interrogatories 9 and 10. C/GG shall furnish DER its answers to Interrogatories 6, 7, and 8 pursuant to this Order by **April 26, 1991.**

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 10, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

MONTGOMERY COUNTY	:	
	:	
v.	:	**EHB Docket No. 91-053-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 12, 1991**

OPINION AND ORDER
SUR PETITION TO INTERVENE OF
BROWNING-FERRIS, INC.

By: Richard S. Ehmann, Member

Synopsis

Petition To Intervene in an appeal from DER's approval, under the Municipal Waste Planning, Recycling and Waste Reduction Act, of the Berks County Municipal Waste Management Plan by the applicant for a permit from DER for the construction and operation of a landfill to be utilized for municipal waste disposal under this plan is denied. The intervenor's interest in this proceeding is too speculative where it has yet to receive a permit from DER for the proposal landfill. The Petition is also too speculative because it is premised on an assumption that Berks County will not defend its approved Plan where there is no evidence from which to make this assumption. Finally, the Petition must be denied because even in the event the appeal is successful, there is no showing of any injury to Petitioner since the appeal's limited scope has not been shown by petitioner to adversely affect the proposed landfilling operation, but rather challenges another segment of the plan.

OPINION

Montgomery County ("Montgomery") has filed an appeal with us from the January 9, 1991 approval by the Department of Environmental Resources' ("DER") under the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, No.101, 53 P.S. §4000.101 *et seq.*, ("Act 101") of the Berks County Municipal Waste Management Plan. According to the Notice Of Appeal, the Plan provides in part that 500 tons per day of municipal waste generated in Berks County is to be disposed of by haulage to a resource recovery facility which Wheelabrator Pottstown, Inc., proposes to construct and operate in Montgomery. Montgomery challenges the plan because Montgomery says it has also prepared a plan for Montgomery County and, while Wheelabrator's proposal facility could be selected to become a portion of its plan, at present, it has not been incorporated into Montgomery's plan. Alternatively, Montgomery says the Berks County plan should have been approved by DER conditioned upon its being consistent with Montgomery's plan.

According to its Petition To Intervene, Browning-Ferris, Inc., (BFI) is the equitable owner of 426 acres of land in Berks County. BFI has applied to DER for a permit to operate a landfill on this land, and DER currently has this application under review but has yet to issue or deny a permit based thereon.

BFI says that after it applied for this permit, Berks County unsuccessfully tried to condemn BFI's landfill site for use as a Berks County owned municipal landfill. The Petition then asserts Berks and BFI settled this proceeding via a service agreement which provided BFI would secure permits for the site and develop it and Berks County would agree to use BFI's site to receive all municipal solid waste from within the County. BFI then

then says it thereafter secured a preliminary injunction mandating that the Berks County Municipal Waste Management Plan ("Plan") be consistent with the Berks County/BFI condemnation proceedings settlement. Finally, the Petition says BFI and Berks County agreed to let 500 tons per day of the County's municipal waste be sent to the as yet unconstructed Wheelabrator Pottstown, Inc. facility in Montgomery County. The Petition also admits that if Berks County cannot send the waste to the Wheelabrator Pottstown facility, it can send this waste elsewhere out of county or to the BFI site and BFI is willing to accept same.[1]

While neither Montgomery nor Berks County has responded to BFI's Petition, DER has done so. DER opposes BFI's Petition and says BFI's Petition does not show good cause for this Board to grant intervention.

We have generally held that intervention is authorized at the discretion of the Board. Keystone Sanitation Co., Inc. v. DER, 1987 EHB 22. We generally grant intervention where the Petitioner establishes that he has a direct, immediate and substantial interest which is not adequately represented by the parties already appearing before the Board. Save Our Lehigh Valley Environment v. DER, 1987 EHB 117. Of course the Petitioner has the burden of proof as to these issues. Sunny Farms, Ltd. v. DER, 1982 EHB 442. In deciding whether or not BFI has met this burden, we consider:

1. the nature of BFI's interest.
2. the adequacy of representation by other parties of BFI's position.
3. the nature of the issues before the Board.
4. BFI's ability to present relevant evidence.
5. the effect of BFI's intervention on administration of the statute under which the proceeding is brought.

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[1]BFI took no appeal from DER's approval of Berks County's Plan.

Glendon Energy Company v. DER, EHB Docket No. 90-104-F (Opinion issued December 4, 1990). The conclusion reached after reviewing the Notice Of Appeal, BFI's Petition and DER's response thereto in light of these five factors is that BFI fails to meet the burden of convincing us to allow it to intervene.

BFI'S interest in this matter is presently speculative from two standpoints. BFI does not have a permit for its proposed landfill. All it has is a pending application for a permit for a landfill. BFI's Petition is thus based on the premise that if BFI is issued a permit for this proposed landfill site by DER at some point in the future and builds the landfill, but the Berks County Plan is then overturned by a successful appeal by Montgomery, BFI's interests reflected by the litigation settlements between it and Berks County will be adversely affected. Of course, if DER denies BFI's permit application, then all of this becomes moot.

In addition, BFI's position appears to be based upon the speculative assumption that Berks County will breach its agreements with BFI as to use of BFI's proposed landfill. We agree with BFI that the exhibits to its petition show there is past litigation in the Common Pleas Court of Berks County between BFI and Berks County. All of that litigation pre-dated DER's approval of Berk's plan. BFI's Petition points to nothing which shows any intent on the part of Berks County to breach its commitments to BFI or to allow its plan to be torpedoed by Montgomery's appeal.[2] Of course, we must also observe

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[2]Of course, this also goes to the question of whether or not the existing parties in this litigation will adequately represent BFI's interest. Insofar as BFI wants this plan sustained, we see no reason to believe DER and Berks County will not fight hard to see it sustained. Insofar as BFI wants any (footnote continued)

here that even if there is a breach of the BFI/Berks County agreements, there is nothing we can do about that. Our jurisdiction is limited and is not broad enough to allow us to address such claims. See The Environmental Hearing Board Act, the Act of July 13, 1988 P.L. 530, No. 84, 35 P.S. §7511 *et seq.*

Finally, we are constrained to point out that we recently denied a Petition To Intervene in this matter filed by Hays Run Associates. See Montgomery County v. DER et al., EHB Docket No. 91-053-E(Opinion issued March 20, 1991). Hays Run Associates ("HRA") represented itself as one of the legal title holders to the land on which BFI wishes to build its landfill. As we pointed out there, if Berks County and DER prevail, HRA and, now, BFI get what they have bargained for with Berks County. If, on the other hand, Montgomery County prevails in its appeal, assuming BFI is issued a permit by DER for this landfill, BFI is also not injured, since the 500 tons of municipal waste proposed for shipment to the Wheelabrator Pottstown, Inc., facility then can come to BFI's landfill and BFI's petition says BFI is willing to accept it. Of course, Montgomery may be seeking more than the surgical removal from the Berks County Plan of the portion dealing with use of the Wheelabrator Pottstown, Inc., facility. This does not appear to be the case from our reading of the Notice Of Appeal. Even if this preliminary reading of Montgomery's appeal is in error, however, there is a serious question as to whether Montgomery has standing to challenge the Berks County Plan beyond that extent, and BFI gives us no reason to believe Berks County and DER are not prepared to raise this defense to such a wholesale challenge.

(continued footnote)
other result, that would broaden the scope of this appeal, and this is a ground to deny a Petition to intervene. City of Harrisburg v. DER, 1988 EHB 946.

Accordingly, we enter the following Order.

ORDER

AND NOW, this 12th day of April, 1991, BFI's Petition To Intervene in this instant proceeding is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 12, 1991

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COALITION OF RELIGIOUS AND CIVIC ORGANIZATIONS, INC. (CORCO)	:	**EHB Docket No. 90-128-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and PFIZER PIGMENTS, INC., Permittee	:	**Issued:** April 16, 1991

OPINION AND ORDER SUR
MOTION TO LIMIT ISSUES

By Maxine Woelfling, Chairman

Synopsis

In an appeal of air quality plan approvals issued by the Department, the Board grants permittee's motion to limit issues in part and denies it in part.

The Board grants the motion with respect to those issues which are moot or irrelevant. Issues pertaining to wastewater discharged from the sources are irrelevant, as are allegations that malodors and other air contaminants from permittee's facility constitute a public nuisance. Whether there has been compliance with public notification procedures at 25 Pa.Code §§127.44 and 127.45 is irrelevant where, under Chapter 127, the plan approval is not subject to those public notification requirements.

The motion is denied with respect to allegations that permittee reactivated sources prior to receiving plan approvals and that permittee's

facility has a history of environmental violations. These allegations tend to show either that problems existed with maintenance and repair or that the sources were not operated with due regard for applicable air pollution restrictions. The motion is also denied with respect to whether the permittee was required to prepare an air pollution episode stand-by plan where it was not established whether sources in Northampton County were subject to the requirement.

OPINION

This matter was initiated by the March 26, 1990, filing of a notice of appeal by the Coalition of Religious and Civic Organizations, Inc. (CORCO), Armen Elliot, and Joseph Welsh, seeking review of the Department of Environmental Resources' (Department) February 28, 1990, issuance of plan approvals pursuant to 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), to Pfizer Pigments, Inc. (Pfizer). The plan approvals authorized Pfizer to reactivate two brown oxide muffle kilns in the City of Easton, Northampton County.

On October 15, 1990, Pfizer filed a motion to limit the issues raised by certain allegations in CORCO's pre-hearing memorandum. According to Pfizer, CORCO alleged facts irrelevant to this action when CORCO asserted that 1) Pfizer reactivated the sources prior to plan approval and had a record of previous environmental violations; 2) Pfizer discharged wastewater from the muffle kilns into the Easton Area Joint Sewer Authority's (EAJSA) treatment plant in violation of applicable federal pre-treatment regulations and without a permit in violation of 25 Pa.Code §91.33; 3) Pfizer discharged wastewater from the kilns into a treatment plant that was violating state and federal requirements; 4) the plan approval for the rotary kiln allows Pfizer

to violate the Air Pollution Episode Standby Plans; and 5) Pfizer emits malodors and air contaminants which constitute a public nuisance. We will address each of these issues separately.

I. Allegations of Reactivation Prior to Plan Approval and Prior Violations of Environmental Laws.

CORCO's pre-hearing memorandum alleges that when the Department issued Pfizer's plan approvals it failed to consider that Pfizer had reactivated the sources with no plan approval and that Pfizer had violated the Air Pollution Control Act and other environmental statutes. Pfizer argues that whether the Department considered Pfizer's compliance history is irrelevant because the Air Pollution Control Act does not authorize the Department to examine an applicant's compliance--either with the Air Pollution Control Act itself or other statutes--when making plan approval determinations. CORCO counters that compliance history is relevant because it relates to whether the sources can and will be operated in accord with good air pollution control practices.[1]

It is unnecessary to address the broad issue of whether the Air Pollution Control Act authorizes the Department to consider compliance history in reviewing a plan approval application for in the case of these sources, their compliance with applicable requirements bears upon whether they are capable of being operated and maintained in accordance with good air pollution control practices, as required by 25 Pa.Code §127.12(a)(10) and §127.12(b).

---

[1] CORCO and Pfizer also disagree as to whether the Board can substitute its own discretion for that of the Department when the Board rules on the Department's plan approval decisions. Since the issuance of a plan approval under the Air Pollution Control Act and the rules and regulations adopted thereunder is discretionary, the Board may substitute its discretion for that of the Department in reviewing the issuance of the plan approval. Warren Sand and Gravel v. Com., Dep't of Env. Res., 20 Pa.Cmwlth 186, 341 A.2d 556 (1975).

Here, because these sources are being reactivated, prior violations by the sources may be relevant because they could show that problems existed with the maintenance and repair of the sources and air pollution control devices.

Pfizer, in its brief in support, suggests that we distinguish between violations from sources at the facility which are not at issue here and violations caused by the performance of the specific sources under dispute. But, violations from sources which are not the subject of the appeal can be relevant if they tend to show problems in the maintenance, repair, or operation of sources under appeal. For instance, violations from a source which is not itself a subject of the appeal may be relevant if the source is the same type as the source under appeal and the same employees operate, maintain, or repair both sources.

II. **Allegations Pertaining to Wastewater Discharged from the Sources.**

CORCO, in its pre-hearing memorandum, alleges that the rotary muffle kilns (plan approval applications 48-313-028A and 48-313-029A) discharge wastewater into the EAJSA publicly owned treatment works. According to CORCO, the concentrations of pollutants in the wastewater exceed limits set by federal pre-treatment regulations. CORCO also claims that, in violation of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the Department's regulations at 25 Pa.Code §91.33, the plan approvals authorize the discharge of industrial waste, without a permit, into a treatment plant which does not utilize a federally-approved pretreatment program or comply with orders, rules, and regulations pertaining to operation and maintenance.

Pfizer contends that CORCO's allegations: 1) are irrelevant to decisions on plan approvals issued under the Air Pollution Control Act; 2) present a moot issue, since, as a result of the issuance of the appropriate

wastewater discharge permits, the Board can grant no meaningful relief; and 3) duplicate issues already involved in the federal litigation between CORCO and Pfizer.[2]

Regarding the permitting issue, Pfizer is correct in asserting that this issue has been rendered moot by EAJSA's issuance of a permit to Pfizer to discharge into its treatment system. See Exhibit C, Appellee Pfizer/Harcros' Reply to Appellant's Response in Opposition to Appellee Pfizer/Harcros Pigments' First Motion to Limit the Issues Raised by Certain Allegations in CORCO's Pre-Hearing Memorandum.

As for Pfizer's alleged violations of pre-treatment standards for discharge into publicly owned treatment works such as EAJSA and EAJSA's alleged violations of the Clean Water Act, 33 USC §1251 *et seq.*, it is difficult to see their relevance to the propriety of the Department's issuance of the plan approval for the rotary muffle kilns. These assertions by CORCO are similar to those made in Skolnick, *et al.* v. Department of Environmental Resources and GPU Nuclear Corp., Docket No. 89-290-F (June 4, 1990), wherein a motion to limit issues was granted on the basis that, among other things, compliance with §401 of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S. §6018.401, and the Low Level Radioactive Waste Disposal Act, the Act of February 9, 1988, P.L. 31, 35 P.S. §7130.101 *et seq.*, was not relevant to the Board's review of a Department determination that a source was of minor significance and did not require a plan approval under the Air Pollution Control Act. Thus, Pfizer's motion to limit issues relating to wastewaters discharged from the sources will be granted.

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[2] The federal litigation is CORCO *et al.* v. Pfizer Pigments, Inc., Civil Action No. 88-1359 (E.D. Pa).

III. Allegation that One Plan Approval Allows Pfizer to Violate the Air Pollution Episode Standby Plans.

In its pre-hearing memorandum, CORCO alleges that plan approval 48-313-028A (pertaining to the rotary kiln) allows Pfizer to violate the Air Pollution Episode Standby Plans. Pfizer, in its brief in support of the motion, maintains that these allegations are irrelevant because standby plans are not required under 25 Pa.Code §137.4, as revised at 20 Pa.Bulletin 3061 (June 9, 1990).

In its response in opposition, CORCO argues that a plan approval decision must be based on the law as it exists at the time of the decision on the permit. Specifically, CORCO contends that, because the issue here pertains to the Department's permitting decision in February, 1990, a June, 1990, rulemaking is irrelevant. In the event the June, 1990, regulations do apply, CORCO maintains that it is unclear whether the Department has exercised its authority to classify any counties under the revised 25 Pa.Code §137.4(b).[3] For its part, Pfizer, in its reply, argues that the language of the revised regulations is clear: standby plans are no longer required unless the Department takes affirmative action to classify a county under 25 Pa.Code §137.4(b).

The language of 25 Pa.Code §137.4 does not support Pfizer's assertion that this issue is now moot. Pfizer has not presented any documentation that

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[3] 25 Pa.Code §137.4(b) now reads:

> The Department will annually classify each county as an area requiring a standby plan based on monitored exceedance of the following criteria: SO_2..., PM_{10}..., CO..., NO_2..., and ozone....

the Department has exempted Northampton County sources from the requirement to prepare standby plans and, since Pfizer's motion must be construed in the light most favorable to CORCO, it must be denied on this particular grounds.

IV. Public Notification Procedures.

Pfizer contends that allegations that the Department failed to comply with regulations governing public notification at 25 Pa.Code §§127.44 and 127.45 are irrelevant. According to Pfizer, these regulations do not apply because the notice requirements specified in the regulations do not pertain to all plan approvals. CORCO counters by arguing that, since the Department gave some notice, the plan approval must have fallen under one of the categories listed under §127.44(a).

Although the plan approval requirements at 25 Pa.Code §127.11 apply to the construction, modification, or reactivation of sources, the public notification procedures in Subchapter B of Chapter 127 are not as broad. Section 127.41 provides that the subchapter applies only to applications involving construction or modification:

> **Purpose**
> This subchapter contains procedures by which the Department is to notify the public of proposed action regarding applications for construction or modification of air contamination sources.
>
> (emphasis added)

Later in Subchapter B, 25 Pa.Code §127.45 reads:

> The notice of the proposed plan approval issuance required by §127.44(a) [relating to public notice] shall include the following:
>
> * * * * *
>
> (2) Location and name of the plant or facility at which construction or modification is taking place.
>
> (emphasis added)

"Reactivation" is not included with "construction" and "modification" in either §127.41 or §127.45, nor does it fall within the definitions of "construction" or "modification" in 25 Pa.Code §121.1.[4]

Consequently, the public notification requirements at 25 Pa.Code §§127.44 and 127.45 are irrelevant because they did not apply to Pfizer's plan approval application. Where the legislature includes specific language in one section of a statute and excludes it from another, it should not be implied where excluded, Patton v. Republic Steel Corp., 492 A.2d 411, 342 Pa.Super. 101 (1985).[5] Section 127.41, which outlines the purpose of Subchapter B, provides a clear indication of the intent of the regulations in that subchapter: they govern the procedures for public notice of construction or modification of air pollution sources. For example, the language in §127.45 refers to the "plant or facility at which construction or modification is taking place." Since the regulations at 25 Pa.Code §§127.44 and 127.45 do not apply to plan approvals involving reactivation only, whether the Department or Pfizer complied with those regulations is irrelevant.

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[4] "Construction" is defined as

> To physically initiate assemblage, installation, erection or fabrication of an air contamination source or an air pollution control device including building supports and foundations and other support functions.

while "modification is defined as

> A physical change in a source or a change in the method of operation of a source which would increase the amount of an air contaminant emitted by the source or which would result in the emission of an air contaminant not previously emitted, except that routine maintenance, repair and replacement are not considered physical changes.

[5] The rules and regulations of administrative agencies are subject to the same rules of statutory construction as statutes themselves. See §1502(a)(1)(ii) of the Statutory Construction Act, 1 Pa.C.S.A. §1502(a)(1)(ii).

V. Allegations that Malodors and Air Contaminants Constitute a Public Nuisance.

CORCO asserts in paragraph A2 of its pre-hearing memorandum that it intends to prove that Pfizer's facility emits malodors and air contaminants which constitute a public nuisance. Pfizer, in its brief in support of the motion to limit issues, maintains that malodors are irrelevant to the extent they emanate from sources that are not the subject of this appeal.

It is difficult to perceive how CORCO's establishing that the Pfizer facility, in general, constitutes a public nuisance will be relevant to a determination that the Department abused its discretion in issuing the plan approvals at issue here. Unless these contentions can be related to assertions that the sources cannot be operated in accordance with good air pollution control practices, discussed *supra*, they are not relevant.

O R D E R

AND NOW, this 16th day of April, 1991, it is ordered that:

1) Pfizer's motion to limit issues is granted with respect to:

   A) issues pertaining to wastewater discharged from the sources;

   B) whether Pfizer and/or the Department complied with proper public notification procedures; and

   C) whether malodors and air contaminants which emanate from the Pfizer facility constitute a public nuisance.

2) Pfizer's motion to limit issues is denied, consistent with this opinion, with respect to:

   A) whether plan approval 48-313-028A allows Pfizer to violate Air Pollution Episode Standby Plans;

B) whether Pfizer reactivated the sources before it received the plan approvals; and

C) whether Pfizer had previous environmental violations.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: April 16, 1991

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SECRETARY TO THE BOAR

LAWRENCE W. HARTPENCE AND IMOGENE KNOLL, t/b/a HYDRO-CLEAN, INC. AND TRI-CYCLE, INC.	:	
V.	:	**EHB Docket No. 90-028-MR**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 17, 1991**

OPINION AND ORDER
SUR
MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Robert D. Myers, Member

Synopsis

The Board holds that, in an appeal that involves a civil penalty assessed for the alleged refusal to allow DER to inspect premises without a warrant, the nature of the alleged behavior is sufficiently narrow to make relevant for discovery purposes other civil penalties assessed by the same office of DER for the same behavior within a relatively short time period. Documents involved in making such assessments are not confidential communications from client to attorney since DER legal counsel are part of the adjudicatory decision-making process. Accordingly, the attorney-client privilege does not apply.

OPINION

One of the issues in this appeal is the propriety of a civil penalty assessed against Appellants by the Department of Environmental Resources (DER) for the alleged refusal to permit a DER employee, acting in performance of his

duties under the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, to enter and inspect Appellants' real estate in Lackawanna County.

Appellants, while conducting discovery into the procedures and considerations used within DER to make the assessment, have learned that DER's Wilkes-Barre office has assessed civil penalties for similar refusals in three other situations during the past three years. Seeking to gain additional information on these other assessments, Appellants sent Notices of Deposition to DER officials in the Wilkes-Barre office directing them to appear for deposition and to produce, *inter alia*, the DER files on the other three assessments. DER has objected on the grounds of relevancy and attorney-client privilege. As a result, Appellants filed a Motion to Compel on March 20, 1991, to which DER filed an Answer on April 5, 1991.

Civil penalty assessments being peculiarly dependent upon the particular facts of each case, we are tempted to declare other assessments irrelevant. We are constrained by two considerations - (1) the broad concept of relevancy during discovery and (2) the unusual nature of the assessment involved. With respect to the first, there are abundant court and Board precedents for an expansive view of relevancy while an appeal is still in its formative stages. Despite these precedents, we would still be loath to permit inquiry into other assessments were we dealing with the multifarious fact situations typical of civil penalty assessments.

What we are dealing with, however, is an assessment levied for behavior that falls within a narrower range of factual circumstances. It should be easier and more probative to compare assessments made solely for such behavior, especially when made by the same office of DER over a relatively short time period. Given these peculiar circumstances, the broad

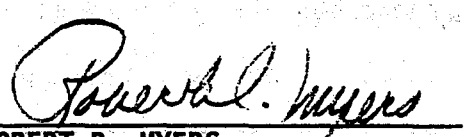
scope of discovery and the limited nature of the inquiry, we are persuaded that the subject matter is relevant.

DER personnel follow a common procedure in assessing civil penalties and utilize calculation sheets and guidelines. Apparently, the process originates with a compliance specialist and moves up the chain of authority to the office of chief legal counsel. Along the way, internal memoranda and other types of written communications may be generated. DER claims that all of these documents are confidential communications from client to attorney and are protected by the privilege set forth at 42 Pa. C.S.A. §5928. We were presented with this argument in City of Harrisburg v. DER, et al. (Docket No. 88-120-F, Opinion and Order sur Nine Motions Regarding Discovery issued April 30, 1990), and dismissed it as inapplicable to situations where DER attorneys are part of the adjudicatory decision-making process. In such situations, the communications cannot be viewed as confidential. That same reasoning applies here.

ORDER

AND NOW, this 17th day of April, 1991, it is ordered that Appellants' Motion to Compel Production of Documents in Conjunction with Notices of Deposition is granted. New deposition dates are to be set by the parties.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: April 17, 1991

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**EHB Docket No. 90-034-W**
v.	:	
U.S. WRECKING, INC.	:	**Issued:** April 17, 1991

OPINION AND ORDER SUR MOTIONS FOR SANCTIONS AND AMENDED MOTION FOR SANCTIONS

By Maxine Woelfling, Chairman

Synopsis

Sanctions pursuant to Pa.R.C.P. No. 4019 are imposed against a party which failed to timely respond to the Department of Environmental Resources' (Department) interrogatories and request for production of documents and failed to comply with a Board order compelling responses to the interrogatories and production of the documents. The facts which were the subject of the interrogatories are established in accordance with the Department's claims and the defendant is precluded from introducing at the hearing on the merits any documents which were the subject of the request for production.

OPINION

This matter was initiated on January 19, 1990, with the filing of a complaint for civil penalties pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L.(1959) 2119, as amended, 35 P.S. §4001 *et seq.*, by the Department. The complaint sought civil penalties for U.S. Wrecking,

Inc.'s (U.S. Wrecking) alleged violation of regulations concerning asbestos removal and disposal when it removed and disposed of insulation containing asbestos from two buildings at 7 and 9 East King Street in the City of Lancaster.

Presently before the Board is the Department's January 29, 1991, motion seeking sanctions against U.S. Wrecking for its failure to comply with the Board's November 23, 1990, order granting the Department's motion to compel and directing U.S. Wrecking to answer the Department's interrogatories and respond to its request for production of documents on or before December 21, 1990. The Department requested that the Board impose the sanction of preventing U.S. Wrecking from presenting any evidence at the hearing on the merits in this matter.

In a letter dated January 31, 1991, the Board advised U.S. Wrecking that any response to the Department's motion should be filed on or before February 18, 1991. As of the date of this opinion, U.S. Wrecking has not responded to the Department's motion.

Apparently in response to U.S. Wrecking's service of its answers to the Department's interrogatories and its response to the Department's request for production of documents,[1] the Department, on March 4, 1991, filed an amendment to its motion for sanctions alleging that, in addition to being untimely, the answers filed were not verified, signed, or complete, in violation of the Pennsylvania Rules of Civil Procedure. The Board advised U.S. Wrecking that any response to the Department's amended motion should be filed on or before March 19, 1991, and U.S. Wrecking has yet to respond to the amended motion.

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[1] A copy of U.S. Wrecking's response was not filed with the Board, as is required by 25 Pa.Code §21.111(c).

The imposition of sanctions is appropriate here.[2] Pennsylvania Rules of Civil Procedure Nos. 4006(a)(2) and 4009(b)(2), as incorporated in the Board's rules at 25 Pa.Code §21.111, mandate that U.S. Wrecking respond to the Department's interrogatories and request for production of documents within 30 days of September 21, 1990. U.S. Wrecking did not do so, and, despite the Board's order of November 23, 1990, U.S. Wrecking did not respond to these discovery requests until nearly 60 days after the deadline in the Board's order.

It now remains to determine what sanction is appropriate under the circumstances. The Department has requested that U.S. Wrecking be precluded from presenting its case-in-chief. Given that the Department has the burden of proof in a civil penalties proceeding such as this, 25 Pa.Code §21.101(b)(1), the efficacy of this sanction with respect to the interrogatories is questionable. A more appropriate sanction is found in Pa.R.C.P. No. 4019(c)(1), which authorizes the issuance of an order establishing, in accordance with the claims of the Department, any facts which were the subject of the interrogatories. See Glenn Coal Company v. DER, 1985 EHB 887. As for the documents requested by the Department which U.S. Wrecking did not timely produce, U.S. Wrecking will be precluded from introducing the documents at any hearing on the merits.

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[2] In light of the decision to impose sanctions, it is unnecessary to address the allegations in the Department's amended motion concerning completeness and proper verification of U.S. Wrecking's responses to the Department's interrogatories.

O R D E R

AND NOW, this 17th day of April, 1991, it is ordered that:

1) The Department's motion for sanctions is granted;

2) Any facts which were the subject of the interrogatories which are the subject of the Department's motion are established in accordance with the Department's claims; and

3) At the hearing on the merits, U.S. Wrecking is precluded from introducing any documents which it failed to timely produce in response to the Department's request for production of documents.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: April 17, 1991

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M. DIANE SMITH
SECRETARY TO THE BOAF

ERNEST BARKMAN, GRACE BARKMAN, ERN-BARK, INC.	:	**EHB Docket No. 90-412-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 17, 1991

OPINION AND ORDER
SUR MOTION TO COMPEL

By Maxine Woelfling, Chairman

Synopsis

A motion to compel production of documents requested pursuant to Pa.R.C.P. No. 4009 is granted where the party upon whom the request is served did not produce the documents, did not set forth specific objections to individual documents, and did not file a motion for a protective order. The failure to timely and properly assert a privilege constitutes a waiver of the privilege and, therefore, the Board will compel production of the documents allegedly covered by the privilege.

OPINION

This matter was initiated with the September 28, 1990, filing of a notice of appeal by Ernest Barkman, Grace Barkman, Ern-Bark, Inc., and Ernest Barkman, Jr. (Barkmans) seeking review of the Department of Environmental Resources' (Department) August 29, 1990, issuance of an order and civil penalty assessment relating to Ernest Barkman's junkyard and alleged

recycling facility in Honeybrook Township, Chester County. The order directed the Barkmans to cease storage and disposal of waste at the facility without a permit in violation of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (Solid Waste Management Act), and to allow representatives of the Department to inspect the facility. It also assessed a civil penalty in the amount of $125,000 for the Barkmans' alleged violations of the Solid Waste Management Act on five separate days.[1]

The parties have engaged in discovery, which has engendered several motions to compel by the Barkmans that were granted by the Board as a result of the Department's failure to timely comply with its obligations under 25 Pa.Code §21.111 and the Pennsylvania Rules of Civil Procedure incorporated therein by reference. The matter presently before the Board has its genesis in the Board's March 8, 1991, order to the Department directing it to produce documents requested by the Barkmans on or before March 28, 1991.

Subsequent to the issuance of the Board's March 8, 1991, order, the Department, by letter dated March 26, 1991, requested an unspecified amount of additional time to respond to the Barkman's interrogatories. The letter also represented that "Departmental files have been reviewed by counsel for the Appellant and copies of requested documents have been provided."

The Barkmans then, on April 5, 1991, filed a motion to compel the Department to produce documents denominated as "confidential" and "restricted." The Barkmans alleged that the only documents provided to them were two lists of documents, one labeled "confidential," the other "restricted," and each setting forth the title and dates of the documents so identified. The Barkmans are requesting the Board to compel the Department to

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[1] The Barkmans' reasons for appeal are not germane to the resolution of the instant controversy.

produce these documents in light of its failure to provide any justification for withholding the documents on the two lists.

In response to the Barkmans' motion, the Department, on April 9, 1991, alleged that the Barkmans had reviewed the Department's entire file on their facility, that the Department had invited the Barkmans to discuss the contents of the files marked "restricted" and that the Barkmans had not done so, and that the Department did not "intend to indiscriminately disclose the contents of documents containing information naming persons who have filed complaints confidentially."

It is evident from the Department's response to the Barkmans' motion that the Department has a fundamental misconception regarding its obligations under Pa.R.C.P. No. 4009(b)(2). When a party receives a request for production of documents, it must, within 30 days after service of the request, respond by either producing the documents or objecting to the request by stating specific objections to the production of specific documents. A blanket assertion that documents are "restricted" or "confidential" with no further explanation does not qualify as a proper objection under Pa.R.C.P. No. 4011. Similarly, the Department's sweeping contention that the production of the documents on the list marked "restricted" may disclose the identity of persons who have complained to the Department about the Barkmans' activities does not rise to the level of a proper objection. The Department must indicate what objection it has to the production of what document. The Department could also, pursuant to Pa.R.C.P. No. 4012, seek a protective order from the Board; here, too, it must provide specific reasons for each document which it seeks to protect from disclosure.

However, none of these procedures was followed by the Department in this instance, so its failure to produce the requested documents for

inspection is not excused and it is deemed to have waived any privilege it may have asserted with regard to these documents. Warner Estate, 31 Chest. Co. Rep. 198 (1982). Consequently, production of all the documents will be compelled.[2]

O R D E R

AND NOW, this 17th day of April, 1991, it is ordered that the Barkmans' motion to compel is granted and the Department shall produce all of the documents enumerated on the "restricted" and "confidential" list for inspection by the Barkmans within seven (7) days of the date of this order.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: April 17, 1991

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[2] Should the Department fail to produce the documents as ordered herein, the Board will entertain a motion for sanctions by the Barkmans. The Department has failed to abide by the relevant discovery deadlines, even where extended by order of the Board or courtesy of its opposing counsel. Its responses to discovery requests are hardly in keeping with either the letter or the spirit of the discovery rules. If the Department has no intention of presenting a good faith defense of its order, then the appropriate course of action would be to withdraw it, thereby freeing the resources of the Board and the Barkmans.

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ESTATE OF CHARLES PETERS, JANE P. ALBRECHT, and LINDA P. PIPHER	:	
v.	:	EHB Docket No. 90-421-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, WESLAND DEVELOPMENT, INC., Permittee, and PIKE COUNTY HOTELS CORPORATION, Intervenor:	:	Issued: April 17, 1991

OPINION AND ORDER SUR
MOTION TO COMPEL DISCOVERY

By Maxine Woelfling, Chairman

Synopsis

A motion to compel answers to interrogatories is granted. It is not necessary to file a motion to dismiss objections to discovery before filing a motion to compel; the Board will rule on the propriety of the objections when ruling on the motion to compel. A party objecting to discovery on the basis of relevancy cannot sustain its burden of demonstrating that the requested discovery is irrelevant where it fails to identify which interrogatories are objectionable. To determine whether discovery is "unreasonable" under Pa. R.C.P. No. 4011(b) or (e), one must show that the nature or quantity of information sought is unreasonable in relationship to its prospective utility.

The Board will compel answers to interrogatories where the response to the interrogatories is inadequate.

OPINION

This matter was initiated by the Estate of Charles Peters, et al. (collectively, Peters) on October 10, 1990, with the filing of a notice of appeal from the Department of Environmental Resources' (Department) September 10, 1990, issuance of a National Pollution Discharge Elimination System (NPDES) permit to Wesland Development, Inc. (Wesland) under §202 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.202. Peters contends that, by issuing the NPDES permit, the Department exceeded its authority, abused its discretion, acted in an arbitrary and capricious manner, or otherwise violated the law. Pike County Hotels Corporation (Pike County Hotels), the owner and operator of Unity House, which is jointly financing the treatment plant with Wesland, filed a petition to intervene on November 13, 1990; the Board granted the petition on December 13, 1990.

The present controversy arises out of a discovery dispute between Peters and Wesland. On February 8, 1991, Wesland filed a motion to compel Peters to respond to certain interrogatories and a request for documents. Wesland contends that Peters provided partial, but inadequate, responses to Interrogatories 1(d) and (g), 2(c) and (d), 3(c), 5(a) and (d), 6(d), 7(g), and 7(i). Wesland also maintains that Peters neither answered nor properly objected to these interrogatories: 1(d), 2(b), 3(b), 5(b), 6(b)-(c), 7(b)-(c), 8(a)-(g), 9(a)-(f), 10(a)-(f), 11(a)-(f), 12(a)-(l), 14(a)(g), 15(a)-(g), 16(a)-(e), 17(a)-(l), 18(a)-(d), 19(a)-(f), 20(a)-(f), 21(a)-(g), 22(a)-(f), 23(a)-(b), 26(a)-(i), 27(a)-(f), 28(a)-(f), 31(a)-(i), 32(a)-(i), 33(a)-(f), 34(a)-(f), 35(a)-(g), 36, 37(a)-(e), 38(a)-(h), 39(a)-(e), 40, 41,

42(a)-(b), 43, 44(a)-(c) and 45(a)-(d).[1] In addition, Wesland argues that Peters never responded to Wesland's first request for production of documents dated November 29, 1990.

On February 8, 1990, Peters filed its response to the motion to compel, raising three categories of arguments. Peters contends that Wesland should have moved the Board to dismiss Peter's objections to discovery rather than filing a motion to compel. Second, Peters makes general objections--objections which do not specify which interrogatory they apply to--as to the irrelevant and unreasonably burdensome nature of the interrogatories. Third, Peters provides specific explanations as to why its answers were adequate for Interrogatories 1(g), 5(a), 5(d), 6(d) and 7(i).

Wesland filed a reply to the response on February 22, 1991.

The first question we must address is whether, as Peters contends, Wesland should have moved the Board to dismiss Peters' objections to the interrogatories rather than filing a motion to compel. A motion to compel is appropriate here. Rule 4006(a)(2) of the Pennsylvania Rules of Civil Procedure provides, in pertinent part: "The party submitting the interrogatories may move the court to dismiss an objection and direct that the interrogatory be answered." In essence, Wesland's motion to compel is a request to dismiss the objections and direct that the interrogatory be answered. Separate motions are not required to compel answers and dismiss objections. Because the Board will not compel answers to interrogatories until it has examined whether the objections are justified, it often rules on

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[1] Initially, Wesland also moved to compel answers to the other interrogatories which were left blank: 13(a)-(d), 24(a)-(j), 25(a)-(g), 29(a)-(g), and 30(a)-(g). Wesland, however, agreed to withdraw those interrogatories when Peters withdrew the contentions in Paragraphs 5, 11, 12, 13, and 16 of its notice of appeal. (See Paragraph 12 of Appellant's Response and Paragraph 15 of Appellee's Reply to Appellant's Response.)

the propriety of objections to discovery when ruling upon motions to compel. (See Brady's Bend Corporation v. DER and Darmac Coal, Inc., 1989 EHB 133, and DER v. Texas Eastern Gas Pipeline Company, Texas Eastern Transmission Corporation, 1989 EHB 186.)

As for Peters' two general objections, it first contends that "many" of Wesland's interrogatories seek information which is neither relevant nor calculated to lead to the discovery of relevant evidence. (Appellants' response, Paragraph 3) Then, Peters maintains that the interrogatories are unduly burdensome and oppressive under Pa. R.C.P. No. 4011 because there were 235 separate questions.

The Board has previously held that general objections are improper. (See Flight Systems, Inc. v. DER, 1988 EHB 914.) This is so because since relevancy is "broadly and liberally construed" for discovery purposes, Save Our Lehigh Valley Environment v. DER and Chrin Brothers, 1988 EHB 147, a party objecting on the basis of relevancy bears the burden of establishing its right to refuse discovery requests. Coalition of Religious and Civic Organizations, Inc., et al. v. DER, EHB Docket No. 90-128-W (Opinion issued November 7, 1990). An objecting party cannot meet this burden where, as here, it fails even to identify to which interrogatories it is objecting.

As for Peters' "unduly burdensome and oppressive" objection, discovery is not presumed to fall within the limitations of Rule 4011 of the Rules of Civil Procedure, Holowis v. Philadelphia Electric Co., 38 D & C 2d 260 (1966), and a party which relies on Rule 4011 as the basis of an objection to discovery bears the burden of demonstrating to the Board that the rule applies under the circumstances. Coalition of Religious and Civic Organizations, Inc. (CORCO) et al. v. DER, EHB Docket No. 90-128-W (Opinion issued November 7, 1990.) To withstand a motion to compel, one objecting

under Pa. R.C.P. No. 4011(b) and (e) must show that the nature or quantity of information sought is unreasonable, considering its prospective utility. The fact that there are 235 questions does not, in itself, demonstrate that the discovery request was unreasonable, for it doesn't necessarily correspond to the amount of information sought. Peters must answer the interrogatories it left blank.

Finally, as for Peters' answers to Interrogatories 1(g), 2(c), 2(d), 3(c), 5(a), 5(d), 6(d), 7(g) and 7(i), Peters does not deny that its answers were inadequate. As a result, Peters will be compelled to provide full and complete answers to those interrogatories.

As for those responses which Peters contends are adequate--the responses to Interrogatories 1(g), 5(a), 5(d) and 6(d)--they, as well, are inadequate.

In Interrogatory 1(g), Wesland asks Peters to identify all interests in real property held by the Estate of Charles Peters in or near Bushkill Falls, including the area, address or location, use, appraised value, ownership interest, and date such property was acquired. While Peters' response to 1(g) includes a description of the Bushkill Falls Tract, a statement that the tract is owned by the Estate of Charles Peters, and a declaration that the tract's appraised value is not known, the response is inadequate because it fails to specify the use of the property and the date the Estate acquired its interest.

In Interrogatory 5(a), Wesland asks Peters to "[e]xplain the factual basis for the assertion contained in paragraph 1 of Appellants' Notice of Appeal that 'The [Department] exceeded its authority, abused its discretion, acted in an arbitrary, capricious, discriminatory and unreasonable manner, and otherwise violated the law,'" by granting Wesland an NPDES permit. Peters

responded with: "The only fact known to Appellant at this time is the DER action under review." In its response to Wesland's motion to compel, Peters argues that its response to 5(a) is justified because it is "conducting a study of the relevant facts and data," and that its case before the Board will be based on the results of this study. (Appellants' response, Paragraph 13)

The response to Interrogatory 5(a) is inadequate. The language "conducting a study of the relevant facts and data" in the response to the motion implies that Peters is familiar with some possible factual basis for its contention that the Department acted unlawfully. If so, Peters must explicate in its response to 5(a) just which facts tend to indicate the Department acted unlawfully. If, however, Peters does not know of any facts at this time which tend to indicate that the Department acted unlawfully, Peters must respond accordingly.

In Interrogatories 5(d) and 6(d), Wesland asks Peters to identify all the communications between the Appellants and the Department which pertain to the allegations that the Department's action was unlawful or adversely affected the Appellants. Peters responded with a list of three written communications, but Wesland moved to compel because the list failed to include all the written communications required under Interrogatories 5(d) and 6(d). In its motion, Wesland requests that Peters be required to identify all of the communications described in 5(d) and 6(d). Peters, in response, maintains that it produced the entire file of the Peters Estate regarding the appeal for inspection and copy, and, therefore, provided Wesland with all the written communications requested. In its reply to the Peters response, Wesland argues that the only records made available to them were those maintained by the Trustee of the Peters Estate, James Gallagher; Wesland has not had access to any documents held by Appellants Linda Pipher and Jane Albrecht.

Peters' response to Interrogatories 5(d) and 6(d) is inadequate. At a minimum, it failed to identify its Letter of Comment submitted to the Department on August 11, 1989. Although Peters maintains that it provided Wesland with all the communications requested because it produced the entire Peters file regarding this appeal, we disagree. Interrogatories 5(d) and 6(d) asked for a list of correspondence, not for access to the Peters file. If the August 11, 1989, letter was not in the file, Peters still had the duty to locate and identify it when answering the interrogatories. The same is true for any other correspondence between the Department and the Appellants, including Appellants Linda Pipher and Jane Albrecht.

In Interrogatory 7(i), Wesland asks Peters to identify the use, location, flow rate, and mean depth of Little Bushkill Creek. In response, Peters wrote: "The Little Bushkill Creek provides waterfalls at the Bushkill Falls scenic attraction. No other information is known at this time." Wesland, in its motion to compel discovery, contends that Peters has more of the information requested than it revealed in its response to the interrogatory. In response to the motion to compel, Peters simply says that it has no knowledge as to the information requested in Interrogatory 7(i) beyond that which it listed in its answer.

The response to Interrogatory 7(i) is inadequate. As noted earlier in this opinion, a party which invokes Pa. R.C.P. No. 4011 when objecting to discovery bears the burden of demonstrating that the rule applies in the circumstances. Where a party claims unreasonable investigation as a defense against answering a discovery request, it must set forth as much information as it presently has and specify how further investigation will be unreasonable. Rush v. Butler Fair & Agriculture Association (No. 3), 17 Dist. & Co. Rep. 2nd 250 (1958). Peters, however, does not explain why any further

investigation would be unreasonable. From the nature of the interrogatory, moreover, it seems that Peters can acquire the other requested information without making an unreasonable investigation.

Peters did not respond to the allegations in Wesland's motion that it did not produce the documents requested by Wesland in its November 29, 1990, request for production of documents and, as a result, an order compelling production of those documents will be issued.

ORDER

AND NOW, this 17th day of April, 1991, it is ordered that Wesland's motion to compel is granted. On or before May 8, 1991, Peters must fully and completely respond to Interrogatories 1(d), 1(g), 2(b), 2(c), 2(d), 3(b), 3(c), 5(a), 5(b), 5(d), 6(b), 6(c), 6(d), 7(b), 7(c), 7(g), 7(i), 8(a-g), 9(a-f), 10(a-f), 11(a-f), 12(a-l), 14(a-g), 15(a-g), 16(a-e), 17(a-l), 18(a-d), 19(a-f), 20(a-f), 21(a-g), 22(a-f), 23(a-b), 26(a-i), 27(a-f), 28(a-f), 31(a-i), 33(a-f), 34(a-f), 35(a-g), 36, 37(a-e), 38(a-h), 39(a-e), 40, 41, 42(a-b), 43, 44(a-c), and 45(a-d) of Wesland's First Set of Interrogatories. Peters shall also fully and completely respond to Wesland's request for production of documents by May 8, 1991.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: April 17, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

AVERY COAL COMPANY, INC.	:	
	:	
v.	:	EHB Docket No. 90-406-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 19, 1991

OPINION AND ORDER
SUR PETITION TO INTERVENE

By Joseph N. Mack, Member

Synopsis

Where the petitioner failed to appeal a compliance order issued to both it and the appellant, it is barred by the doctrine of administrative finality from now attacking the compliance order by means of intervention in this appeal. In addition, the Board is not the proper forum in which to adjudicate or enforce rights or obligations which may exist between the petitioner and the appellant. Since the petitioner has not shown that it will present any additional evidence if allowed to intervene in this appeal, its Petition to Intervene is denied.

OPINION

This is an appeal by Avery Coal Company, Inc. ("Avery") of Compliance Order ("C.O.") 904079, issued by the Department of Environmental Resources ("DER") to Avery and Thompson Brothers Coal Company ("Thompson Brothers").

C.O. 904079 ordered Avery and Thompson Brothers to treat discharges from two points near a mine site in which both Thompson Brothers and Avery were involved. Thompson Brothers was the permittee of the mine site and Avery mined it pursuant to an agreement with Thompson Brothers. An appeal of C.O. 904079 was taken by Avery, but none was taken by Thompson Brothers.

Prior to this, both Avery and Thompson Brothers had been issued another order to treat the discharges--C.O. 904070. Both Avery and Thompson Brothers appealed that order. However, when C.O. 904079 was issued, it superseded C.O. 904070, and the appeals of the latter were subsequently dismissed by the Board as moot.

The matter now facing the Board is a petition by Thompson Brothers, filed on March 18, 1991, requesting that it be allowed to intervene in this appeal of C.O. 904079. In support of its petition, Thompson Brothers states that it is entitled to intervene as the permittee of the site in question and that its interests will not be adequately represented by Avery in this proceeding. Avery filed objections to the petition and a supporting brief on March 25, 1991, asserting that since Thompson Brothers failed to appeal the issuance of C.O. 904079, it is now final as to Thompson Brothers and, therefore, Thompson Brothers is precluded from attacking it. Avery further argues that Thompson Brothers' interest will be adequately represented by Avery in this proceeding since both are jointly and severally liable under the C.O. and their interests vis-a-vis DER are the same. Finally, Avery asserts that any evidence which Thompson Brothers may want to present concerning allocation of liability between Avery and Thompson Brothers pursuant to the aforesaid mining agreement between them is not relevant to this case. On or about April 1, 1991, DER also filed objections to Thompson

Brothers' Petition to Intervene and a memorandum in support of its objections. DER also argues that Thompson Brothers is barred from attacking C.O. 904079 since it did not appeal issuance of the order. DER further contends that Thompson Brothers is simply trying to "circumvent the jurisdictional timely filing requirement and appeal 'through the back door' via intervention."

Intervention before the Board is discretionary and is governed by 25 Pa. Code §21.62. In ruling on a petition to intervene the Board will consider the following factors: 1) the nature of the petitioner's interest; 2) whether that interest will be adequately represented by other parties to the proceeding; 3) the nature of the issues before the Board; 4) the petitioner's ability to present relevant evidence; and 5) the effect of intervention on administration of the statute under which the proceeding has been brought. City of Harrisburg v. DER, 1988 EHB 946, 947. The burden is on the prospective intervenor to show that intervention is warranted. Franklin Township Board of Supervisors v. DER, 1985 EHB 853.

In its petition, Thompson Brothers states that, if allowed to intervene, it will present evidence on the following: 1) DER did not validly issue C.O. 904079 as a matter of law or fact; 2) any discharge problems at the mine site are the responsibility of Avery who has operated the site since 1984; and 3) Avery is the constructive permittee by virtue of the aforesaid agreement between the two which allowed Avery to mine the site.

We first address Thompson Brothers' contention that DER did not validly issue C.O. 904079. As correctly noted by Avery and DER in their objections to intervention, Thompson Brothers did not appeal the issuance of C.O. 904079. Under the doctrine of administrative finality, an unappealed order of DER becomes final as to the party who failed to appeal it, and that

party is precluded from attacking the order in a subsequent proceeding. Commonwealth v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976). Since Thompson Brothers did not appeal the issuance of C.O. 904079, it is foreclosed from now attacking its content or validity. Since Thompson Brothers is foreclosed from challenging the order, it cannot present any evidence in this proceeding attacking the validity of the order. Therefore, Thompson Brothers has no grounds to intervene on this basis.[1]

We next address Thompson Brothers' second and third contentions, i.e. 1) that Avery is the constructive permittee of the mine site in question pursuant to the agreement between Avery and Thompson Brothers which authorized Avery to mine the site, and 2) that any unauthorized discharges at the site are the responsibility of Avery. As noted in prior Board decisions, the Board does not have authority to enforce the rights of parties which may arise under a private contract, such as the aforesaid agreement between Avery and Thompson Brothers. McKees Rocks Forging, Inc. v. DER, EHB Docket No. 90-310-MJ (Opinion and Order issued March 15, 1991); Broad Top Township v. DER, EHB Docket No. 86-607-W (Adjudication issued February 13, 1991). The Board's

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[1] In its objections, Avery cites and attempts to distinguish the case of Right of Way Paving Company, Inc. v. DER, 1986 EHB 364, 1986 EHB 621, 1988 EHB 472. That case involved an appeal filed by Right of Way Paving Company, Inc. ("ROW") from two bond forfeitures by DER. American Insurance Company ("AIC"), which had underwritten the bonds, attempted to appeal the forfeitures but its appeal was dismissed as untimely. It then sought to intervene in the appeal of ROW. AIC was twice denied intervention on the grounds that AIC's interests were coincident with those of ROW and would, therefore, be adequately represented in the proceeding. When ROW failed to appear at the hearing on the merits of its appeal, AIC was allowed to intervene on the basis that its interests were no longer adequately represented. The Board Member ruling on the issue of intervention rejected the argument that intervention should be denied on the basis of administrative finality. In reaching our decision in the instant matter, we are not unmindful of ROW but do not subscribe to all of the reasoning set forth therein.

jurisdiction is strictly limited to appeals of actions taken by DER; it has no authority to adjudicate the rights of individual parties vis-a-vis each other. McKees Rocks Forging, supra at p. 5-6; Berwind Natural Resources v. DER, 1985 EHB 356, 358. Therefore, we have no means by which to enforce the aforesaid agreement between Thompson Brothers and Avery with respect to mining of the site. Nor can we officiate as Thompson Brothers and Avery battle over which of the two may be responsible for any unauthorized discharges from the site. If such dispute exists, this is not the appropriate forum in which to resolve that issue.

Since Thompson Brothers may not present evidence attacking the validity of C.O. 904079 and since we are not the appropriate forum in which to adjudicate issues between Thompson Brothers and Avery, Thompson Brothers has not met its burden of demonstrating that it is entitled to intervene in this proceeding.

O R D E R

AND NOW, this 19th day of April, 1991, the Petition to Intervene in the appeal at Docket No. 90-406-MJ, filed by Thompson Brothers Coal Company is denied.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 19, 1991

cc: See next page

EHB Docket No. 90-406-MJ

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M. DIANE SMITH
SECRETARY TO THE BOARD

THE CARBON/GRAPHITE GROUP, INC.	:	
v.	:	EHB Docket No. 90-524-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 19, 1991

OPINION AND ORDER
SUR
DER MOTION IN LIMINE, AS AMENDED

By: Richard S. Ehmann, Member

Synopsis

DER's Motion To Limit Issues is granted in part and denied in part. Insofar as portions of it are based on the contention that because we denied Appellants' Petition For Supersedeas, certain issues are irrelevant at the merits hearing, the motion is denied. A denial by a single Board member of a Petition For Supersedeas because Petitioner has failed to show a likelihood of prevailing on the merits does not mean that Petitioner cannot advance its contentions and introduce evidence to support same at the merits hearing so that the entire Board may adjudicate the merits thereof, it only means that the single Board member does not believe that the petitioning appellant demonstrated a likelihood of prevailing on the merits when an adjudication is issued. DER's Motion is sustained under Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, where it seeks to bar the offering of evidence and the advancement of legal contentions which support arguments not timely raised in the Notice Of Appeal but first appearing in Appellant's

Pre-Hearing Memorandum. Where the parties are in the process of reviewing the possible settlement of certain issues, either by stipulation that certain effluent limitations are not final and binding on the permittee or by withdrawal of these limitations from the permit, a ruling on the Motion *In Limine* is deferred pending these discussions.

OPINION

On November 29, 1990, The Carbon/Graphite Group, Inc. ("C/GG") filed a Notice Of Appeal with us challenging DER's issuance of National Pollutant Discharge Elimination System Permit (NPDES) PA 0003085. While the parties have settled a portion of their initial dispute the appeal remains before us as to DER's imposition of effluent limitations for pH, aluminum, iron and manganese as to discharges from nine Outfalls at C/GG's plant in St. Marys Borough, Elk County, Pennsylvania. C/GG contends these discharges are acid mine drainage (AMD) for which it is not responsible and therefore DER is wrongfully attempting to require C/GG to treat same by placing these effluent limitations in this permit.

By an Opinion and Order dated February 19, 1991, we granted DER's Motion To Dismiss C/GG's Second Petition For Supersedeas. By an Opinion and Order dated March 22, 1991, we refused C/GG's Petition To Amend which sought the certification from this Board which would have allowed C/GG to take an interlocutory appeal to the Commonwealth Court from the denial of its supersedeas request. The instant opinion concerns DER's Motion *In Limine*, as amended, and C/GG's response thereto.[1] We have issued other orders in this

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[1]In addition to DER's Motion and C/GG's response thereto, we have received a letter from DER's counsel responding to C/GG's Response and a letter from (footnote continued)

matter which we do not detail here, but we note this matter is scheduled for a hearing on its merits to begin on May 22, 1991.[2]

DER's Motion seeks a ruling that certain issues raised by C/GG are irrelevant, that others are premature and that C/GG waived its right to raise still other objections to the effluent limits in the NPDES permit. C/GG, of course, responds there is no waiver, that its issues are relevant and that its arguments are not premature, but if the Board believes they are, it must rule on them in such a way as to preserve C/GG's right to subsequently challenge same.

DER's initial argument deals with what it refers to as C/GG's contentions as to prior off-site mining. C/GG asserts factually that mining on properties owned by others created the AMD, that neither C/GG nor the predecessor owners of this plant conducted this mining and that the mining predates January 1, 1966. It concludes legally that DER lacks authority to require C/GG to treat the AMD arising off its property for discharges arising off property from mines abandoned prior to January 1, 1966 and that C/GG is not legally responsible for pollution traversing its property based solely on ownership of the traversed property. In support of its position on these issues, DER cites Section 316 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.316 and concludes from the same

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(continued footnote)
C/GG responding to DER's letter. We do not encourage such letter writing campaigns.

[2]There is pending before us C/GG's request for reconsideration *en banc* of our Order of February 19, 1991 and also a motion from C/GG seeking a ruling that DER bears the burden of proof here. Neither is addressed herein.

cases it previously cited to us in successfully seeking dismissal of C/GG's Second Petition For Supersedeas that fault is not a prerequisite for liability under Section 316 because strict liability is the standard under Section 316.

C/GG responds to this argument by saying DER reads Section 316 wrongly. C/GG says Section 316 imposes liability based on pollution caused by a condition on the land of the landowner/order recipient so there must be more than the pollution itself on the land to create landowner liability, and, thus, these factual and legal contentions are relevant.

We believe DER misreads our Opinion of February 19, 1991. That opinion was written in response to DER's Motion To Dismiss C/GG's Second Petition For Supersedeas. In response to DER's motion, we held that C/GG's petition failed to show a reasonable probability of success on the merits. We stand by our reading of Section 316 under Philadelphia Chewing Gum Corp. v. Commonwealth, DER, 35 Pa. Cmwlth. 443, 387 A.2d 142 (1978), affirmed in part *sub nom*, National Wood Preservers, Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980), appeal dismissed 449 U.S. 803, 101 S. Ct. 48, 66 L.Ed.2d 7 (1980), as set forth in that opinion, but in so doing, we recognize that C/GG does argue this opinion expands the holding of National Wood, *supra*. Only a single Board member issued the Order which granted DER's Motion. Obviously, in granting the Motion, he did not agree with C/GG that this was an expansion of National Wood, at least based on what was presented to him by the parties at that time. That is a different question from whether we allow C/GG to attempt to make its factual record in support of its position so that we have it and C/GG's legal contentions thereon before the Board when all five Board members consider these issues and we issue our Adjudication on the merits of this appeal. The prior opinion by one Board member addressed whether a

sufficient showing was made to warrant a hearing on C/GG's Second Petition For Supersedeas, not whether C/GG could be allowed to try to make a showing at the final merits hearing. Accordingly, we must deny DER's Motion on this basis.

DER next argues that the contentions in C/GG's Pre-Hearing Memorandum, to the effect that it is DER's responsibility to remediate this AMD, are irrelevant. DER's argument appears to mischaracterize C/GG's argument because DER says that DER's abandoned mine reclamation program only assists in remediation. We read C/GG's position as suggesting that DER is required to do any (and all) necessary remediation as to AMD from abandoned mines. Further, C/GG's Memorandum Of Law In Opposition To DER's Motion *In Limine* argues DER is attempting to delegate to C/GG DER's duty to remediate the AMD. Both arguments appear to suggest that C/GG takes the position that DER has exclusive jurisdiction over remediating AMD and a duty to do so, as opposed to having a shared or partial responsibility therefor.

As with the preceding portion of DER's Motion, when C/GG's Second Petition For Supersedeas was denied the Board as a whole did not reject the merits of C/GG's argument. Instead, one Board member found that there was sufficiently small probability that C/GG would succeed on the merits of its appeal, based on this argument, that the supersedeas petition could be denied. There is an enormous difference between the two and we will not say, based on the opinion denying C/GG's Second Petition For Supersedeas, that C/GG should be barred from raising these issues at its merits hearing. So stating is not a retreat from the prior opinion but a recognition of that opinion's

limitations. Because DER offers us no reason other than our prior opinion to grant its Motion on this issue, we must reject DER the motion on this issue, too.[3]

DER's Motion next turns to C/GG's contentions centered on the quality of Elk Creek. DER's Motion and Brief consider this issue twice. On page 7 of its Brief DER argues irrelevancy and on page 12 it argues waiver. To examine this issue we must begin with C/GG's Notice Of Appeal. C/GG's Notice Of Appeal states all of C/GG's challenges to the imposition of pH limitations in paragraph 4. The pH limitations are not challenged elsewhere in C/GG's Notice Of Appeal. In paragraph 4, C/GG raises its contentions as to its lack of responsibility for the AMD and DER's duty to remediate same. Paragraph 5 of the Notice Of Appeal deals with DER imposed monitoring requirements. Paragraph 6 deals with the requirement that C/GG perform a Toxic Reduction Evaluation. Paragraph 7 deals with DER's proposed effluent limitations for iron, aluminum and manganese. No mention is made in paragraph 4 of issues concerning Elk Creek's quality or the need to consider same in setting the pH limitation. It is only in paragraph 7 that issues of Elk Creek's water quality are raised.[4]

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[3]We would point out to counsel for DER that the proper function of a Motion is to state the reasons why the relief sought should be granted, while a companion Memorandum Of Law should discuss the rationale supporting the reasons advanced in the motion. It is inappropriate to advance a motion which recites that the bases for it are found in a Brief in support thereof. Such an approach invites misconstruction of the Motion and the resulting rejection thereof .

[4]Counsel for both parties have advised this Board of their clients' settlement of dispute as to monitoring requirements and the Toxic Reduction Evaluation. Apparently, as part thereof, on April 12, 1991, we received a (footnote continued)

It is thus clear that as to the dispute on pH effluent limitations, Elk Creek's quality was not raised by C/GG in any fashion in the notice of appeal. Under Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989), it has thus been waived. Accordingly, we sustain DER's Motion on this point.

The only other effluent limitations to which Elk Creek's quality might relate are those proposed in Part C of the NPDES permit for iron, aluminum and manganese. Counsel for DER contends in DER's Brief supporting its motion that unlike a pH limitation which applies immediately (assuming we do not reverse DER on this point in this appeal) and is a final effluent limitation, the limitations on iron, aluminum and manganese are only tentative proposals. DER says as such there is no present obligation imposed on C/GG to comply therewith, and when, and if, DER imposes final effluent limitations for discharges of these parameters from C/GG's Outfalls, C/GG retains its full rights to appeal therefrom to this Board.

In response, C/GG's Brief argues that C/GG runs the risk that unless it appeals everything now, it may be foreclosed from challenging these limitations later. It then says that if this Board finds that the effluent limitations for these three parameters are indeed premature, it should issue a ruling to that effect to preserve C/GG's right to appeal same. We agree that C/GG was wise to file a "protective appeal" on these issues to safeguard its right to challenge same until DER clarified whether there was "finality" to these proposed effluent limitations. It now appears there is no finality with

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(continued footnote)
written notice from DER of its withdrawal of the Toxic Reduction Evaluation requirement from the NPDES permit and its substitution of another requirement.

regard thereto from representations contained in DER's Brief filed in support of this motion.

We are not fully comfortable issuing an Order based solely on representations which appear in a party's Brief. If DER agrees these are only proposed limitations, it could solve our problem here by withdrawing same from the permit. Alternatively, the parties might stipulate to their lack of "finality", and we could incorporate that stipulation into an Order of this Board. Our suggestions along these lines have not produced a resolution of these iron, aluminum and manganese issues yet, but we have directed counsel for both parties to redouble their efforts in this regard. Accordingly, we are deferring a ruling on this issue while these efforts continue. If the parties cannot resolve this issue soon, however, we will require representations in support of DER's position other than in counsel's Brief before we will rule thereon. As reflected below, the parties are to turn their attention to prompt resolution of this aspect of the appeal.[5]

We treat DER's motion as it pertains to biomonitoring issues in the same way we treated it as to the iron, aluminum, and manganese effluent limitations, and we do this for the exact same reason. DER has stated this is solely a proposal and not a final decision on biomonitoring requirements.

Finally, in its motion and the amendment thereto, DER argues that C/GG has waived its right to raise both the applicability of 25 Pa. Code §97.15(4) and the argument that Section 315 of the Clean Streams Law, *supra*,

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[5]We do again advise DER, most strongly, that it would be wise to omit references to <u>proposed</u> effluent limitations or other "proposals" in future permits, as their inclusion only serves to raise potential issues which do not in fact exist, they cloud the real issues and subject DER to the risk that we interpret their inclusion in the permit as intended to have an impact on the permittee's rights (in which case they would indeed be appealable).

is applicable to the instant appeal. DER's Motion contends C/GG failed to timely raise these issues and they are, thus, waived, citing Game Commission.

After a further review of C/GG's Notice Of Appeal, there is no question that any issue as to 25 Pa. Code §97.15(4) was not raised in C/GG's Notice Of Appeal. It is also clear that C/GG has never filed any request with us for leave to amend its Notice Of Appeal to add this ground.

In response to DER's Motion, C/GG argues it is not required to provide DER with a specification of its legal theory as long as it tells DER that it is appealing a specific permit condition. It then cites Blackwell v. State Ethics Commission, 523 Pa. 347, 567 A.2d 630 (1989), for the proposition that once this Board's jurisdiction is invoked, the Board is free to hear all legal arguments in support of the action challenged. C/GG then concludes Game Commission, *supra*, does not apply to bar consideration of this issue and is distinguishable because there the Game Commission sought to raise a new ground for appeal whereas here C/GG merely seeks to raise another basis for its challenge to DER's imposition of these effluent limitations.

We do not read either Game Commission or Blackwell in the same fashion as C/GG. Blackwell dealt with the inability to waive "an issue of jurisdiction in its most fundamental sense." It dealt with subject matter jurisdiction because Blackwell averred to the Supreme Court that the State Ethics Commission did not lawfully exist between June 30, 1988 and June 26, 1989, so its actions in that period were "null and void and without legal effect." The Supreme Court, while recognizing that this issue was raised belatedly, held it to be one of subject matter jurisdiction which was non-waivable and raisable by a party at any time or *sua sponte* by the Court. Blackwell clearly does not stand for the proposition ascribed to it by C/GG.

Further, Game Commission clearly bars the untimely raising of additional grounds for appeal even though the appeal is timely as to all grounds for appeal initially set forth in the Notice Of Appeal. As the Commonwealth Court pointed out in that case, 25 Pa. Code §21.51(e) made it clear that:

> "Any objection not raised shall be deemed waived provided that, upon good cause shown, the Board may agree to hear such objection or objections."

When this section is read with 25 Pa. Code §21.52, the Court concluded that the failure to file a specific ground for appeal within the thirty-day period is a defect going to jurisdiction and the time period for adding those grounds cannot be extended *nunc pro tunc* absent appellant showing of good cause.

Recently, in Croner, Inc. v. Commonwealth DER, No. 1789 C.D. 1990 (Opinion issued April 9, 1991), the Commonwealth Court held that a statement from paragraph 8 of Croner's Notice Of Appeal that DER's conditioning of a permit "is otherwise contrary to law and in violation of the rights of Appellant" was sufficient to be considered to raise the issue of whether a specific regulation violated a section of a statute, even though this issue was not raised explicitly in the Notice Of Appeal. In issuing Croner, *supra*, the Commonwealth Court does not modify its holding in Game Commission, *supra*, nor mention same in any fashion and we did not cite Game Commission as the authority for our decision in Croner, but rather cited ROBBI v. DER et al., 1988 EHB 500, and NGK Metals Corporation v. DER, EHB Docket No. 90-056-MR (Opinion and Order issued April 5, 1990). Accordingly, we do not consider Croner to modify Game Commission.

Croner appears to adopt the position set forth therein because of the general language in Croner, Inc's Notice Of Appeal, as cited by the Court. Paragraph 8 of Croner's Notice Of Appeal states in full:

> 8. The action of the Commonwealth of Pennsylvania, Department of Environmental Resources, in conditioning Appellant's mine drainage permit to these conditions, is otherwise contrary to the law and in violation of the rights of Appellant.

C/GG's memorandum says it objected to DER's imposition of the effluent limitation on the ground that it constituted "an abuse of discretion [is] arbitrary and capricious, and violate[s] C/GG's due process and equal protection rights". C/GG cites paragraph 4.2 of its appeal for this contention. C/GG then argues this contention is broad enough to include its 25 Pa. Code §97.15(4) issue. Paragraph 4 subparagraph 4.2 of the appeal provides in full:

> 4. The pH effluent limitations of the Permit for Outfalls 001, 002, 003, 006, 007, 010, 035, 039, and 041 should be deleted for the following reasons.
>
> ...
>
> 4.2 The remediation of acid mine drainage from abandoned mines is the responsibility of the DER. DER has a program in place for remediating abandoned mines and the acid mine drainage associated with the abandoned mines. It is DER's responsibility under this program to treat or remedy the acid mine drainage traversing the C/GG property. DER cannot place this responsibility on innocent parties such as C/GG. The pH effluent limitations contained in the Permit and the DER's non-action with regard to the acid mine drainage are unlawful, are an abuse of discretion, are arbitrary and capricious, and violate C/GG's due process and equal protection rights. (emphasis added)

The general language in C/GG's Notice Of Appeal, as highlighted immediately from paragraph 4.2 above and as cited by C/GG, references the remediation of acid mine drainage by DER. It was not a general objection that DER's actions were arbitrary, unreasonable, capricious or unlawful similar to

that in Croner. The only fair reading of this paragraph is that DER's actions are arbitrary or unlawful or an abuse of discretion because of C/GG's allegations as to remediation. As pointed out above, no request for leave to amend has even been made by C/GG, so we have no attempt to show good cause before us. Thus, paragraph 4.2 of C/GG's Notice Of Appeal is not broad enough to include §97.15(4) and we therefore grant DER's motion with regard thereto.

While we thus sustain DER as to §97.15(4) of the regulations, we reject any suggestion that C/GG may not raise its Section 315 arguments as to the applicability of Section 315 of the Clean Streams Law. C/GG's appeal could have been more precise and specific when it said C/GG has no legal responsibility to treat the pollutants it collects and discharges to Elk Creek but we do not believe a fair reading of paragraph 4.1 of C/GG's Notice Of Appeal can be said to exclude its contentions as to Section 315 of the Clean Streams Law. This paragraph does aver that DER is requiring C/GG to treat drainage from off-site mines for which it is not responsible. It goes on to allege C/GG did not mine that property and therefore it is inappropriate for DER to force C/GG to treat this drainage. Finally, it concludes this pH effluent limitation is "an abuse of discretion, arbitrary, capricious and a violation of due process and equal protection." Since no statute section is cited in any portion of paragraph 4.1, we find this language to be broad enough that we cannot say clearly that the Section 315 issues are not before us. Accordingly, we must deny DER's Motion *In Limine* as to the amendment thereto raising this issue, and we enter the following order.

ORDER

AND NOW, this 19th day of April, 1991, DER's Motion *In Limine* is granted in part and denied in part. DER's Motion is granted as to the issues raised by paragraph B7 of C/GG's Pre-Hearing Memorandum. DER's Motion is also granted to the extent the allegations in paragraphs A29 and B8 of C/GG's Pre-Hearing Memorandum deal with the pH effluent limitation challenged by paragraph 4 of C/GG's Notice Of Appeal.

Counsel for C/GG and DER are directed to meet between the date of this Order and May 3, 1991 for purposes of negotiation of a resolution of the iron, aluminum and manganese proposed effluent limitations issue and the biomonitoring issue. If resolution of these issues has not been achieved by May 3, 1991, DER and C/GG are directed to notify this Board thereof in writing, with each party setting forth its position as to the issues that it believes are preventing settlement and the offers it has made with regard thereto. At that point we shall take further action on this aspect of the matter.

In the interim, action on DER's Motion as it pertains to paragraphs A8, A16, A17, A18, A19, A20, A21, A22, A23, A24, A25, A26, A27, A28, B8, B14, B15, B16, B17, B18, and B19 and their relationship to both the iron, aluminum, and manganese effluent limitations in Part C of the Permit and the biomonitoring requirements are deferred.

The remainder of DER's Motion is denied for the reasons set forth in the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 19, 1991

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
Zelda Curtiss, Esq.
Western Region
For Appellant:
John J. McAleese, III, Esq.
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Philadelphia, PA

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M. DIANE SMITH
SECRETARY TO THE BOAI

MELVIN J. HOFFER	:	
	:	
v.	:	EHB Docket No. 90-343-MR
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 22, 1991

OPINION AND ORDER
DISMISSING APPEAL
FOR FAILURE TO COMPLY WITH BOARD ORDERS

Robert D. Myers, Member

Synopsis

An appeal is dismissed after the Appellant repeatedly fails to comply with Board orders.

OPINION

Melvin J. Hoffer (Appellant), acting *pro se*, filed a Notice of Appeal on August 14, 1990 challenging an Order and Assessment of Civil Penalty issued by the Department of Environmental Resources (DER) on April 18, 1990. Appellant's pre-hearing memorandum was due on November 13, 1990. On that date the Board received from him an 11-page handwritten letter in which he raised a number of objections and questions about DER's action but listed no witnesses or exhibits and gave no indication that a copy had been served on DER's legal counsel.

On January 4, 1991 the Board sent a letter to Appellant directing him to advise the Board by January 14, 1991 whether the 11-page letter was

intended to be his pre-hearing memorandum and whether a copy had been served on DER's legal counsel.

On January 3, 1991 DER filed a Motion for Sanctions for Appellant's alleged failure to appear for deposition on November 2, 1990. The Board notified Appellant by letter dated January 8, 1991 that his response to the Motion had to be in the Board's hands no later than January 23, 1991.

Appellant failed to respond to the Board's letter of January 4, 1991 and failed to file a response to DER's Motion for Sanctions. Accordingly, on February 8, 1991 the Board issued an Order directing Appellant (1) to respond to the Board's January 4 letter no later than February 25, 1991, and (2) to make himself available for deposition on a date and time designated by DER's legal counsel not more than 30 days from the date of the Order. The Order admonished Appellant that his failure to comply will result in the imposition of sanctions "which could include a dismissal of the appeal."

Appellant has made no response to the Board's January 4 letter. He was served with a notice to appear for deposition on March 8, 1991 and failed to appear. A Second Motion for Sanctions was filed by DER on March 15, 1991 to which Appellant has filed no response.

It is clear beyond question that Appellant is disinterested in complying with Board orders and prosecuting his appeal. Accordingly, the appeal will be dismissed.

ORDER

AND NOW, this 22nd day of April, 1991, it is ordered that the appeal of Melvin J. Hoffer is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 22, 1991

cc: **Bureau of Litigation**
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sb

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M. DIANE SMITH
SECRETARY TO THE BOARD

A.C.N., INC.	:	
	:	
	:	
v.	:	EHB Docket No. 89-167-M
	:	(consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 23, 1991

OPINION AND ORDER
SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

Partial summary judgment is entered on issues, concerning which Appellant stipulated to the essential facts in proceedings before Commonwealth Court. Such stipulations may be treated as admissions in the appeals pending before the Board. The sole remaining issue to be resolved is the propriety of the amount of the civil penalty assessment.

OPINION

These consolidated appeals involve a municipal solid waste transfer station operated in Philadelphia County by A.C.N., Inc. (ACN), a Pennsylvania corporation wholly owned by Bonnie Nickels (Nickels). The transfer station had received a permit from the Department of Environmental Resources (DER) on July 2, 1986. This permit was suspended by DER on May 15, 1989 and revoked on January 8, 1990 because of alleged violations of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et*

seq., and its regulations, and ACN's failure to comply with DER orders. ACN appealed both actions and the appeals were consolidated on July 6, 1990.

A hearing scheduled to begin on March 19, 1991 was cancelled in order to afford ACN time to obtain replacement legal counsel. The order cancelling the hearing set another hearing date of May 6 and 7, 1991 and authorized DER to file a Motion for Partial Summary Judgment on or before March 29, 1991. DER filed such a Motion on March 25, 1991; ACN has filed no response.

DER's Motion alleges that ACN has admitted, either in its Notices of Appeal, pre-hearing memoranda or related court proceedings, all of the facts supporting the violations charged by DER. Accordingly, summary judgment should be entered in DER's favor on those issues, leaving as the only remaining issue the propriety of the civil penalty assessed for those violations.

Attached to DER's motion and memorandum of law are 6 exhibits. Three of them relate to a Commonwealth Court proceeding in the case of Commonwealth of Pennsylvania, Dept. of Environmental Resources v. A.C.N. Inc. and Bonnie Nickels, No. 200 M.D. 1990, instituted by DER's filing of a Petition for Review in the Nature of Complaint in Equity. This Petition's 32 factual averments parallel those in DER's orders suspending and revoking ACN's permit and resolve into a prayer to enjoin ACN from operating the transfer station and to remove the waste located there.

The transcript of an August 8, 1990 hearing on DER's Petition before Commonwealth Court Judge Silvestri has been provided to us. It reveals that ACN and Nickels, through legal counsel, stipulated to the truth of the essential averments in DER's Petition.

These stipulations constitute admissions which may be used against ACN in the proceedings pending before the Board: Muzychuk v. Yellow Cab Co.,

343 Pa. 335, 22 A.2d 670 (1941), and authorities therein cited. These admissions remove from our consideration all issues raised in the appeals except the propriety of the amount of the civil penalty assessment. The hearing scheduled to begin on May 6, 1991 will be limited to this issue.

ORDER

AND NOW, this 23rd day of April, 1991, it is ordered as follows:

1. DER's Motion for Partial Summary Judgment is granted. Summary judgment is entered in DER's favor and against ACN on all issues raised in the Notices of Appeal except the propriety of the amount of the civil penalty assessment.

2. The hearing scheduled to convene on May 6, 1991 shall be limited to the civil penalty issue.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 23, 1991

cc: **Bureau of Litigation**
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For Appellant:
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and
Bonnie Nickels
Fort Washington, PA

sb

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M. DIANE SMITH
SECRETARY TO THE BOARD

THE CARBON/GRAPHITE GROUP, INC.	:	
	:	
v.	:	EHB Docket No. 90-524-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 23, 1991

OPINION AND ORDER SUR THE CARBON/GRAPHITE GROUP, INC'S MOTION FOR REHEARING AND RECONSIDERATION EN BANC

By: Richard S. Ehmann, Member

Synopsis

A motion for rehearing and reconsideration *en banc* of an Order denying a petition for supersedeas without a hearing is denied. The Board will not grant a motion for reconsideration of an interlocutory order unless there are exceptional circumstances present, and no exceptional circumstances have been raised by the motion in this matter.

OPINION

On February 5, 1991, we issued an Order in the above-captioned appeal which denied without a hearing The Carbon/Graphite Group, Inc.'s ("C/GG") Second Petition For Supersedeas. That Order advised the parties that our opinion explaining the Order would soon follow. On February 19, 1991, we issued our Opinion and Order Sur DER's Motion To Dismiss [C/GG's] Second Petition For Supersedeas which explained the bases for our Order of February 5, 1991 and stated C/GG's petition failed to state any ground upon which it

was likely to succeed on the merits of its appeal. An Order specifically affirming the February 5, 1991 Order was attached to the Opinion. On March 22, 1991, we issued an Opinion and Order denying C/GG's Petition to Amend our Orders dated February 5, 1991 and February 19, 1991 to incorporate a statement in order to allow C/GG to pursue an interlocutory appeal therefrom to the Commonwealth Court.

Presently before the Board is C/GG's Motion For Rehearing and Reconsideration *En Banc* of our February 19, 1991 Opinion and Order, along with an accompanying memorandum, which was faxed to us on March 11, 1991 and was filed on March 14, 1991. We received the Department of Environmental Resources' (DER) Objection to C/GG's Motion and supporting brief on March 27, 1991. In its Motion, C/GG alleges that five errors were committed by Board Member Ehmann in the February 19, 1991 Order ("Order") and that reconsideration *en banc* of these issues will show C/GG is likely to succeed on the merits of its appeal. DER responds that none of the reasons advanced by C/GG presents the exceptional circumstances necessary for us to review the interlocutory order.

The Board's rules of practice and procedure provide in relevant part at 25 Pa.Code §21.122(a):

> (a) The Board may on its own motion or upon application of the counsel, within 20 days after a decision has been rendered, grant reargument before the Board *en banc*. Such action will be taken only for compelling and persuasive reasons, and will generally be limited to instances where:
>
> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the

> decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

Board precedent has interpreted the term "decision" in this rule to mean a final adjudication by the Board. Old Home Manor, Inc. and W.C. Leasure v. DER, 1983 EHB 463; Springettsbury Township Sewer Authority v. DER, 1985 EHB 612. The Board has ruled, however, that we are empowered to reconsider our rulings at any time prior to final adjudication, but that we will only reconsider interlocutory rulings when the request for reconsideration presents exceptional circumstances. Bobbi L. Fuller et al. v. DER and Paradise Township Sewer Authority, EHB Docket No. 89-142-W (Adjudication issued December 20, 1990); Salford Township Board of Supervisors et al. v. DER and Mignatti Construction Co., 1988 EHB 676; Springettsbury, *supra*.

The first issue raised by C/GG's Motion is that the Order impermissibly expands the scope of liability under §316 of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.316, "by finding that C/GG is responsible for and must abate a 'condition', acid mine drainage, which exists off C/GG property in abandoned mines and for which C/GG is not responsible, factually or legally." C/GG's Motion then incorporates by reference the argument set forth in its memorandum.[1] C/GG's memorandum states that our Order misconstrues the position which C/GG advocates; it says it does not advocate limiting §316 liability to those persons responsible for creating the polluting condition. C/GG's memorandum cites a number of EHB and

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[1]Each of C/GG's contentions purports to incorporate by reference the argument set forth in its memorandum. The preferred practice before the Board is to avoid incorporation by reference into motions of arguments raised in briefs.

Commonwealth Court cases in an effort to show us that §316 creates two classes of persons who may be held liable for pollution of the waters of the Commonwealth: "those actually responsible for creating such pollution and those owners and occupiers of real property on which is found 'a condition causing the pollution'." C/GG then contends that it is not responsible for the existence of the acid mine drainage and that the source of the drainage is abandoned mining operations located on property which is neither owned nor occupied by C/GG. C/GG concludes its argument by urging us to find it cannot be liable under §316 for remediation of acid mine drainage [AMD] caused by an off-site condition. The preceding statement is precisely the issue which we examined in our February 19, 1991 Opinion; we did not misapprehend C/GG's position regarding liability under §316. Since C/GG is merely re-articulating the argument it made in support of its Second Petition, it has not demonstrated this first issue is an exceptional circumstance warranting our reconsideration. Salford, *supra*.[2]

The second and third issues raised by C/GG's Motion are interrelated and are treated as such in C/GG's memorandum. The second issue asserts that we "incorrectly failed to apply Section 315(a) of the Clean Streams Law, which limits the Department's authority to order remediation of acid mine drainage from mines at which mining ceased prior to January 1, 1966", since the AMD which flows onto the C/GG property originates in mines that have not been

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[2]In its memorandum, C/GG presents a more elaborate argument on this point than was presented in its Second Petition and response, and it now cites numerous cases which were not previously cited in an attempt to convince us of the correctness of its position. As we noted in our decision in City of Harrisburg v. DER and Pennsylvania Fish Commission, EHB Docket No. 88-120-F (Opinion issued May 30, 1990), the proper time to present arguments and cite cases is before the Board makes its ruling and not afterward.

mined since January 1, 1966. This is not what was presented as a ground for supersedeas, however. The argument pertaining to §315(a), as raised by C/GG's Second Petition For Supersedeas, stated that only mine property owners or operators have been required to treat AMD from abandoned or previously mined property under §315(a), and, since C/GG has never mined its property, DER does not have the authority to force it to treat the AMD. Our Opinion and Order of February 19, 1991, concluded that whether or not C/GG has mined its property is irrelevant to DER's ability to order C/GG to correct the water-polluting condition on C/GG's property pursuant to §316. The fact that C/GG disagrees with our conclusion does not, in itself, constitute an exceptional circumstance requiring our reconsideration of the matter. City of Harrisburg v. DER and Pennsylvania Fish Commission, EHB Docket No. 88-120-F (Opinion issued May 30, 1990). The third issue in C/GG's motion argues that there is a conflict between sections 315 and 316 such that the time limitation in 315 must be "read into" section 316. We have previously ruled in our March 22, 1991 Opinion in this appeal that C/GG's Second Petition For Supersedeas never raised as an issue for us to resolve a conflict between §315 and §316. In fact, the excerpt of §315(a) cited in the Second Petition For Supersedeas did not even include the portion of that section dealing with the January 1, 1966 time limitation. C/GG cannot convince us that we should reconsider our Order by now raising grounds which were not even contained in its Second Petition.

The fourth basis for reconsideration asserted by C/GG is that we erred in finding C/GG had adopted the AMD which flows onto its property. This same issue was raised by C/GG in its Petition To Amend Orders. In our March 22, 1991 Opinion and Order we stated that C/GG incorrectly reads the February 19, 1991 Opinion and Order as adopting a Philadelphia Chewing Gum Corporation v.

Commonwealth, DER, 35 Pa. Cmwlth. 443, 387 A.2d 142 (1978), affirmed in part *sub nom.* National Wood Preservers, Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980), appeal dismissed, 449 U.S. 803, 101 S.Ct. 48, 66 L.Ed. 2d 7 (1980), rationale for holding C/GG liable. As we explained in our March 22, 1991 Opinion, what we said in our February 19, 1991 Opinion and Order was that even if the standard applied by the Philadelphia Chewing Gum court were applied to the question of C/GG's liability for treating the AMD, C/GG would be liable. Our February 19, 1991 decision rests upon the standard for liability set forth in National Wood, and not upon C/GG's adoption of the AMD.[3] Accordingly, DER is correct in its assertion that C/GG has not shown exceptional circumstances as to this issue.

The final issue raised by C/GG's Motion seeks to have us reconsider our ruling in the February 19, 1991 Opinion and Order that several issues raised by C/GG's Second Petition For Supersedeas had been waived by C/GG's failure to raise them in its Notice of Appeal. C/GG argues that our rules at 25 Pa.Code §21.51 require the Notice of Appeal to identify those actions of DER which the appellant believes are objectionable, and, by stating in the Notice of Appeal that the pH effluent limitations were an abuse of discretion, were arbitrary and capricious, and were violative of C/GG's due process and equal protection rights, it complied with this rule. Citing 25 Pa.Code §21.52(a), C/GG urges our jurisdiction "attaches to an 'action of the Department,' not to a legal theory raised in opposition to that action." C/GG then argues that our

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[3]We noted in our March 22, 1991 Opinion that since the Supreme Court issued its Opinion in National Wood there have been no opinions from that court modifying the National Wood decision and there have been several opinions issued by the Commonwealth Court which appear to be in line with National Wood.

"jurisdiction was properly invoked" and that we were free to hear all legal arguments in support of the action being challenged, citing Blackwell v. State Ethics Commission, 523 Pa. 347, 567 A.2d 630 (1989). C/GG attempts to bolster this argument by arguing the Commonwealth Court's decision in Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989), is inapposite to the instant matter because the Game Commission sought to raise entirely new grounds for its appeal, whereas C/GG is seeking to assert all the legal bases for its allegation that DER's imposition of a pH limitation is unlawful.

The Commonwealth Court in Game Commission, *supra*, has said that additional grounds for appeal to this Board which are untimely raised are barred from the appeal, even though the appeal is timely as to the grounds for appeal initially set forth by the appellants. Our February 19, 1991, Opinion and Order, applying the rule of Game Commission, found that C/GG had waived two grounds for supersedeas raised in its Second Petition because they were not raised as objections in its Notice of Appeal.

As we read Blackwell, *supra*, the Supreme Court's decision in that matter has no bearing on our following of the Game Commission decision.[4] The question which the Supreme Court considered in Blackwell was whether the State Ethics Commission was lawfully in existence between June 30, 1988 and June 26, 1989, because if the Commission did not exist during that period, any actions

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[4]In reaching the decision to follow Game Commission, we are not unmindful of the Commonwealth Court's decision in Croner, Inc. v. Commonwealth, DER, No. 1789 C.D. 1990 (Opinion issued April 9, 1991). Croner does not apply here nor does it modify Game Commission. Our reasoning in reaching this conclusion is the same as the analysis of these cases set forth in Boardmember Ehmann's Opinion and Order Sur DER's Motion *In Limine*, As Amended, dated April 19, 1991, in this appeal.

which it performed therein would be deemed as null and void and without legal effect. The Supreme Court identified this issue as going to subject matter jurisdiction, and observed that subject matter jurisdiction is not waivable, and may be raised at any stage of a proceeding by a party, or *sua sponte* by the court or agency. Clearly, Blackwell does not stand for the proposition that once an appeal is timely filed with us, we are obliged to hear all arguments which support that appeal.

C/GG's Motion and supporting memorandum do not demonstrate the existence of any exceptional circumstances which would require us to reconsider our application of the Game Commission decision in our February 19, 1991 Opinion and Order to the objections not raised in its notice of appeal. Without a showing that exceptional circumstances exists which would warrant reconsideration of our interlocutory Order, we deny C/GG's motion.

ORDER

AND NOW, this 23rd day of April, 1991, it is ordered that C/GG's Motion For Rehearing and Reconsideration *En Banc* is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 23, 1991

cc: **Bureau of Litigation**
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For Appellant:
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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

ALBERT P. LEONARDI and HUBERT D. TAYLOR	:	
v.	:	**EHB Docket No. 90-507-E (Consolidated)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and ESSEX-ASHFORD COUNTRYSIDE L.P., Permittee	:	**Issued: April 24, 1991**

OPINION AND ORDER
SUR ESSEX-ASHFORD COUNTRYSIDE L.P.'s
MOTION FOR SANCTIONS

By: Richard S. Ehmann, Member

Synopsis

A Motion For Sanctions by Permittee against a *pro se* Appellant for failure to answer Interrogatories and produce documents will be treated as a Motion To Compel and will be granted. The fact that appellants and permittee have met and that Appellant is "not much for writing" do not constitute a valid defense to failing to produce documents or answer interrogatories as required by the Rules of Civil Procedure and 25 Pa.Code §21.111.

OPINION

Albert P. Leonardi ("Leonardi") and Hubert D. Taylor ("Taylor") filed separate appeals with this Board from the issuance by the Department of Environmental Resources ("DER") of National Pollutant Discharge Elimination System (NPDES) Permit No. PA 0102652 under provisions of the Clean Water Act, 33 U.S.C. Section 1251 *et seq.*, and the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* This permit was issued on

October 19, 1990 to Essex-Ashford Countryside L.P. ("EAC") for a discharge to an unnamed tributary to Elk Creek at a point in McKean Township, Erie County.

By Order dated March 18, 1991, the Taylor appeal (Docket No. 90-516-E) was consolidated with the Leonardi appeal at the instant docket number. Taylor and Leonardi are appearing *pro se* while EAC and DER are represented, each by its own counsel.

Before us, at this point in this matter, is EAC's Motion For Sanctions seeking dismissal of Leonardi's appeal because of his failure to provide EAC answers to its interrogatories or produce documents sought by EAC. EAC filed a set of nineteen Interrogatories to Leonardi with this Board on February 20, 1991. Included therewith is a request for production of documents. The interrogatories specify that they are to be answered within thirty days. This is also the time period spelled out in Pa. R.C.P. 4006(a)(2), which applies to discovery before this Board pursuant to 25 Pa.Code §21.111(c). EAC's Motion avers it has received neither answers to the interrogatories nor production of documents from Leonardi, nor did it receive objections to same. As the result, it seeks dismissal of this appeal pursuant to Pa.C.R.P. 4019.

In response thereto, we received from Leonardi a document captioned Pre-Hearing Order No. 1, Dated February 1, 1991 And "Motion For Sanctions" To Be Suspended. A review of this document indicates it is both Leonardi's Pre-Hearing Memorandum and his response to EAC's Motion For Sanctions. Concerning the Motion For Sanctions, Leonardi's filing states:

> The request of Motion For Sanctions should be released as I'm not much for writing and I along with Mr. & Mrs. Taylor and their daughter Kathy attended a meeting at Knox, McLaughlin, Gornall and Sennett, 120 W. 10th St., Erie, PA as requested by the attorneys for the Permittee. We

> met for about two and a half hours discussing the conditions that led to my appeal and that of Mr. Taylor's.

When a party files an appeal with this Board, he assumes certain obligations including the responsibility to conduct his appeal in accordance with our rules. This obligation applies to those who appear without legal counsel to represent them and those who retain an attorney for this purpose. We encourage all parties appearing before us to retain counsel to represent their interests because non-lawyers often can become ensnared in the rules of procedure because of their lack of experience therewith. While we encourage parties to retain counsel, we do not make it mandatory, so an appellant may appear *pro se*. When that occurs, however, we cannot protect such an appellant from his own blunders but must apply the rules of procedure evenhandedly to all parties.

Having said this, we observe that it is no defense to failure to answer interrogatories that a *pro se* appellant is "not much for writing." The rules of procedure apply uniformly to those who can write volumes and those who do not write easily. When EAC's interrogatories were propounded, Leonardi was obliged to provide written answers thereto within thirty days and to produce the documents sought for inspection by EAC's counsel, both as spelled out in the portion of the Rules dealing with the concept of Discovery.

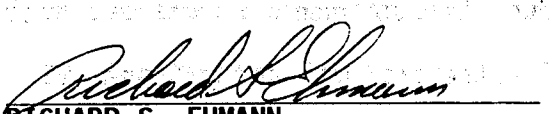
Moreover, what applies to those who are "not much for writing" also applies equally to those who go to meetings and those who do not go to meetings. Attendance at a meeting with an opposing party or its counsel does not excuse Leonardi from preparing and filing formal answers to EAC's Interrogatories or producing the documents sought.

Having stated the above, however, we will not grant EAC's Motion and dismiss Leonardi's appeal. As we have held in Anderson W. Donan v. DER et al., EHB Docket No. 88-375-F (Opinion issued December 11, 1990), we generally will not impose sanctions unless there has already been a refusal to obey a Board Order directing compliance with discovery procedure. No such refusal is averred by EAC and we are not shown cause to vary from that procedure. Nevertheless, this does not excuse Leonardi's conduct.[1] Accordingly, we treat EAC's Motion For Sanctions as a Motion To Compel and we enter the following order.

ORDER

AND NOW, this 24th day of April, 1991, it is ordered that EAC's Motion For Sanctions, treated as a Motion To Compel, is granted. Leonardi is ordered to answer EAC's interrogatories in writing, and to produce the requested documents for inspection by EAC within thirty days in accordance with the procedures outlined in the Pennsylvania Rules of Civil Procedure and 25 Pa.Code §21.111.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 24, 1991

[1]We are requiring Leonardi to answer these interrogatories and produce these documents. On his failure to do so in a timely fashion, EAC may move for the imposition of appropriate sanctions.

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Theresa Grencik, Esq.
Western Region
For Appellant:
Albert P. Leonardi
Hubert D. Taylor
McKean, PA
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M. DIANE SMITH
SECRETARY TO THE BOARD

THE CARBON/GRAPHITE GROUP, INC.	:	
	:	
v.	:	EHB Docket No. 90-524-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 24, 1991

OPINION AND ORDER SUR
APPELLANT'S MOTION FOR RULING
THAT APPELLEE
BEARS THE BURDEN OF PROCEEDING AND PROOF

By: Richard S. Ehmann, Member

Synopsis

Where DER admits its issuance of a permit occurred under the authority of Section 316 of the Clean Streams Law and that section only authorizes DER to issue orders, the action of issuing the permit was issuance of an order, particularly where the permittee had written to DER withdrawing the application for permit prior to the permit's issuance, and, as a result, DER bears the burden of proof in this appeal pursuant to 25 Pa.Code §21.101(a) and §21.101(b)(3).

The burden of proof in the appeal of this permit does not shift from DER under 25 Pa.Code §21.101(d), because the burden of proof never shifts from the party on whom it is originally placed. Easton Area Joint Sewer Authority, et al. v. DER et al., EHB Docket No. 86-559-W (Opinion issued October 29, 1990).

OPINION

Currently before us in the instant proceeding is The Carbon/Graphite Group, Inc.'s ("C/GG") Motion For Ruling That Appellee Bears The Burden Of Proceeding And Proof and an Objection To Motion For Ruling That Appellee Bears The Burden Of Proceeding And Proof filed on behalf of the Department of Environmental Resources. This motion arises in an appeal from DER's imposition of effluent limitations as to pH at specific Outfalls discharging groundwater, storm water runoff, or a combination of the two, from C/GG's plant located in St. Marys Borough, Elk County.

This motion was filed because of our Opinion and Order dated February 19, 1991, granting DER's Motion To Dismiss Second Petition For Supersedeas. There, we reviewed C/GG's Petition and attached affidavits and found that up until DER issued NPDES Permit No. PA 0003085 to C/GG, DER had not previously required C/GG or the predecessor operators of this plant to treat the groundwater discharged at these Outfalls. This groundwater which C/GG collects and discharges is contaminated by acid mine drainage ("AMD") initially generated in mines located on property owned by third persons. We also found that in 1988, Airco Carbon (C/GG's predecessor/owner and operator of this plant) had collected all the industrial waste waters generated by plant operations and piped them to the St. Marys Borough sewage treatment plant for treatment and discharge,"... so these Outfalls discharge only AMD collected from surface seeps, groundwater contaminated by AMD which enters these drains by gravity or is pumped there by C/GG (the furnace basements), and storm water."

Our Opinion then went on to say: "As stated in Footnote 1, *supra*, the NPDES permit confirms that these Outfalls must discharge only groundwater (the AMD) or storm water and AMD, in combination. DER's Answer to the Second

Petition also concedes that C/GG's manufacturing waste waters are not discharged here, but, rather, flow to the St. Marys plant." We then concluded in part: "DER's action in imposing these effluent limitations, aimed solely at this AMD, via the NPDES permit gives this permit the effect of an Order issued under §316 of the CSL. Monessen, Inc. v. DER, EHB Docket No. 88-486-E (Opinion issued May 21, 1990)."

In response to these statements, C/GG's motion now urges that 25 Pa.Code §21.101 requires DER to bear the burden of proof and burden of proceeding. C/GG's Motion and supporting Memorandum Of Law say that neither C/GG nor Airco Carbon received an NPDES permit for discharges from this plant prior to issuance of permit PA 0003085, which is the permit now under appeal in this proceeding. C/GG says a permit was applied for in 1982 by Airco Carbon. DER did not issue a permit at that time, however. In 1989, after the Airco Carbon plant's waste waters had been collected and piped to the sewage treatment plant the prior year, DER asked for an update on the discharges from C/GG (the new owner of the plant) and C/GG wrote to DER saying that since it no longer discharged process waste water, an NPDES permit was unnecessary so C/GG was withdrawing its permit application. Thereafter, DER issued C/GG the permit currently under appeal.[1]

C/GG raises three basic arguments in support of this Motion. First, it argues that under these facts this permit constituted a *de facto* administrative order issued under Section 316 of the Clean Streams Law, Act of

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[1]These assertions are based upon the Stipulation For Burden Of Proof filed by the parties on April 19, 1991 in lieu of a hearing in which we would have taken evidence to make a record with regard thereto. DER's Objections, Brief in support thereof, and the exhibits attached thereto also concede all of these points insofar as they are germane to this Opinion.

June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.316, so, pursuant to 25 Pa.Code §21.101(a) and 21.101(b)(3), DER bears the burden of proof. Secondly, it asserts that DER possesses the data on which it based its decision to require C/GG to treat these discharges and the information about AMD's impact on this stream so even if DER can establish some degree of pollution is occurring from these discharges, it fails to meet the second part of the test under 25 Pa.Code §21.101(d) to shift the burden of proof to C/GG. Finally, C/GG asserts DER must bear the burden of proof because basic fairness should not require C/GG to prove a negative, i.e., DER lacks authority to issue this permit.

In response, DER contends this permit was issued to regulate storm water discharges from C/GG's plant under Section 402(p) of the Clean Water Act, 33 U.S.C. §1342(p), and authorizes a discharge of AMD as an industrial waste. It argues C/GG, rather than DER, is the property owner so it has more knowledge of these discharges, and, thus, under 25 Pa.Code §21.101(d), the burden of proof should be on C/GG. DER also urges that C/GG asserts the affirmative here because C/GG says that DER has unlawfully required it to treat AMD, and under 25 Pa.Code §21.101(a), C/GG bears the burden as the party making this affirmative assertion. DER's Brief also asserts that under common law, the burden of proof belongs to C/GG and disputes C/GG's contention that unless the burden of proof is on DER, C/GG is being asked to prove the negative.

When we originally wrote that DER's action in imposing pH effluent limitations was, in effect, issuing an administrative order under Section 316, we were unaware that C/GG had written to DER on October 4, 1989 withdrawing the application for an NPDES permit. That information does not change our

position that DER issued an Order here. Rather, it reinforces that opinion. Clearly, even if C/GG and Airco Carbon once sought a permit, the withdrawal letter puts an end to any suggestion that C/GG solicited permission from DER for permission for discharges from its plant to Elk Creek.

After the withdrawal letter's receipt by DER, DER had several options under the Clean Streams Law. As to industrial wastes, which DER contends these discharges are, Section 301 (35 P.S. §691.301) bars all discharges except those authorized by that Act. Section 307 (35 P.S. §691.307) bars all indirect and direct discharges of industrial wastes unless the discharger has secured a permit from DER authorizing same. Pursuant to 25 Pa.Code §92.5, an NPDES permit is such a permit. Obviously, C/GG was no longer trying to secure any Section 307 permit authorizing discharges and DER was thus left with its statutory remedies as to any discharges for which it wanted to hold C/GG liable. DER's remedies were to issue orders to C/GG under Section 316 and 610 (35 P.S. §691.610), to seek an injunction under Section 601, (35 P.S. §691.601), to initiate criminal actions under Section 602 (35 P.S. §691.602), or to seek civil penalties under Section 605 (35 P.S. §691.605). However, DER could not issue a permit to C/GG pursuant to Section 316 because that section only authorizes DER to issue orders. The fact that DER's action in imposing the effluent limitations contained in this permit was taken pursuant to this section has been conceded by DER. While the Permit does not spell out use of Section 316 as authority for DER's action, Paragraph 2 of DER's Motion In Limine says:

> "[DER] based its issuance of the Permit on Section 316 of the Clean Streams Law, 35 P.S. §691.316 which has been interpreted to hold landowner and occupiers responsible for the

> correction of pollution problems on the land, irrespective of the landowner/occupier's having caused the existing pollution."

Accordingly, it is clear that the permit's pH limitations were imposed by an administrative order issued pursuant to Section 316. Monessen, Inc. v. DER, EHB Docket No. 88-486-E (Opinion issued May 21, 1990)

Contrary to DER's assertion, it is Monessen which is more on point than Municipal Authority of the Township of Union v. DER, 1989 EHB 1156. In Union, the Appellant sought and received a permit for a discharge but elected to challenge the effluent limitations established therein by DER. There was no action taken by DER under Section 316 in Union as there is here, and, unlike Union, C/GG was not seeking a permit. Thus, while DER is correct that in the fact situation present in Union our decision there is good law, it is clear that the facts in this case are so different they require a different result.

With regard to the issue of the applicability of Section 21.101(a), both parties appear to assert that their opponent is asserting the affirmative. It is DER which has issued this "order" under Section 316 and has thus asserted that these effluent limitations must be imposed on C/GG. C/GG's assertion that it is not responsible for treatment of these waters came only in response to DER's order commanding that C/GG meet certain pH levels in the discharges. It was DER's order which caused commencement of this appeal and it asserts the need for this pH limitation; thus, the burden of proof under Section 21.101(a) is properly on DER unless another subsection of this regulation applies to modify same.

Section 21.101(b)(3) is such a subsection. However, it specifically mandates that when DER issues an order to a party to abate water pollution, the burden of proof is on DER unless otherwise provided in the Rule.

The only other subsection of this rule which might countermand this specific directive in Section 21.101(b)(3) in this case is 25 Pa.Code §21.101(d). Again, both parties construe it in their own favor and both parties ignore our decision in Easton Area Joint Sewer Authority et al. v. DER et al., EHB Docket No. 86-559-W (Opinion issued October 29, 1990). In Easton, we cited McCloskey v. Nu-Car Carriers, Inc., 387 Pa. Super 466, 564 A.2d 485 (1989), appeal denied, ___Pa.___, 575 A.2d 115 (1990), and said that our appellate courts have uniformly held that the burden of proof or persuasion never leaves the party on whom it is initially placed, though the burden of producing evidence may shift in the course of a hearing. We have been offered no reason to reverse that holding and can see none based on the positions asserted by the parties. Accordingly, the burden remains with DER.

C/GG also argues it is unfair for it to have the burden of proof here because it is being asked to prove a negative, i.e., DER lacks the authority to impose these requirements. Having ruled that the burden of proof here falls on DER, we need not pass on this assertion and DER's counter-argument that C/GG is not being asked to prove a negative.

We have not directly addressed the question of which party bears the burden of proceeding in this matter. However, DER's Brief suggests the burden of proof and burden of proceeding remain with the party asserting a fact. 25 Pa.Code §21.101(a) of our rules says the same thing and we have held that DER bears the burden of proof here. Clearly, DER is asserting that C/GG must control the quality of certain discharges from Outfall pipes at C/GG's plant

Board any order shifting the burden of going forward with the evidence from it to C/GG. Accordingly, it appears to us that at least initially, DER bears the burden of proceeding, too.

Based on the foregoing, we enter the following order.

ORDER

AND NOW, this 24th day of April, 1991, C/GG's Motion For Ruling That Appellee Bears The Burden Of Proceeding And Proof is granted.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 24, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOAF

CLEMENTS WASTE SERVICES, INC., et al.	:	
	:	
v.	:	**EHB Docket No. 91-075-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
BERKS COUNTY, Permittee	:	**Issued: April 29, 1991**

OPINION AND ORDER
SUR BROWNING-FERRIS, INC.'S
AND HAY'S RUN ASSOCIATES'
PETITIONS TO INTERVENE

By: Richard S. Ehmann, Member

Synopsis

Before the Board are two petitions to intervene in an appeal of the Department of Environmental Resources' ("DER") conditional approval of Berks County's Municipal Solid Waste Management Plan under Act 101. Browning Ferris, Inc. ("BFI") asserts it has an interest in this appeal pursuant to its pending application with DER for a permit for a landfill, its expenditure of money in "development, permitting and planning" of the landfill, and the designation of its proposed landfill as the county's disposal site. Hay's Run Associates ("HRA") asserts that it stands to be paid a royalty interest, under an agreement with BFI, for each ton of solid waste disposed of pursuant to the Plan in BFI's proposed landfill on HRA's property.

Intervention is denied because the petitioners lack direct, immediate, and substantial interests in the outcome of this appeal, have not demonstrated that Berks County and DER will not adequately defend the Plan,

and have not shown any evidence which they would produce or how their intervention would assist the Board in resolving the appeal.

OPINION

On February 25, 1991, Clements Waste Services, Inc. ("CWSI"), Recycling Works, Inc. ("RWI"), and Brian Clements commenced an appeal with us from DER's conditional approval of the Berks County Municipal Solid Waste Management Plan ("Plan") under the Municipal Waste Planning, Recycling, and Waste Reduction Act, Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.101 *et seq.* ("Act 101"). The appeal asserts that the Plan failed to meet the requirements of Act 101 for a variety of reasons and, thus, contends DER erroneously gave its conditional approval of the plan.

BFI's Petition

On March 26, 1991, BFI filed a petition seeking to intervene in this appeal. BFI alleges that it is the equitable owner of property of which the legal title is held by HRA and another entity, and that under a development agreement with these legal titleholders, BFI is empowered to develop a municipal waste landfill on the property. BFI's petition further states that on September 23, 1988, BFI filed with DER an application for a municipal waste landfill on the property and that the application is still under review. BFI asserts it has spent more than $11,000,000 in the development, permitting, and planning of its landfill, and that it has entered into irrevocable agreements with various parties in order to carry out its obligations to Berks County. The petition states that BFI has a substantial, direct and immediate interest in the outcome of this appeal, based upon the expenses it has already incurred, its application for DER permit, the Plan, and the designation of substantial municipal waste to be disposed of at its landfill. The petition

further claims that BFI's interest is inadequately represented in this appeal by the current parties of record because Berks County, DER, and BFI have clearly separable and distinct interests and because Berks County and BFI have, in the past, been on opposite sides of litigation regarding issues related to the Plan. BFI claims that following its filing with DER of its application for a permit, Berks County unsuccessfully attempted to condemn BFI's landfill site for use as a Berks County-owned landfill. The petition next asserts that Berks County and BFI settled this proceeding via a service agreement which provided that BFI would secure permits for the site and develop it and Berks County would agree to use BFI's site to receive all municipal solid waste from within the County. BFI claims that it then secured a preliminary injunction mandating that the Plan be consistent with the Berks County/BFI condemnation proceedings settlement. The petition asserts that subsequent to this injunction, an agreement was reached between BFI and Berks County under which it was agreed that 500 tons per day of municipal waste would go to an out-of-county facility and the remaining county municipal waste would be designated to BFI's proposed landfill. The petition says that this agreement was made part of a final order of the common pleas court, dated September 4, 1990 (Exhibit D to the petition). Additionally, BFI's petition lists the arguments it seeks to present if intervention is granted. These arguments show that BFI seeks intervention on the same side as DER and Berks County.[1]

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[1]We point out that neither BFI nor HRA took appeal to us from DER's action.

We received the appellants' and DER's objections to BFI's petition on April 8, 1991, and April 9, 1991 respectively.[2] Berks County filed its opposition to the petition on April 11, 1991. On April 12, 1991, BFI filed a brief in support of its petition. Subsequently, on April 16, 1991, we received BFI's Reply to DER's response to BFI's Petition.[3]

Intervention before the Board is governed by 25 Pa.Code §21.62. We have consistently held that intervention is discretionary and that petitioners must demonstrate a direct, immediate, and substantial interest in the outcome of the litigation. Keystone Sanitation, Inc. v. DER, 1989 EHB 1287. In ruling on a petition to intervene, the Board considers five factors, including 1) the nature of the prospective intervenor's interest; 2) the adequacy of representation of that interest by other parties; 3) the nature of the issues before the Board; 4) the ability of the prospective intervenor to present relevant evidence; 5) the effect of intervention on administering the statute under which the proceeding is brought. City of Harrisburg v. DER, 1988 EHB 946. Additionally, intervention is not permitted where it will overly broaden the scope of the original appeal or result in a multiplicity of arguments or

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[2]In its reply brief, BFI urges us to deem DER to have waived its objections to BFI's petition because DER's response was due by April 8, 1991 and was not received by the Board until April 9, 1991. Even treating DER's response as untimely, BFI's petition is still opposed by the appellants, who timely filed their opposition with this Board.

[3]BFI's serial filings appear to be an attempt at multiple bites at the apple of intervention. We did not solicit the filing thereof and do not recommend such a course of conduct in the future, absent a Board request therefor.

confusion of issues. *Id.* The burden of showing that intervention should be granted rests with the prospective intervenor. Sunny Farms, Ltd. v. DER, 1982 EHB 442.

Appellants contend BFI's asserted interest arises from a contractual relationship with Berks County. Citing Skotedis et al. v. DER, 1988 EHB 533, and Franklin Township Board of Supervisors v. DER, 1985 EHB 853,[4] they argue we have held third party contractors do not have the type of interest which warrants the granting of intervention. Further, appellants point out that BFI's proposed landfill has not yet been approved by DER.

BFI's brief in support of its petition contends the cases cited by appellants are inapplicable because by approving the Plan, DER approved a regulatory measure which selected BFI as a designated facility. Based upon this assertion, BFI argues it has the relationship of a permittee, rather than a contractor, to this appeal. Additionally, BFI argues that it is not significant that DER has not yet acted upon its landfill permit application because the appellants know that under the Governor's Executive Order of October 17, 1989 and implementing actions taken by DER, BFI's designation as a

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[4]In Skotedis, a contractor who conducted a fill operation authorized by an encroachment permit issued to a borough under the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.*, sought to intervene in a third party appeal of the issuance of the permit. We denied intervention, reasoning, in part, that the contractor's contractual relationship with the borough-permittee was not relevant to the issues before the Board. We also relied upon our decision in Franklin Township, which had involved a petition to intervene brought by trash haulers in an appeal of a landfill permit denial. The trash haulers in Franklin contended, *inter alia*, that the permit denial would have an adverse economic impact on them and would impair contracts between them and the permit applicant. We denied the petition in Franklin, holding, *inter alia*, that the haulers' contractual interests vis-a-vis the permit applicant were not cognizable before the Board and that the economic impact of permit denial on the haulers was irrelevant to the issues before the Board.

county solid waste recipient is a necessary step in a two-step permitting process, such that should BFI's designation under the Plan be revoked, BFI's landfill permit application would be jeopardy.

Contrary to BFI's assertion, we do not view its posture in this appeal to be that of a permittee, as it has not submitted the Plan to DER; rather, its relationship is more akin to that of a contractor. While the Plan does designate BFI's landfill as the disposal site for Berks County municipal waste, it does so pursuant to an agreement which was entered between BFI and Berks County. It is the validity of the Plan and DER's approval thereof which are at issue in this appeal. The economic impact on BFI, i.e., the expenses it has incurred, is irrelevant to this appeal. Skotedis; Franklin. BFI's interest in having its proposed landfill as the designated disposal site under the Plan will only be affected if DER issues BFI's permit, BFI constructs the landfill, and the Plan is overturned by a successful appeal in this matter. Of course, DER might deny BFI's permit application. For these reasons, we found BFI's interest in having its proposed landfill designated under the Plan to be remote and speculative as to the issues on appeal in Montgomery County v. DER, EHB Docket No. 91-053-E (Opinion issued April 12, 1990). We do not see how BFI's argument regarding the Governor's Executive Order and DER's implementation thereof lessens the significance of BFI's not having a permit for its landfill. The combined effect of this appeal possibly eliminating BFI's landfill from the Plan and the Governor's Executive Order on BFI's permit application is but one speculative reason for which DER might deny BFI's application. BFI's application might ultimately be denied for any number of other reasons. We thus conclude BFI's interest in having its landfill designated under the Plan is remote and speculative at present.

In its brief in support of its petition, BFI raises the argument that it is an indispensable party and that denial of its petition would violate its right to due process. BFI cites Borough of Wilkinsburg v. Horner, 88 Pa. Cmwlth. 594, 490 A.2d 964 (1985), and Posel v. Redevelopment Authority of Philadelphia, 72 Pa. Cmwlth. 15, 456 A.2d 243 (1983), in support of this argument.[5] Applying the four-pronged test set forth in Horner and Posel, BFI has not demonstrated that it is an indispensable party. That test is:

> 1. Do absent parties have a right or interest related to the claim?
> 2. If so, what is the nature of that right or interest?
> 3. Is that right or interest essential to the merits of the issue?
> 4. Can justice be afforded without violating the due process rights of absent parties?

Horner, *supra*, at ____, 490 A.2d at 965. As we have already concluded in this Opinion that BFI's interest in having its landfill designated as the disposal site under the Plan is remote and speculative at present, its interest is not "so directly connected with and affected by litigation that [it] must be a party of record to protect such [interest]." Posel, *supra*, at ____, 456 A.2d at 246. Thus, BFI has not proven itself to be indispensable to this appeal.

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[5]A review of these decisions shows them to be distinguishable from the present appeal. Both matters involved actions in equity seeking to enjoin the performance of contracts, and in both, the Commonwealth Court held intervention should have been granted so that the entity seeking intervention could assert its rights under the challenged contract and be afforded due process. Unlike the courts in Horner and Posel, our jurisdiction is limited and is not broad enough to allow us to address contract questions. Avery Coal Company, Inc. v. DER, EHB Docket No. 90-406-MJ (Opinion issued April 19, 1991); City of Harrisburg, *supra*.

BFI has failed to show that its interest in having its landfill designated as the disposal site by the plan will not adequately be represented by Berks County and DER in this appeal. BFI incorrectly asserts the only party so far allowed in this case is the DER. Our rules at 25 Pa.Code §21.51(g) state that service of the notice of appeal upon the recipient of an approval shall subject the recipient to the jurisdiction of the Board as party appellee. The notice of appeal here certifies service upon Berks County. This service subjects Berks County to our jurisdiction as a party appellee, as the caption in this appeal reflects. See Ingrid Morning v. DER, 1988 EHB 919; Haney et al. v. DER et al., 1987 EHB 997. Regarding Berks County's representation, BFI states that it and Berks County have clearly separable and distinct interests in their opposition to the appellants' appeal, but BFI does not indicate how this is so. BFI does not point to anything which would indicate that Berks County intends to allow its Plan to be overturned in this appeal, except to allege that it and Berks County have been on opposite sides of litigation regarding the BFI landfill in the past. The existence of this litigation, which pre-dated DER's approval of the Plan, is not sufficient to show us that in this matter, Berks County will assume a position hostile to BFI and permit the challenge to its Plan, including the portion of the Plan designating BFI's landfill, to succeed. See Montgomery County, *supra*.

Additionally, BFI's petition asserts that it and DER have separable and distinct interests in their opposition to this appeal. BFI's brief claims that DER's interest is in justifying its procedural treatment of the Plan and defending the substantive sufficiently of the Plan, and that DER has no interest in whether BFI is a designated facility under the Plan, such that DER

would not have the same objectives as BFI in an appeal of our decision.[6] To the extent that both DER and BFI desire to see the approved Plan upheld, BFI has not shown that DER will not adequately represent it. While DER might not desire to pursue an appeal of our decision, should it affect BFI's designation under the Plan, BFI has not argued that Berks County would not pursue such an appeal. In view of the agreement which was entered into by BFI and Berks County, it would be reasonable to believe Berks County would represent BFI's interests in such an appeal.

Moreover, while BFI has stated in its petition that it seeks to introduce evidence in this appeal, its petition does not specifically articulate the evidence it would present. BFI's brief states that BFI is an experienced national solid waste company operating in all 50 states and it "surely has something to offer on the technical issues in this appeal", however, it has not explained how it might be of assistance to the Board. See New Hanover Corporation v. DER, EHB Docket No. 90-225-W (Opinion issued September 21, 1990).

BFI's brief in support argues that BFI is the only entity which can be expected to present evidence on the question of whether the appellants have standing to challenge in this proceeding the Order entered by the Berks County Common Pleas Court on September 4, 1990. BFI does not explain why Berks County cannot offer evidence on this point, and since Berks County was a party

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[6]We note that the decisions cited by BFI regarding the standing of a zoning board to appeal a decision of a common pleas court reversing the zoning hearing board's decision are not relevant to DER's standing to appeal a decision of this Board. We further note that whether 53 P.S. 11004-A would confer on a landowner who secured a variance from a zoning hearing board the absolute right to intervene in a third party appeal of the zoning hearing board's decision would not mandate intervention by BFI in the present appeal.

to the agreement and is a party in this appeal, we find BFI's evidence would merely duplicate that of Berks County. The arguments which BFI seeks to make if intervention is granted do not reveal any issue which DER, along with Berks County, would not be able to present. Because BFI has failed to sustain its burden of persuading us that intervention should be granted, we deny its petition.

HRA's Petition

On March 11, 1991, HRA filed a petition seeking to intervene in this appeal, alleging it is a tenant in common owner of the tract of land in Berks County on which BFI's proposed landfill would be located. HRA's petition states that BFI has pending with DER a landfill application and that when BFI's landfill is approved by DER, it will receive all of the Berks County municipal waste (except for the 500 tons per day which is to go to a proposed resource recovery plant in Montgomery County). HRA's petition further states that under a development agreement between HRA and BFI, HRA is to be paid a royalty for each ton of solid waste disposed of at the BFI landfill. HRA alleges it has a substantial, direct, and immediate interest in the outcome of this appeal based on its royalty interest, BFI's application with DER, the Plan and its designation of substantial municipal waste to be disposed of at the BFI landfill. HRA claims that its interest is inadequately represented by the current parties because BFI and Berks County have, at times, had an adversarial relationship concerning landfilling on HRA's property. The petition then lists seven arguments which HRA would present if intervention is granted. These arguments show that HRA seeks intervention on the same side as Berks County and DER.

On March 18, 1991 and March 21, 1991, DER and the appellants filed their respective responses to HRA's petition. On April 5, 1991, HRA filed its brief in support of its petition. Subsequently, on April 11, 1991, Berks County filed its response to HRA's petition, expressing its agreement with DER's response and supporting memorandum.

On April 22, 1991, we received a letter from HRA's counsel which stated his belief that the interests of HRA in this appeal are "essentially indistinguishable" from those of BFI, and which requested that we incorporate into HRA's memorandum all arguments made in BFI's brief in support of its petition.

Addressing HRA's royalty interest, this interest arises under a contract between HRA and BFI. Since the royalty agreement is not even with a party to this proceeding, clearly, under our decision in Skotedis and Franklin, HRA's royalty interest is not cognizable before this Board. The economic impact of HRA's royalty interest is not relevant to the issues on appeal concerning the validity of the Plan and DER's approval of the Plan. If, as a result of these proceedings, HRA does not receive royalties from BFI, its recourse (if it has any) would lie in another forum. We are not authorized to rule on contract questions. City of Harrisburg, *supra*.

HRA also contends that the Plan's designation of BFI's landfill on HRA's property as the disposal site for the municipal waste gives HRA a unique interest in the outcome of this appeal, which cannot be adequately represented by any party. It urges that although Berks County and DER may share some common interests with it, neither Berks County nor DER shares HRA's unique

interest in its property. In support of this argument, HRA's brief cites Kriss v. DER and Christopher Resources, Permittee, 1988 EHB 697, and Rohm and Haas Delaware Valley, Inc. v. DER, 1988 EHB 135.

Under our reasoning in ruling on BFI's petition, *supra*, we find HRA's interest in having its property designated by the Plan as a County municipal waste disposal site to be remote and speculative at present, since DER has yet to issue BFI a landfill permit. Further, neither Kriss nor Rohm and Haas convinces us to permit HRA's intervention in the present appeal. Kriss involved a third party appeal by property owners of DER's issuance of surface mining permits to the permittee. Our decision in Kriss to permit residents and property owners Catherine McKnight and Coriena Garlett to intervene on the side of the appellants was made upon those petitioners' showing that their interests would not be adequately represented in the appeal by the appellants because the impact of surface mining could vary form property to property. Since intervention in Kriss was sought on the side opposing DER and the permittee, it was not alleged that the property owners' interests could be represented by those entities. Our decision in Rohm and Haas to permit the petitioner therein to intervene was based upon his demonstration that DER's actions in that appeal showed his interest might not be adequately represented by DER. Here, HRA has not shown that its interest in having its property designated by the Plan as the landfill site will not adequately be represented by Berks County and DER in this appeal. As to Berks County's representation, HRA states that its interests are separable from Berks County and that Berks County may oppose the Plan for different reasons from those of HRA. It does not, however, give any examples of any such reasons, nor does it explain how their interests are separable. Further, HRA asserts that Berks County and BFI

have an adversarial relationship concerning the landfill site. Neither HRA's petition nor the brief in support of the petition explain why this past history of BFI and Berks County being on the opposite sides of litigation leads HRA to believe that Berks County will not adequately defend its Plan and its designation of the BFI landfill contained therein. We conclude here, as we concluded in ruling upon BFI's petition, *supra*, that the past history of litigation between BFI and Berks County is not sufficient to show that Berks County will not adequately represent HRA's interest in resisting the challenge to the Plan.

Additionally, DER clearly has an interest in having its conditional approval of the Plan upheld. A review of the arguments which HRA seeks to make if intervention is granted does not show any issue which DER, along with Berks County, would be unable to present. Although HRA has stated in its petition that it seeks to introduce evidence in this appeal, its petition does not specifically articulate the evidence which HRA would present; it merely lists arguments. HRA has not explained how its involvement would assist the Board in resolving this appeal. New Hanover Corporation v. DER, EHB Docket No. 90-225-W (Opinion issued September 21, 1990). Accordingly, HRA has failed to carry its burden of persuading the Board that intervention should be granted.[7]

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[7]We note that HRA's petition has been reviewed as if incorporating BFI's arguments, and, as those arguments did not succeed in BFI's attempt to intervene, they are likewise unsuccessful in HRA's petition. HRA has requested that under our decision in Right of Way Paving Co., Inc. v. DER, ("ROW"), 1988 EHB 472, we permit it to renew its petition at a later point in this matter should it believe its reasons for intervention have been strengthened. We note that ROW has not been followed in our other Board precedent and, in fact, its reasoning has recently been called into question (footnote continued)

ORDER

AND NOW, this 29th day of April, 1991, it is ordered that the petitions to intervene of Browning-Ferris, Inc. and Hay's Run Associates are denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 29, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
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For Permittee:
Lee E. Ullman, Esq.
Reading, PA

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(continued footnote)
in Avery Coal Co., Inc. v. DER, EHB Docket No. 90-406-MJ (Opinion issued April 19, 1991). HRA and BFI are free to observe the proceedings in this appeal by reviewing the pleadings filed with the Board or by having a non-participating observer present at the merits hearing. To the extent that HRA or BFI believes it could be helpful in resolving the appeal, it is free to raise its legal arguments in an *amicus curiae* brief at the end of this proceeding. See City of Harrisburg, 1988 EHB 946. Moreover, HRA and BFI have the right to challenge the terms of any settlement approved by the Board in this matter. See 25 Pa.Code §21.120(a).

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M. DIANE SMITH
SECRETARY TO THE BOARD

MODERN TRASH REMOVAL OF YORK, INC.	:	**EHB Docket No. 91-001-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 30, 1991

OPINION AND ORDER SUR
PETITION TO INTERVENE

By Maxine Woelfling, Chairman

Synopsis

A petition to intervene is denied. Intervention is inappropriate where the petitioner is adequately represented by the existing parties, the petitioner does not demonstrate that it will present relevant evidence, and allowing intervention would overly broaden the scope of appeal, thus impeding the Board's deliberations.

OPINION

This matter was initiated by the January 3, 1991, filing of a notice of appeal by Modern Trash Removal of York, Inc. (Modern), seeking review of a December 4, 1990, Department of Environmental Resources' (Department) permit modification issued to Modern. The Department's action was taken pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (Solid Waste Management Act). The permit modification, among other things, limited Modern to disposing of no more than 4,667 tons of solid waste on an average daily basis in any quarter of the year

and restricted the proportion of waste which could be accepted from outside the Commonwealth.

In its notice of appeal, Modern raised specific challenges to 23 of 50 conditions contained in the permit modification. The legal questions raised include whether, by imposing certain provisions, the Department acted *ultra vires*, abused its discretion, or violated various provisions of the federal or state constitutions.

On March 22, 1991, Lower Windsor Township (Township) filed a petition to intervene.[1] According to the Township, it has an interest in this proceeding because Modern's landfill and its expansion lie within the municipality, so that Modern's activity may affect the health, safety, welfare, and property of the Township and its citizens. The Township also contended that the proposed extension of the landfill will exacerbate groundwater contamination which already affects the Township and its citizens. Finally, the Township maintained that it "will be significantly affected by any decision to modify the conditions contained in the [permit modification] as a result of the currently pending [a]ppeal." (Petitioner's petition to intervene, ¶ 3(E).)

The Township proposed to introduce three types of evidence in a hearing on the merits: 1) evidence concerning the existing and proposed operations occurring at Modern's landfill, and the effect of both on the Township and its environment; 2) evidence of local concerns and considerations; and 3) evidence of past violations which dictate that the Department must include certain provisions in the permit modification.

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[1] The Township also filed an appeal of the permit modification at Docket No. 90-580-F.

Finally, the Township also argued that the Department does not adequately represent its interest, since the Township wants conditions in the permit modification to be made more stringent.

The Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, provides that "any interested party may intervene in any matter before the Board." 35 P.S. §7514(e). The section, however, is not considered to mandate automatic intervention and is applied through precedent under 25 Pa.Code §21.62. Glendon Energy Company v. DER, EHB Docket No. 90-268-W (Opinion issued December 4, 1990). The decision whether to grant intervention is discretionary, Id., Keystone Sanitation Co., Inc. v. DER, 1987 EHB 22, and the prospective intervenor bears the burden of convincing the Board that it should grant intervention. 25 Pa.Code §21.62(e) and Franklin Township Board of Supervisors *et al.* v. DER, 1985 EHB 853.

The factors considered by the Board in ruling on a petition to intervene include 1) the prospective intervenor's relevant interest; 2) the adequacy of representation provided by the existing parties; and 3) the ability of the prospective intervenor to present relevant evidence. BethEnergy Mines, Inc. v. DER, 1987 EHB 873. In addition, the Board will also evaluate whether intervention would overly broaden the scope of the initial appeal and impede the Board's deliberations. Franklin Township, *supra*, 1985 EHB 946.

While the Township does possess a relevant interest in this appeal, its petition to intervene will not be granted because it failed to show that its interests will not be adequately represented or that it will present relevant evidence.

The Township maintains that its interests are not adequately represented because it seeks permit conditions more stringent than those

imposed by the Department. However, that issue is not before the Board here, for the focus of Modern's appeal is that certain of the conditions were too stringent or beyond the authority of the Department. Consequently, the Department will adequately represent the Township's interests here.

As for its ability to present relevant evidence, the Township characterizes the evidence it intends to present in very broad terms that do not relate to the specific challenges raised in Modern's notice of appeal. Because of this, allowing the Township to intervene would overly broaden the scope of the appeal and impede the Board's deliberations.

O R D E R

AND NOW, this 30th day of April, 1991, it is ordered that the petition to intervene of Lower Windsor Township is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: April 30, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

MCKEES ROCKS FORGING, INC.	:	
	:	
v.	:	**EHB Docket No. 90-310-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** May 1, 1991

OPINION AND ORDER
SUR APPELLANT'S MOTION TO DISMISS
FOR FAILURE TO JOIN INDISPENSABLE PARTY

By Joseph N. Mack, Member

Synopsis

An appellant's Motion to Dismiss an order of the Department of Environmental Resources ("DER") for failure to join a third party which the appellant believes to be an indispensable party to this action is denied. Where DER chooses not to take enforcement action against a particular party, that constitutes an exercise of its prosecutorial discretion, which is not an adjudicatory action subject to the Board's review.

OPINION

This involves an appeal by McKees Rocks Forging, Inc. ("McKees Rocks") from a November 28, 1990 Order of DER requiring McKees Rocks to perform a groundwater assessment and to submit a cleanup plan for groundwater contamination allegedly found at its axle forging facility in Stowe Township, Allegheny County. A more detailed history of this case is set forth in an

Opinion and Order Sur Third Party Claim issued on March 15, 1991 at Docket No. 90-310-MJ ("March 15, 1991 Opinion"). That Opinion denied McKees Rocks' Third Party Claim by which McKees Rocks sought to join USX Corporation ("USX") and Century America Corporation ("Century") as third party defendants. The Third Party Claim was denied on the grounds that the Board does not have the power to compel the joinder of third party defendants.

The matter now before the Board is a Motion to Dismiss for Failure to Join Indispensable Party ("Motion to Dismiss") filed by McKees Rocks on April 5, 1991. In this Motion, McKees Rocks is requesting that we dismiss DER's order for failure to join USX, whom McKees Rocks contends is responsible for any groundwater contamination at its site. Specifically, McKees Rocks requests that we dismiss DER's order until DER determines the source of the pollution and/or joins USX in its enforcement action.[1]

On April 25, 1991, DER filed Objections to the Motion to Dismiss, contending that it was not verified and that it constituted an impermissible challenge to DER's exercise of prosecutorial discretion.

As noted above, we have previously ruled that the Board does not have the power to join USX as a third party defendant in this matter. McKees Rocks, March 15, 1991 Opinion, p. 3. Now, McKees Rocks is asking that the November 28, 1990 administrative order be dismissed because of DER's failure to name USX as a party to it.

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[1]McKees Rocks misconstrues the nature of a "Motion to Dismiss" in our proceedings. A "Motion to Dismiss" generally is one means by which an appeal may be dismissed, e.g. for such reasons as failure to state a cause of action or lack of standing. However, although it is not the proper procedural vehicle for attacking DER's order in this case, we will address the arguments contained therein.

DER's failure or refusal to take enforcement action against a party constitutes an exercise of prosecutorial discretion. Such an exercise of prosecutorial discretion is not an adjudicatory action subject to our review. Frawley v. Downing, 26 Pa.Cmwlth. 517, 518-519, 364 A.2d 748 (1976), U.S. cert denied 436 U.S. 910; Ralph D. Edney v. DER, 1989 EHB 1356, 1357. As such, we have no power to compel DER to join USX in this enforcement action. If, as McKees Rocks argues, it is not responsible for the alleged groundwater contamination and, therefore, should not be required to perform the clean-up, that is a matter for McKees Rocks to bring out in its appeal. However, the failure to name USX as a party to this enforcement action is not a basis for dismissal of DER's order.

Moreover, even if we could entertain McKees Rocks' Motion, as noted by DER, it is not supported by any affidavit or even a verification that the information contained therein is true and correct. This is essential since the factual allegations contained in the Motion are largely in dispute. William Fiore v. DER, EHB Docket No. 84-010-W (Opinion and Order issued December 17, 1990).

O R D E R

AND NOW, this 1st day of May, 1991, the Motion to Dismiss for Failure to Join Indispensable Party filed by McKees Rocks Forging, Inc. is denied.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 1, 1991

EHB Docket No. 90-310-MJ
May 1, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

BEMCO RECYCLING **LOUIS W. BELSITO, III**	:	
v.	:	**EHB Docket No. 91-087-MR**
COMMONWEALTH OF PENNSYLVANIA **DEPARTMENT OF ENVIRONMENTAL RESOURCES**	:	**Issued: May 1, 1991**

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Robert D. Myers, Member

Synopsis

The Board refuses to supersede a DER compliance order requiring Appellants to cease operating, without a permit under the Solid Waste Management Act, a facility where used tires are cut into nuggets to be sold as mulch. The Board dismissed Appellants' argument that they were exempt from the permit requirements because they were engaged in recycling, construing the language in Chapter 271 of DER's regulations to conform to section 1501 of Act 101 which limits recycling to specific materials, excluding tires. The Board also questioned Appellants' claim to irreparable harm since they commenced operations with full knowledge that DER considered them subject to the permit requirement.

OPINION

Louis Belsito III and Bemco Recycling (Appellants) have appealed from a Compliance Order issued by the Department of Environmental Resources (DER) on February 22, 1991 charging Appellants with processing tires without a

permit. The Compliance Order was issued pursuant to authority contained in the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., and Chapter 283 of DER's regulations at 25 Pa. Code. The site is the Dean A. Mathison property in West Buffalo Township, Union County. Appellants filed a Petition for Supersedeas on March 25, 1991 to which DER filed an Answer and Motion to Dismiss Petition for Supersedeas on April 15, 1991.

The Motion was taken under advisement and a hearing on the Petition proceeded as scheduled on April 16, 1991 in Harrisburg, presided over by Administrative Law Judge Robert D. Myers, a Member of the Board. Appellants elected to proceed without legal counsel; DER had legal representation. Appellants filed a post-hearing brief on April 23, 1991; DER on April 26, 1991.

From the evidence presented at the hearing, it appears that Bemco Recycling (Bemco) is a sole proprietorship owned by Louis Belsito III (Belsito). Belsito has been exploring business opportunities involving the handling of used tires for the past two years. These activities brought him into contact with officials of DER. At a meeting on December 10, 1990 and again in a letter dated January 23, 1991 Belsito was informed by DER that he needed a permit under 25 Pa. Code Chapter 283 to slice used tires into strips with a knifelike tool.

Despite this advice, Belsito proceeded to make the slicer, establish business arrangements with 36 tire stores or auto dealerships for the supply of used tires, and solicit purchase orders for a product called "forever mulch." Belsito's operations consisted of picking up the used tires at the supplier's place of business and transporting them to the Mathison property where they were cut into one-inch wide strips. The strips were then cut into

one-inch "nuggets," placed in bags and sold as "forever mulch." Profits were to be generated from charges paid by suppliers (about 75 cents per tire) and charges paid by customers for the mulch.

After inspecting the Mathison property on February 20 and 22, 1991, observing about 200-300 tires piled on the ground and the slicing machine located in a trailer, DER's Douglas L. Overdorff issued the Compliance Order. Belsito ceased operations, pursuant to the Compliance Order, but continued to haul tires from suppliers and store them on the Mathison property. DER agreed to this so long as the storage complied with DER's Interim Policy for the Storage of Waste Tires and Tire-Derived Materials. When Overdorff inspected the Mathison property in April 1991, there were 2,000 - 2,500 tires stored on the site.

When he ceased operating, Belsito had generated about $1,500.00, almost entirely from charges paid by suppliers. He had used this money to build the slicer and obtain other necessary equipment. He claims that DER's Compliance Order terminated his growing business, forced his family to go on welfare and caused his home mortgage to go into default.

To be entitled to a supersedeas, Belsito must show, by a preponderance of the evidence, (1) irreparable harm, (2) the likelihood of prevailing on the merits, and (3) the unlikelihood of injury to the public. If pollution or injury to the public health, safety or welfare exists or is threatened, a supersedeas may not be granted: Environmental Hearing Board Act, section 4(d), Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d); 25 Pa. Code §21.78.

We have held that DER action forcing the shutdown of a business operation inflicts irreparable harm: Elmer R. Baumgardner et al. v. DER, 1988 EHB 786; Frank Colombo et al. v. DER, 1989 EHB 1319. While we are not

inclined to retreat from that position, we confess to some hesitation about applying it to this appeal. When an entrepreneur is informed ahead of time that his proposed operation requires a permit and then, despite that knowledge, proceeds to invest his resources and incur obligations without obtaining a permit, he assumes the risk that he will lose it all when ordered to shut down. Harm that can easily be avoided hardly seems irreparable. Our research has produced no prior Board or court decision even discussing the issue. It seems to us, however, that these circumstances are relevant in balancing the interests of the parties as mandated by Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983).

Apart from that, it is unlikely that Appellants will prevail on the merits. The definition of "solid waste" in section 103 of the SWMA, 35 P.S. §6018.103, includes municipal waste. "Municipal waste" is defined in the same section as "any garbage, refuse...and other material...resulting from operation of...commercial...establishments...." Tires obtained from tire dealers fall within this classification: Max L. Starr v. DER, EHB Docket No. 87-203-W, Adjudication issued April 1, 1991. The cutting of tires into nuggets to be used as mulch constitutes "processing," which is defined in section 103 of the SWMA to include "technology used for the purpose of reducing the volume or bulk of municipal...waste or any technology used to convert...such waste materials for off-site reuse."

The operation of a municipal waste processing facility requires a permit from DER: sections 201 and 501 of the SWMA, 35 P.S. §6018.201 and §6018.501. This statutory requirement is fleshed out by 25 Pa. Code Chapter 271. Section 271.101(b) lists 8 operations for which no permit is required. One of these (4) is "a source separation and collection program for recycling

municipal waste, or for dropoff points, or collection or processing centers for source separated recyclable materials." Appellants claim to qualify for this exemption. They argue that the tires are "source separated recyclable materials" as that term is defined in 25 Pa. §271.1 and that their operations amount to "recycling" as that term is defined in 25 Pa. Code §271.1. Thus, the tires are "materials that are separated from municipal waste at the point of origin for the purpose of recycling," and Appellants' operations involve the "collection, separation, recovery and sale or reuse of metals, glass, paper, plastics and other materials which would otherwise be disposed or processed as municipal waste."

DER maintains, however, that the recycling exemption in Chapter 271 must be construed in agreement with the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 566, 53 P.S. §4000.101 et seq. (commonly referred to as Act 101), a statute dealing with the specific subject of recycling. Section 1501 of that Act, 53 P.S. §4000.1501, appears to limit recyclable materials to clear glass, colored glass, aluminum, steel and bimetallic cans, high-grade office paper, newsprint, corrugated paper and plastics - all of which are items that can be used by a manufacturer as a substitute for or a supplement to virgin raw materials. This element of recycling is not apparent from the Act's definition of "recycling" in section 103, 53 P.S. §4000.103, but is manifest in the definition of "recycling facility" in the same section.[1]

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[1] We note that the same element is an integral part of the regulations adopted by the U.S. Environmental Protection Agency pursuant to sections 1008 and 6004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C.A. §§6907, 6964. "Recycled material," as defined in 40 CFR §246.101, means a material "used in place of a primary, raw or virgin material in manufacturing a product."

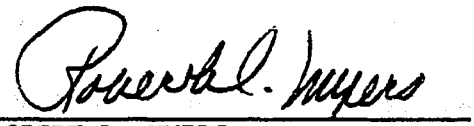
We have previously looked to Act 101 for guidance on the meaning of recyclable material: Elmer R. Baumgardner et al. v. DER, supra, and we see no reason not to do it here. Since tires are not on the list of items in section 1501 of Act 101, they do not constitute a recyclable material under 25 Pa. Code §271.1. Appellants' operation, therefore, cannot be recycling under 25 Pa. Code §271.101(b)(4), and a permit is required.

For the foregoing reasons, a supersedeas cannot be granted.

ORDER

AND NOW, this 1st day of May, 1991, it is ordered that the Petition for Supersedeas, filed by Appellants on March 25, 1991, is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: May 1, 1991

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SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA,	:	
PENNSYLVANIA FISH COMMISSION	:	**EHB Docket No. 86-338-W**
and	:	
LITTLE CLEARFIELD CREEK WATERSHED	:	
ASSOCIATION, Intervenor	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** May 3, 1991
and	:	
AL HAMILTON CONTRACTING COMPANY, Permittee:		

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

By Maxine Woelfling, Chairman

Synopsis

A Department of Environmental Resources' (Department) approval of a request for a variance to surface mine coal within the 100-foot stream barrier was procedurally defective when there was no showing that the proposed variance was advertised as required by §4.5(i) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4e(i) (SMCRA), and 25 Pa.Code §86.102(12). Further, the Department did not provide the Pennsylvania Fish Commission (PFC) a copy of the proposed variance to allow it to comment on the request, as required by the statute and regulation.

To secure a stream variance from the Department, a miner must demonstrate beyond a reasonable doubt that the variance will cause no adverse

hydrologic or water quality impacts. Where no justification is offered with such a proposed variance, the applicant has failed to make the requisite demonstration under §4.5(i) of SMCRA.

BACKGROUND

On July 3, 1986, the PFC filed an appeal from the Department's June 5, 1986, approval of revisions to Surface Mining Permit (SMP) No. 17803167 authorizing Al Hamilton Contracting Company, Inc. (Hamilton) to surface mine within 25 feet of a stream and auger mine beneath the stream.

On July 23, 1986, the PFC filed a petition for supersedeas. On August 22, 1986, prior to any hearings on the PFC's petition, the Little Clearfield Creek Watershed Association (Association) petitioned for leave to intervene in support of the position taken by the PFC. On October 27, 1986, since none of the parties objected to the Association's petition, an order was issued granting the intervention and aligning the Association with the PFC. Thereafter, hearings were held on the PFC's petition on November 12 and 25, 1986.

In the hearing on November 12, 1986, Hamilton moved to dismiss the appeal based on allegations that the PFC lacked standing. By order of March 23, 1987, the Board granted the PFC's petition and superseded the revisions to SMP No. 17803167 until an adjudication on the merits. That order was confirmed in a May 23, 1989, opinion.[1] The written opinion denying Hamilton's motion to dismiss was issued on November 4, 1988.[2]

On March 28, 1989, the Board received a letter from counsel for Hamilton advising it that the site covered by the variance had been reclaimed,

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[1] See 1989 EHB 619.

[2] See 1988 EHB 1058.

backfilled, and vegetated. This letter went on to say that because Hamilton's mining of this site was rendered uneconomic by virtue of the supersedeas, Hamilton intended to press its position in this appeal with the expectation that if the appeal were dismissed, Hamilton could then sue someone for damages. After several continuances, the merits of this appeal were heard on January 9, 1990. Only one day of hearing was necessitated because the parties had stipulated to the use of the evidence from the supersedeas hearing and introduced the transcripts thereof into the record of the hearing (T2-126).[3]

Following receipt of the transcript from the hearing on the merits, the PFC filed its post-hearing brief on February 20, 1990, and Hamilton filed its post-hearing brief on March 30, 1990. Neither the Department nor the Association filed post-hearing briefs.

After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. The Appellant is the PFC, with an address of P. O. Box 1673, Harrisburg, PA 17105-1673. PFC is an independent agency charged with the obligation of enforcing The Fish and Boat Code of 1980, 30 Pa.C.S. §101 *et seq.* (PFC's Notice of Appeal)

2. The Appellee is the Department, the agency of the Commonwealth with the authority to administer the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (Clean Streams Law), and SMCRA, and the rules and regulations promulgated thereunder.

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[3] References to the transcript of the supersedeas hearing are identified as T-___. Since the page numbers of the merits hearings' transcript are not consecutively numbered with those of the supersedeas hearing, they are identified as T2-___. Exhibits of the PFC are identified as Exh. A-___, while those of Hamilton appear as Exh. P-___.

3. The Permittee of SMP No. 17803167 is Hamilton, the address of which is R. D. 1, Box 87, Woodland, PA 16881. (PFC's Notice of Appeal)

4. The Intervenor is the Association, an organization of persons interested in the protection of the water quality and recreational uses of the Little Clearfield Creek watershed. Its address is P. O. Box 2, Glen Richey, PA 16837. (Petition to Intervene; T-89)

5. On August 25, 1981, in response to a permit application submitted in September, 1980, the Department issued Mine Drainage Permit (MDP) No. 17800142 to Simca Mining, Inc. (Simca) of 405 James Street, Curwansville, PA 16833. The MDP authorized Simca to surface mine an area in Ferguson Townsnip, Clearfield County, known as the Anderson Mine. (Exh. A-4)

6. MDP 17800142 prohibited mining within 100 feet of the edge of Campbell Run. (Exh. A-4; T-38-39)

7. In October, 1980, Simca also submitted an application, No. ENC 17-12,to encroach on the headwaters of Campbell Run as part of the operation of the Anderson Mine. (T-31-32)

8. In August of 1984, Simca submitted another request for the Department's approval to relocate the headwaters of Campbell Run as part of the operation of the Anderson Mine. (Exh. A-5; T-39)

9. In December of 1984, the Department approved the transfer of the permit for the Anderson Mine from Simca to Hamilton and renumbered the permit as SMP No. 17803167 (the Permit). (Exh. A-5; T-40-41) As transferred, the Permit referenced, but did not approve, the pending request to relocate the headwaters of Campbell Run in Special Condition 7. (Exh. A-5; T-42)

10. Prior to the Permit's transfer, and on November 7, 1984, the PFC, staff members from the Department's Bureau of Mining and Reclamation (BMR), representatives from Hamilton, and representatives of the Association

had met to discuss concerns about the proposed temporary relocation of the headwaters of Campbell Run and its restoration to its original location after coal extraction and backfilling. (Exh. A-5; T-39-41)

11. The PFC continued to oppose the relocation, but recommended design criteria for the relocation in the event the Department decided to approve it.

12. After the meeting, the PFC was of the impression that Hamilton would try to revise its design plans in response to concerns raised at the meeting and that the Department, the PFC, the Association, and Hamilton would again meet before the Department took action on the relocation application. (Exh. A-6)

13. On February 6, 1986, the PFC became aware that BMR's District Office at Hawk Run (Hawk Run) had approved a revision to the Permit authorizing the relocation of Campbell Run. (Exh. A-6; T-42)

14. The revision to the Permit was issued without any further consultation with the PFC. (Exh. A-6; T-41-42, 156, 166)

15. John Arway, a fisheries biologist for the PFC, complained to Karl Sheaffer, who was then Chief of BMR's Permits Division. (Exh. A-6; T-44)

16. As a result of the investigation of the PFC's complaint, the Permit was suspended for 90 days in order to allow the PFC to review Hamilton's final proposal. (Exh. A-7; T-46-48, 156, 166-167)

17. On March 18, 1986, representatives of the PFC, including John Arway, met with BMR concerning the PFC's objections to Hamilton's proposal. (T-48-49, 168, 187; T2-57)

18. The two agencies discussed whether the portion of Campbell Run at the Anderson Mine was perennial or intermittent in nature and finally agreed that Campbell was a perennial stream. (T2-57)

19. The agencies also evaluated whether the Hamilton proposal was adequate to assure re-establishment of perennial flow after relocation and concluded that the Hamilton proposal was inadequate in this regard. (T-49; T2-57)

20. Immediately after their meeting, BMR and the PFC met with Hamilton, the Association, and others and discussed what options were available which would protect Campbell Run and still allow some mining by Hamilton within the permit area. (T-48-50, 275; T2-59)

21. During the course of the second meeting on March 18, 1986, BMR's Karl Sheaffer suggested a possible compromise in which the stream would not be relocated: Hamilton would mine within 25 feet of either side of the center line of Campbell Run and then auger mine the coal below the 50-foot strip supporting Campbell Run. (T-157, 171, 216, 278; T2-60, 135)

22. The PFC representatives and BMR's Karl Sheaffer left the second meeting on March 18, 1986, believing that if Hamilton agreed to Sheaffer's proposal, it would submit a written proposal for review and comment by the Department and the PFC. (T-188; T2-60)

23. BMR's Gary Byron, the Hawk Run District Mining Manager, left the meeting believing that the PFC agreed to Sheaffer's compromise proposal but that Hamilton's representative had to discuss it with Hamilton. (T-159)

24. Hamilton's representative, Terry Rightnour, left the meeting believing that the Association did not agree to the proposal, but that BMR did, and that he would need to present it to Hamilton for its agreement. He was unsure if the PFC agreed to it or not. (T-278-279; T2-136-137)

25. As a result of this meeting, Hamilton amended its mining plan and submitted it to Hawk Run for review. (T-279-280, 283; T2-140)

26. Neither the Department's Hawk Run office nor Hamilton provided a copy of the amended proposal to the PFC.

27. William Hellier was chief of Hawk Run's Permit Section and supervised the hydrogeologist and mining engineers who reviewed the Simca/Hamilton permit application for the Anderson Mine. (T-140-141)

28. Hellier did not personally review any of Hamilton's variance proposals. (T-140)

29. In August of 1984, Hamilton's proposal to relocate 2,110 feet of Campbell Run at the Anderson Mine was advertised, and, in February of 1984, another proposal by Hamilton to auger mine at some location on the Anderson Mine was advertised. (T-146-148)

30. Hamilton's plans for relocating Campbell Run and for auger mining on the Anderson Mine changed substantially after the 1984 advertisements. (T-148-149)

31. There was no advertisement of Hamilton's amended mining plan reflecting the proposal to mine both sides of Campbell Run to within 25 feet of the middle of the stream and to auger mine the remaining 50 feet. (T-142)

32. Hawk Run's Michael Gaborek reviewed Hamilton's proposal; he discussed a portion of it with the PFC's John Arway and communicated Arway's concerns to Terry Rightnour of Hamilton, who, in late May of 1986, further revised Hamilton's mining plan. (T-218-219)

33. Although Gaborek indicated to Arway that he would get back to him regarding Hamilton's reactions to the PFC's concerns, there was no evidence that this occurred. (T-218-219)

34. When Gaborek reviewed Hamilton's amended mining plan, he did not consult with Hawk Run's hydrogeologist about the impact of mining up to 25 feet from the center of the stream. (T-225-226, 228)

35. Robert Weiss, Hawk Run's hydrogeologist, reviewed Hamilton's proposal to relocate Campbell Run but never reviewed the proposal to strip mine to within 25 feet of its center line and then auger mine for the coal beneath this 50-foot strip. (T-234)

36. After the March, 1986, meeting, Hamilton did not prepare any hydrogeologic review of its proposal because it did not think one was necessary or that Hawk Run wanted one. (T2-138)

37. Hamilton did not perform any piezometric measurements or hydrologic budgets to support its variance proposal. (T2-148)

38. After the March 18, 1986, meeting, Hamilton submitted no additional information to justify mining within the 100-foot barrier and the Department sought none from Hamilton. (T2-149)

39. On June 6, 1986, Hawk Run issued a new "Part C" for the Permit reflecting Hamilton's amended proposal. (Exh. A-8)

40. Gary Byron made the decision to approve Hamilton's variance request, based on the recommendations of Messrs. Hellier and Gaborek, his two site visits, and his participation in the March 14, 1986, meeting. (T-151, 153)

41. Byron did not discuss Hamilton's amended proposal with Weiss, and his conclusions regarding the water quality impacts of the proposal were drawn from his review of the permit file for the Anderson mine. (T-152-154)

42. Neither Byron nor Hellier is a hydrogeologist. (T-239)

43. Campbell Run is a tributary of Gazzam Run, which is, in turn, a tributary of Little Clearfield Creek. (T-32; T2-34)

44. Campbell Run is designated as a High Quality-Cold Water Fishery at 25 Pa.Code §93.9. (T2-33)

45. Campbell Run supports a reproducing population of brown trout and brook trout approximately one-half mile downstream of the Anderson Mine. (T2-33)

46. The confluence of Campbell Run with Gazzam Run is about two miles downstream of the Anderson Mine; Gazzam Run is stocked with trout at its confluence with Campbell Run, and it flows several miles further until it reaches Little Clearfield Creek. (T2-34)

47. John Arway has conducted three aquatic surveys of the portion of Campbell Run which traverses the Anderson Mine; Arway's first survey, conducted in October of 1980, found seven taxa of benthic macroinvertebrates. (T-65-66)

48. Arway conducted a second survey in June of 1984, and again confirmed the benthic macroinvertebrate population. (T-66)

49. In May of 1989, Arway resurveyed the stream and found 12 taxa of various benthic macroinvertebrates, including Diptera, Chironomidae midges, mayflies, and caddis flies. (T2-21-23)

50. The benthic macroinvertebrates found in Campbell Run are indicative of the perennial nature of the stream because if the stream had only intermittent flow, the benthic macroinvertebrates could not survive. (T2-24-26)

51. Although Byron concluded, based on one of his two visits to the Anderson Mine and the observations of others, that Campbell Run was an intermittent stream, Arway concluded, based on his dozen site visits, that the stream was perennial. (T-180, 182, 184; T2-19, 23, 24, 25, 35)

52. The substrates of Campbell Run are characteristic of a perennial stream. (T2-23)

53. Campbell Run is a perennial stream.

54. Flow in Campbell Run starts being visible at the upstream edge of the Anderson Mine boundary, and the initial recharge area is upstream of this point. (T-105, 106)

55. Additional flow from springs and groundwater enters Campbell Run as it traverses the Anderson mine. (T-105-106)

56. Seepages have been observed on the mine's highwall and on the low wall of the stream barrier, and Hamilton's Permit Map 6.2 shows springs and seeps in the area of the Anderson Mine. (T-121, 125, 322, 323)

57. The Anderson Mine at Campbell Run was not perched above the water table, but was located at and in the pre-mining water table; prior to mining, Campbell Run appears to have been a gaining stream. (T-110, 125)

58. The watershed of Campbell Run at the Anderson Mine encompasses 174 acres, with 70 acres, or approximately 40% of the recharge area, located upstream of the Anderson Mine and 104 acres draining to the point of the proposed variance. (T2-96, 113)

59. Surface mining at the Anderson Mine will intercept and disrupt the groundwater and surface water flow to Campbell Run in the remaining 60% of the recharge area. (T2-96-97, 113-116)

60. Because mine spoil replaced in a strip cut is several orders of magnitude more permeable than the same material prior to mining, it will disrupt ground and surface water recharge of Campbell Run from the mine site area by interception of these flows; while a water table will eventually re-establish itself in the spoil, it is at the lower end of the mine site, near the D Seam's outcrop. (Exh. A-23; T-106-107; T2-88-89, 92)

61. Mining to within 25 feet of the stream's center line may also cause shifts and, thus, cracks in the stream bed, increasing the possibility of leakage. (T-108; T2-124)

62. Mining within 25 feet of the stream's center will make this portion of Campbell Run an intermittent stream. (T-109; T2-94, 124)

63. Hamilton's mining within the 100-foot barrier and up to within 25 feet of the stream's center line, as was approved by Hawk Run, would have a more serious impact than if mining remained beyond the 100-foot barrier, although the amount of this impact cannot be quantified. (T2-96-97, 114)

64. Augering for coal beneath the 50-foot wide stream barrier will not materially injure Campbell Run, since the damage to the stream will already have been done by strip mining within the 100-foot barrier. (T-111; T2-98-99)

65. Terry Rightnour, the owner and president of Energy Environmental Services, Inc., testified as an expert witness on behalf of Hamilton. (T-248, 263)

66. Rightnour has an undergraduate degree in environmental resource management from the Pennsylvania State University's (Penn State) School of Agriculture and a Master's Degree in Environmental Pollution Control from Penn State's School of Civil Engineering. (T-249, 261)

67. Rightnour has never completed any formal course in hydrogeology, but did complete an undergraduate geology course. (T-257-258, 260)

68. Rightnour is a certified water well driller. (T-258-260)

69. Before the hearing in this matter, Rightnour never testified as an expert groundwater hydrologist. (T-261)

70. Rightnour has worked in the field of environmental consulting in one capacity or another for many years and was familiar with the history of the permits for this site, having participated in preparing the application to

re-permit the mine site under federal primacy requirements and having attended the November, 1984 and March, 1986 meetings with Hawk Run and PFC. (T-250-252, 264-265, 274)

71. Robert M. Hershey of Meiser and Earl, Inc., testified as an expert hydrogeologist on behalf of the PFC. (T-95; T2-82)

72. Mr. Hershey received a bachelor of science degree in geology from Penn State and a master of environmental pollution control from Penn State; his thesis was "The Identification of Heterotrophic Bacteria Isolated from Acid Mine Water." (Exh. A-13)

73. Mr. Hershey has been employed as a hydrogeologist by Meiser and Earl since November, 1976; he has evaluated the hydrologic impact of numerous strip mines in Pennsylvania. (Exh. A-13)

74. Mr. Hershey is a registered geologist in the state of Virginia. (Exh. A-13)

75. Mr. Rightnour's testimony conflicts with Mr. Hershey's in that Mr. Rightnour believes that there will be little difference in terms of impact on Campbell Run between mining outside the 100-foot stream barrier and mining outside the 25-foot stream barrier. (T2-153)

76. To the extent that Mr. Rightnour's testimony conflicts with Mr. Hershey's testimony, Mr. Hershey's testimony is entitled to more weight because of his credentials and experience in hydrogeology.

DISCUSSION

As we have stated repeatedly in the past, when a third party appeals an action taken by the Department, it bears the burden of proving by a preponderance of the evidence that the Department committed an abuse of discretion. 25 Pa.Code §21.101(c)(3); Broad Top Township v. DER and Dash Coal Company, EHB Docket No. 86-607-W (Adjudication issued February 13, 1991). Thus, in order for the Board to overturn the Department's approval of the variance, the PFC must demonstrate that the Department erred in finding that Hamilton has established beyond a reasonable doubt that the variance it sought would not result in adverse hydrologic or water quality impacts. Anderson W. Donan, M.D., et al. v. DER, 1990 EHB 990. For the reasons which follow, we hold that the PFC has met this burden.

The Procedural Propriety of the Department's Action

The PFC contends that the Department's actions amending Part C of the Permit to approve the variance proposal to mine within the 100-foot set back barrier specified in §4.5(i) of SMCRA, 52 P.S. §1396.4e(i), and 25 Pa.Code §86.102(12) failed to comply with the procedural requirements for granting variances. The PFC argues that public notice was not given by Hamilton, there were no public hearings held by the Department, the variance plans were not provided to the PFC prior to the revisions, and the Department provided no opportunity for input from the PFC prior to taking action on Hamilton's proposal.

Hamilton's post-hearing brief strongly disagrees with this characterization of the record. It argues that the PFC was given ample opportunity from 1980 through 1986 to review and comment upon both the underlying MDP and SMP, as well as the variance request, as is shown by a

series of memoranda to the Department.[4] Hamilton also contends that public notice was not deficient and that a public hearing was not needed because adequate public participation was provided through an informal conference and the opponents of the variance did not request one. In addition, Hamilton asserts that the Department's interpretation of its regulations to the effect that the conference was sufficient must be given weight and not overturned unless erroneous, and it was not erroneous here.[5]

Section 4.5(i) of SMCRA provides:

> No operator shall conduct surface mining operations within one hundred feet of the bank of any stream. The Department may, however, grant a variance from this distance requirement if the operator demonstrates beyond a reasonable doubt that there will be no adverse hydrologic or water quality impacts as a result of the variance. Such variance shall be issued as a written order specifying the methods and techniques that must be employed to prevent adverse impacts. Prior to granting such variance, the operator shall be required to give notice of his application thereof in two (2) newspapers of general circulation in the area once a week for two (2) successive weeks. Should any person file any exception to the proposed variance within twenty (20) days of the last publication thereof, the department shall conduct a public hearing with respect thereto. The department shall also consider any information or comments submitted by the Pennsylvania Fish Commission prior to taking action on any variance request.

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[4] The parties produced a significant volume of evidence in this matter, dating from the period in 1980 when Simca first sought a permit through late 1984, and we have afforded them the courtesy of several findings of fact regarding this evidence, even though it is irrelevant to the issues before us in this appeal.

[5] The Department did not advance such an interpretation of its regulations.

25 Pa.Code §86.102(12) contains similar language.[6]

The statute and the regulation both set forth detailed procedural requirements when an operator seeks a variance to mine within 100 feet of a stream. Initially, the operator must advertise the fact that it is seeking such a variance by publishing notice in two newspapers for two consecutive weeks. That did not occur in this case.

In 1984, with its request for a stream relocation permit having been previously denied by the Department, Hamilton submitted a new request to temporarily relocate approximately 2,100 feet of Campbell Run while Hamilton mined the stream bed area and to then replace this stream in its old location. It is undisputed that this proposal was advertised properly. It is also clear that another advertisement was made in 1984 for possible auger mining somewnere on the 350 acre site covered by the Permit.[7] The record is also clear that at the time of these advertisements, the concept contained in the variance now on appeal to this Board was not under consideration by Hamilton, its consultants, the Department, the Association, or the PFC.

Further, it is undisputed that at no time after the March 19, 1986, meeting, when the concept embodied the variance proposal now under review was first brought up, was there any public notice of this proposal by Hamilton, as is required by the statute and regulation. The fact that Hamilton may have previously advertised another proposal which was rejected, suspended, or withdrawn is simply not sufficient to satisfy its obligation to give public

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[6] There is no analogous provision in the federal Surface Mining Control and Reclamation Act, 30 USC §12, *et seq.*, although a regulation adopted pursuant to SMCRA at 30 CFR. §715.17(d)(3) authorizes surface coal mining within the 100-foot stream barrier if approved by the regulatory authority.

[7] Revisions to mining plans which involve auger mining must be advertised under 25 Pa.Code §§86.31 and 86.54(1)(ii).

notice of the variance request. The logic of Hamilton's argument is that once it advertises any proposal, it has advertised all future proposals. Nothing in the statute or regulations suggests this interpretation.[8] Since there was no evidence of proof of publication of the variance proposal, it is obvious that the Department's approval of Hamilton's proposal was premature and procedurally defective.[9]

Equally obvious is that the statute and implementing regulation required the Department to consider the PFC's comments on Hamilton's proposal prior to approving or rejecting it. For the PFC to make meaningful comments on a proposal, the PFC must be shown the proposal and given an opportunity to review it. Here, discussions on the concept of what became Hamilton's proposal were held in a March 18, 1986, meeting. Both the PFC's representative and BMR's Karl Sheaffer left the meeting feeling that a formal proposal would be put forward by Hamilton in the future and that the PFC could evaluate it at that time. Even Mr. Rightnour recognized that more than the meeting was needed because, as he put it, he had to go back to Hamilton's principals and make a presentation of the proposal to see if they approved the

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[8] This interpretation is inconsistent with the General Assembly's directive in §4.5(i) of SMCRA to have variance requests undergo detailed scrutiny. The General Assembly's intent is evident from the public participation requirements, as well as the standards for demonstrating entitlement to the variance.

[9] This regulation and statute also mandate a public hearing if objections to the advertised proposal are received. Informal conferences in lieu of public hearing are only authorized for road variances, not stream variances. See 25 Pa.Code §§86.102(8), 86.103(c), and 86.34(d). Here, no advertising of this variance took place. The Association and the PFC could not rest on their prior objections to the application to relocate the stream as protest of this variance proposal any more than Hamilton could rely on that proposal's advertising. Accordingly, we need not consider whether a public hearing should have been conducted, since the events which would have triggered such a hearing never took place.

concept. The formal variance proposal, which Byron approved, was only submitted after Rightnour received Hamilton's approval to prepare and submit it. Even thereafter, when Mr. Gaborek talked with Arway by telephone about this proposal, Gaborek's testimony made it clear that the PFC did not have Hamilton's latest proposal and that Gaborek was to get back to Arway further on it.

Thus, while the PFC was consulted once after the meeting about a concept in Hamilton's proposal, which proposal only the Department and Hamilton possessed, the PFC neither saw the final proposal to comment on it nor waived its right to see and comment on it. Under the circumstances, it was never afforded an opportunity to comment. Accordingly, the Department cannot be said to have considered comments and information from the PFC on Hamilton's variance proposal as required.[10]

The Sufficiency of the Evidence to Support the Proposal

While we could sustain the appeal by the Association and the PFC solely on these procedural deficiencies and remand the matter to the Department for consideration of their comments, that would be useless, for their concerns have been aired before the Board. County of Schuylkill *et al.* v. DER and City of Lebanon Authority, 1989 EHB 1241, 1271. Consequently, we will turn to the merits.

In order for the Department to grant a variance from the 100-foot set back/boundary, the operator seeking the variance must demonstrate beyond a reasonable doubt that there will be no adverse hydrologic or water quality

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[10] There is some suggestion in the record that the statutory process for considering stream variance requests was ignored by the Department to avoid adverse comment by the PFC. At the very least, it was open to question as to whether the Hawk Run or central office of BMR had the ultimate authority to reach a decision on the proposal.

impacts if the variance is granted. Here, the record shows that data relating to the impact of the proposed variance on hydrology and stream water quality was neither submitted by Hamilton nor sought by the Department.

Moreover, the decision made by the Department was reached without benefit of a review of the stream's hydrology and water quality by a qualified individual within the Department. Mr. Byron is not a hydrogeologist, and other than his site view and a review of the file, he relied on the recommendations of Messrs. Gaborek and Hellier. Mr. Hellier never reviewed the variance request. Mr. Gaborek is a mining engineer, and he neither conducted a hydrologic review nor had a hydrologic review conducted by another Department staff member. As to water quality impacts, all Mr. Byron did was review information in the Department file. Hamilton submitted no details of the water quality impact of the proposed variance, and the Department performed no analysis of its own.

On these bases alone, we can hardly conclude that Hamilton demonstrated to the Department beyond a reasonable doubt that there would be no adverse hydrologic or water quality impacts from the proposed variance. On the contrary, the evidence presented by the PFC through Messrs. Arway and Hershey established that an adverse hydrologic impact would occur through an increased likelihood that the portion of Campbell Run within the Anderson Mine site would turn from perennial to intermittent flow.

Accordingly, we issue the following order reversing the grant of the variance to Hamilton.

CONCLUSIONS OF LAW

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

2. The PFC and the Association have the burden of proving by a preponderance of the evidence that the Department abused its discretion in approving Hamilton's variance request, 25 Pa.Code §21.101(c)(3).

3. Before an application for a stream variance under §4.5(i) of SMCRA and 25 Pa.Code §86.102(12) can be granted by the Department, the applicant must furnish the Department with proof of advertisement of the specific proposal which the Department has under consideration.

4. Where §4.5(i) of SMCRA and 25 Pa.Code §86.102(12) mandate that the Department consider information and comments from the PFC on a proposed stream variance, the Department must furnish the PFC a copy of the proposal submitted to it, provide an opportunity for PFC review, and then evaluate the comments of the PFC.

5. To be entitled to a stream variance under §4.5(i) of SMCRA and 25 Pa.Code §86.102(12), the applicant must offer the Department proof beyond a reasonable doubt that there will be no adverse impact on water quality or stream hydrology if the variance is granted.

6. Where Hamilton failed to submit to the Department any evidence as to the hydrologic or water quality impacts of mining within the 100-foot barrier as proposed in its variance request, it failed to show the merit of its variance request beyond a reasonable doubt.

O R D E R

AND NOW, this 3rd day of May , 1991, it is ordered that the appeal of the PFC and the Association is sustained and the Department's approval of Hamilton's variance request is reversed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

* TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

* Board Member Fitzpatrick concurs in the result only.

DATED: May 3, 1991

cc: See following page.

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Dennis T. Guise, Esq.
Harrisburg, PA
For Al Hamilton Contracting Co.:
Alan F. Kirk, Esq.
KRINER, KOERBER & KIRK
Clearfield, PA
For Little Clearfield Creek Watershed Association:
Gary A. Knaresboro, Esq.
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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

WILLOWBROOK MINING COMPANY,	:	
	:	
v.	:	EHB Docket No. 91-113-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 7, 1991

OPINION AND ORDER
SUR PETITION TO INTERVENE

By Joseph N. Mack, Member

Synopsis

Petition to intervene in this appeal filed on behalf of an environmental group is denied. While the environmental group may have the requisite direct interest, this interest is already adequately represented by the Department of Environmental Resources (DER).

OPINION

Willowbrook Mining Company (Willowbrook) has applied for a Surface Mining Permit to open a surface mine in Cherry Township, Butler County in the Slippery Rock Creek Watershed. By letter of February 15, 1991, DER denied the application on the basis that Willowbrook had not demonstrated that there was "no presumptive evidence of potential pollution to the waters of the Commonwealth"; that the application failed "to demonstrate that the proposed mining operation will not cause or contribute to the degradation of in-stream

water quality"; and finally, that Willowbrook had "failed to demonstrate the availability of an adequate alternate water supply." Willowbrook appealed this denial on March 15, 1991.

On April 18, 1991, Penns Woods West Chapter of Trout Unlimited (PWWTU) filed a Petition to Intervene. The petition alleged that PWWTU was composed of members who "have an interest in the protection and enhancement of the cold water streams in Western Pennsylvania and specifically are users of Slippery Rock Creek and its tributaries", and that if the permit were to be granted, i.e. if the appeal were sustained, the proposed mining would "create an unreasonable risk of harm to the trout and other fish populations and to the aquatic ecosystem..." PWWTU goes on to state that it will present evidence of the recreational uses of the watershed, particularly sport fishing, as well as the probability of harm to the stream life from acid mine drainage and other side effects of surface mining.

By letter dated April 22, 1991, the Board advised the parties of PWWTU's petition to intervene. On April 24, 1991, Willowbrook filed a Response in opposition thereto, arguing that PWWTU's interest in the proceeding was adequately represented by DER. DER filed no response to the petition.

Intervention in a case before the Board is governed by 25 Pa.Code §21.62, which provides that intervention is discretionary with the Board. We have consistently held that petitioners must demonstrate a direct, immediate, and substantial interest in the litigation. City of Harrisburg v. DER, 1988 EHB 946, 948. The burden is on the prospective intervenor to show that intervention is warranted. Id. The Board considers five factors when ruling on a petition to intervene, to wit: the nature of the interest of the

applicant for intervention; the nature of the issues before the Board; the ability of the prospective intervenor to present relevant evidence; the effect of the intervention on administering the statute involved; and, lastly, the adequacy of the representation of the interest of the prospective intervenor by other parties to the litigation. Id. at 947.

Of these considerations we will focus primarily on the last with respect to PWWTU's petition to intervene. PWWTU indicates that its interest in this matter and the evidence it intends to produce concern the water quality of the Slippery Rock Creek watershed and the potential effects of mining thereon.

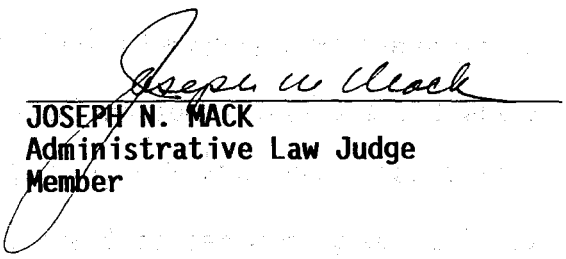
As noted above, this appeal is the result of an application for a mining permit, which application was denied by DER. The denial was based on DER's assessment of in-stream water quality and potential pollution to the waters of the Commonwealth. To the extent that PWWTU is interested in water quality and alleges that mining will have a detrimental effect on the quality of the watershed, we find that this interest is adequately represented by DER. Thus there is no basis for granting leave to PWWTU to intervene in this proceeding, where its interest is adequately represented.

Accordingly, for the reasons set forth herein, the petition of PWWTU to intervene will be denied.

O R D E R

AND NOW, this 7th day of May, 1991, it is hereby ordered that the Petition to Intervene filed by Penns Woods West Chapter of Trout Unlimited is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 7, 1991

cc: **Bureau of Litigation**
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For Petitioner:
Richard N. Parker, President
Penns Woods West Chapter of
Trout Unlimited

rm

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M. DIANE SMITH
SECRETARY TO THE BOARD

EDWARD SIMON	:	
	:	
v.	:	**EHB Docket No. 91-064-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 9, 1991**

OPINION AND ORDER
SUR DER'S MOTION TO DISMISS
FOR LACK OF JURISDICTION

By: Richard S. Ehmann, Member

Synopsis

Where a party appellant fails to file his appeal with this Board within thirty days of the date of receipt of notice of DER's action, this Board is deprived of jurisdiction to hear the appeal, so the Motion To Dismiss must be granted.

A Motion To Dismiss For Lack of Jurisdiction states adequate grounds therefor when it establishes that Appellant is challenging a DER decision not to initiate enforcement action against a dam owner. The refusal of DER to exercise prosecutorial discretion in a specific fashion is not appealable to the Environmental Hearing Board.

OPINION

On February 15, 1991, Edward Simon ("Simon") filed an appeal with this Board which objects to "an illegal and unpermitted dam in Venango Township, Erie County, Pennsylvania." Simon's three page Notice of Appeal states the

200 to 300 foot long dam is in a wetlands and is constructed across Alder Brook. It says a pond area several acres in size has been excavated behind the dam and Alder Brook's channel has been altered in this area. Simon's Notice of Appeal next indicates a portion of his property is flooded by this dam's pool. The Notice of Appeal recites a series of communications with the Water and Power Resources Board in the 1960's and a series of communications with the staff of its successor, the Department of Environmental Resources ("DER"), running throughout 1990 and ending with a letter from J. Dixon Early, P.E. of DER's Office of Resource Management, dated November 5, 1990, telling Simon that if he wishes to appeal from DER's refusal to take action against the dam's owner, he should appeal to the Environmental Hearing Board. The Notice of Appeal also contains a recitation of the problems which Simon contends are caused by this dam and the misrepresentations regarding same by others.

In response to this Notice of Appeal, DER has filed a Motion To Dismiss For Lack of Jurisdiction.[1] In it, DER contends the untimeliness of this appeal acts to deprive this Board of jurisdiction to hear same. DER says that it advised Simon by letter dated June 4, 1990 that it was taking no action as to this dam. It also attaches as an exhibit, a letter from DER to Simon, dated October 2, 1990, stating that in DER's opinion, a hearing before this Board (suggested by Simon) is inappropriate. Finally, its Brief concludes that even if a subsequent November 5, 1990 DER letter to Simon is used to begin the appeal period's clock, Simon's appeal is untimely. DER also raises the fact that this appeal seeks to challenge a DER decision not to

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1 Also pending before us but unaddressed herein is Simon's Motion For On-Site Dam Visit.

initiate any legal action in regard to this dam and alleged channel change. It then concludes this appeal is a challenge to DER's exercise of prosecutorial discretion and that we have no jurisdiction to hear same.

In response thereto, Simon has filed his Objection To Motion To Dismiss For Lack Of Jurisdiction. As to the timeliness issue raised by DER, Simon recites that his dealings with DER's predecessor began in 1963 and that DER has failed to act positively since then to address the issues he has raised. He recites that he was not informed of the process for appeals to this Board but had to discover it himself and that DER has yet to inform him that it has finalized its complete investigation of his complaints about this dam. Simon then concludes that in light of the government agencies' continuing lapses in their performance of their duties, "the Honorable Board [should] use it's [sic] discretion in the procedural Lapse of Timeliness as compared to the preponderance of major violations of the Dam Safety and Waterways Management Act in arriving at the Board's decision on the Department's Motion To Dismiss."

On the question of prosecutorial discretion, Simon contends DER's predecessor promised to act but did not and DER has now reversed itself and refuses to act because DER does not see this dam is a hazard. Despite this reversal of position, Simon contends his appeal does not seek prosecution of the dam's owner; rather, he requests the Department to "undertake it's mandated legal authority and responsibility as provided by the Dam Safety and Encroachments Act."

Turning to the timeliness issue first, the law is clear that any action of DER may be appealable to this Board providing the appeal is "filed with this Board within 30 days after the party appellant has received written notice of

such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin ...." 25 Pa.Code §21.52(a). This time limitation on appeals to this Board is jurisdictional in that an appeal must be timely or this Board has no jurisdiction to hear it. Commonwealth, Pennsylvania, Game Commission v. Pennsylvania Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989); Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). According to the Notice of Appeal, the latest DER acted was by its letter of November 5, 1990, (a copy is attached both to Simon's Notice of Appeal and DER's Motion) and this appeal was not filed until February 15, 1991, which is more than 30 days after this letter. This untimeliness deprives us of any authority to hear Simon's appeal. Kirila Contractors, Inc. v. DER, EHB Docket No. 90-488-E (Opinion issued December 28, 1990).[2] While it may be that Simon was not initially told by DER about the procedure for appeals to this Board and he discovered it himself as he suggests, this constitutes no defense to DER's Motion. It is obvious that DER's letter of November 5, 1990, notified him of this Board's address. Even using that date as the time of DER's action, as we do above, his appeal is still untimely. That untimeliness is a problem is recognized by Simon, too. His Objections to

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[2] DER's Motion To Dismiss, based on timeliness, has no support within it for its untimeliness assertions, and this has been held to be grounds to deny such a Motion. Eagle Crest Development, Ltd. v. DER, EHB Docket No. 90-074-F (Opinion issued February 21, 1991). Here, we do not deny the motion for this reason. This is because DER has attached this support to its Brief and because DER's November 5, 1990 letter is also attached to the Notice of Appeal, but counsel is advised Briefs are not the place for factual support of motions. Briefs are the location to discuss the reasoning behind a party's legal assertions or to apply these assertions to the facts supplied elsewhere such as in a hearing or as set forth in (or attached to) a Motion (as with Motions For Summary Judgement).

DER's motion asks us to use our discretion as to his "procedural Lapse of Timeliness."

Concerning this argument as to our discretion, Board discretion does not exist as to jurisdictional questions. We either have jurisdiction or we do not. Having jurisdiction is not a matter of Board discretion.

Finally, as to Board jurisdiction, Simon asserts he has yet to be told by DER that it has completed its investigation of his complaint. This assertion, if it is true, does not create jurisdiction for this Board over the instant appeal. If DER has not made up its mind yet, as he states, then his appeal is premature because no decision has been made. Lankenau Hospital v. DER et al., EHB Docket No. 89-041-M (Opinion issued October 17, 1990); Plymouth Township v. DER, EHB Docket No. 90-201-W (Opinion issued August 23, 1990). If, on the other hand, DER has made such a decision, and the documents attached to DER's Brief and Simon's own Notice Of Appeal and Objections suggest it has, then the appeal was filed too late according to Rostosky.

Even if we were not faced with this jurisdictional defect, we would have to sustain DER's Motion based upon its other proposition. While we do not doubt Simon when he says he is not seeking the prosecution of the dam's current owner, it is clear that he wants DER to cause the dam to be breached and the stream restored to its former channel. As his Objections state, he wants DER "to undertake it's [sic] mandated legal authority and responsibility" as to this illegal dam and channel change. We cannot fairly read this request as anything other than a demand that DER act to compel the breaching of the dam and a restoring of the old channel because the request is coupled with an appeal which seeks reversal of the DER's refusal to do so. We have repeatedly held a DER refusal to exercise its prosecutorial discretion in

a specific manner is not an adjudicatory action by DER and thus is not subject to review by this Board. Margaret C. and Larry H. Gabriel M.D. v. DER, EHB Docket No. 89-582-E (Opinion issued May 17, 1990); Washington Township Concerned Citizens v. DER, EHB Docket No. 90-152-F (Opinion issued February 8, 1991); and Ralph Edney v. DER, 1989 EHB 1356.

Accordingly, we are compelled to grant DER's Motion and we enter the following Order.

O R D E R

AND NOW, this 9th day of May, 1991, it is ordered that the DER Motion To Dismiss For Lack Of Jurisdiction is granted and the appeal of Edward Simon is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 9, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Charney Regenstein, Esq.
Western Region
For Appellant:
Edward Simon
Erie, PA

med

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

LARRY D. HEASLEY, et al.	:	
	:	
v.	:	EHB Docket No. 91-031-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
COUNTY LANDFILL, INC., Permittee	:	Issued: May 13, 1991

OPINION AND ORDER
SUR COUNTY LANDFILL'S MOTION
TO DISMISS AND/OR FOR SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

An appeal is dismissed for lack of standing where the Appellants have failed to demonstrate that they will suffer substantial, direct, and immediate injury as a result of a modification to a solid waste permit.

OPINION

On June 27, 1990, the Department of Environmental Resources ("DER" or "the Department") issued to County Landfill, Inc. ("County Landfill") Permit No. 101187 ("the permit") for the construction and operation of a waste disposal and/or processing facility in Farmington Township, Clarion County.[1]

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[1]The appellants herein, Larry D. Heasley, et al. ("Appellants"), appealed the issuance of the permit on July 27, 1990. Their appeal was docketed at EHB
footnote continued

Condition No. 26 of the permit read as follows:

> No more than 30 percent of solid waste actually received for disposal at this facility on an average daily basis during the standard calendar year quarter may be imported from points of original generation outside of Pennsylvania. (Emphasis Added)

An appeal was filed by County Landfill at EHB Docket No. 90-312-MJ, taking exception to Condition No. 26 of the permit. County Landfill asserted that the Department had exceeded the authority granted to it by Governor's Executive Order 1989-8[2] ("Executive Order") by imposing a limitation on the importation of "solid waste," as opposed to the narrower category of "municipal waste." On November 15, 1990, DER and County Landfill entered into a Settlement Agreement at Docket No. 90-312-MJ whereby Condition No. 26 of the permit was amended to read as follows:[3]

> No more than 30 percent of municipal waste actually received for disposal at this facility on an average daily basis during the standard calendar year quarter may be imported from points of original generation outside of Pennsylvania. (Emphasis Added)

Appellants appealed the Settlement Agreement by filing Objections thereto on January 4, 1991, asserting that insufficient limits were placed on

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continued footnote
Docket No. 90-311-MJ. Docket No. 90-311-MJ also includes Appellants' challenge to a Water Obstruction Permit issued to County Landfill with respect to the facility in question. In addition, EHB Docket No. 90-459-MJ, Appellants' appeal of a gas collection permit issued to County Landfill, was consolidated with No. 90-311-MJ on December 26, 1990.

[2]Governor's Executive Order 1989-8, which was issued on October 17, 1989, requires DER to adopt a state Municipal Waste Management Plan by September 26, 1991.

[3]In agreeing to the revision of Condition No. 26, County Landfill expressly reserved its right to challenge the constitutionality of the Executive Order. (Settlement Agreement, para. 7)

residual waste and out-of-state waste. This appeal was docketed at EHB Docket No. 91-031-MJ.

On February 8, 1991, County Landfill filed a Motion to Dismiss and/or for Summary Judgment. As a basis for dismissal, County Landfill first argues that the appeal is premature because it objects to the lack of a limit on residual waste, when, in fact, County Landfill is prohibited from receiving any residual waste unless and until it applies for and receives Module 1 approval. County Landfill asserts that Appellants may file their Objections if and when County Landfill files a Module 1 application. Secondly, County Landfill argues that the Appellants have no standing to bring this appeal because the Settlement Agreement has no direct or immediate impact on any rights or interests of the Appellants. Finally, in support of its argument for summary judgment, County Landfill asserts that there are no facts in dispute and that it is entitled to judgment as a matter of law in that the revised Condition No. 26 to the permit was based entirely on the language of the Executive Order. Appellants filed a Brief in Opposition to County Landfill's Motion on February 28, 1991, simply reiterating the arguments raised in their appeal. County Landfill's Motion to Dismiss and/or for Summary Judgment is the matter now before the Board.

We note initially that a number of the assertions made by Appellants in this appeal relate to the entire permit. As noted above, this is an appeal from the November 15, 1990 Settlement Agreement which revised Condition No. 26 to the permit by substituting "municipal waste" for "solid waste." Therefore, the scope of our review is limited solely to determining whether the Department abused its discretion or acted arbitrarily in revising Condition No. 26. Appellants cannot use this appeal of the modification of Condition

No. 26 as a springboard for an attack on the entire permit. Inquiring Voices Unlimited, Inc. v. DER, EHB Docket No. 85-548-R (Opinion and Order issued July 18, 1990). Appellants will have the opportunity to voice their challenge to the entire permit in their appeal docketed at EHB Docket No. 90-311-MJ. Therefore, we limit our review to Appellants' arguments which relate to the settlement resulting in the modification of Condition No. 26. All other matters are outside the scope of this appeal.

Turning to County Landfill's Motion, we first address the argument that the Appellants lack standing to bring this appeal because the Settlement Agreement with respect to Condition No. 26 has in no way affected Appellants' rights or interests. In order for the Appellants to have standing to bring this appeal, they must be able to demonstrate that they have a substantial interest which has been directly and immediately impacted by the permit modification. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 280 (1975); Roger Wirth v. DER, EHB Docket No. 88-527-W (Opinion and Order issued December 18, 1990). A "substantial" interest is one where there is "some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." William Penn, 346 A.2d at 282. The term "direct" means that there is a causal connection between the harm complained of and the action being appealed. Id. Finally, an "immediate" interest is one which is more than a merely remote consequence of the judgment, focusing on the proximity of the action and injury to the person challenging it. Id. at 283; Wirth, supra at 3.

The primary concern raised by Appellants in this appeal is that, as a result of the Settlement Agreement, County Landfill will now be able to dispose of unlimited amounts of residual waste at its facility. (App. Brief

in Opposition, p. 2) Although Appellants acknowledge that the facility in question is permitted as a "municipal waste" landfill (App. Objections, p. 5), they argue that the practical effect of the permit modification is "to change the character of [the facility] from a municipal waste landfill to one that accepts very little municipal waste...[and which] accepts unlimited amounts of residual waste..." (App. Objections, p. 4). However, County Landfill has provided us with the affidavits of Arthur F. Provost, Acting Regional Solid Waste Manager for the Department's Bureau of Waste Management's Meadville Office, and Mark Tondra, Vice President of County Landfill, which confirm that County Landfill is not authorized to accept any residual waste under the current terms of its permit. Rather, if in the future County Landfill wishes to receive residual waste at its facility, it must apply for and obtain Module 1 approval from the Department. At present, the Department has not granted Module 1 approval to County Landfill, nor is there any indication that such approval has been sought. If and when County Landfill applies for and receives Module 1 approval for disposal of residual waste at its site, at that time Appellants will have the opportunity to voice their concern as to the amount of residual waste to be accepted at the site. Until that occurs, Appellants' rights have not been affected. See Borough of Girardville v. DER, EHB Docket No. 88-505-F (Opinion and Order issued January 29, 1990) (In that case, the Board ruled that Appellants lacked standing to appeal DER's decision to merely suspend, rather than revoke, a hazardous waste facility's interim status which had allowed it to remain open. In so holding, the Board found that Appellants' rights had not been affected, since the suspension, like revocation, resulted in closure of the facility, and it could not reopen until DER gave its approval, at which point Appellants would have a right to

appeal.) Since Appellants' concern regarding residual waste to be accepted at the landfill is, at this point, purely speculative, they have not demonstrated they will suffer any immediate injury as a result of the permit modification. Wirth, supra at 4.

Appellants do not address the issue of standing in their Brief. They simply argue that they will be left in the position of having to appeal every approval of a residual waste module application. That is absolutely correct. While Appellants may find that burdensome, if we addressed their appeal at this time, we would be forced into a position of having to anticipate whether County Landfill will ever apply for and receive approval for the disposal of residual waste and, if so, the extent of that approval.

Appellants also express a concern that Condition No. 26, as revised, does not place a sufficient limitation on the amount of out-of-state waste which may be accepted at the landfill. We fail to see how Appellants have a direct and substantial interest in the amount of out-of-state waste deposited at the landfill, other than to express a general desire that "the Commonwealth [execute] its duties as Trustee of our Natural Resources..." and that "the Department limit the amounts of out-of-state solid waste being disposed of in municipal waste landfills so that they can be conserved and utilized by Pennsylvania for current and future solid waste disposal." (App. Brief in Opposition, p.3). Although Appellants may have a strong desire to see that landfill space in Pennsylvania is properly conserved and utilized, this does not establish the sort of "substantial, direct, and immediate" interest which is necessary to confer standing to appeal in this matter.

In conclusion, we find that Appellants have not demonstrated that the settlement resulting in modification of Condition No. 26 of the permit has

resulted in a substantial, direct, and immediate impact on their rights. Thus, we find that Appellants lack standing to bring this appeal. Since this appeal is being dismissed for lack of standing, there is no need to address the arguments raised by County Landfill in its Motion for Summary Judgment.

O R D E R

AND NOW, this 13th day of May, 1991, it is ordered that County Landfill's Motion to Dismiss for lack of standing is granted and the appeal of Larry D. Heasley, et al., docketed at No. 91-031-MJ, is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Richard S. Ehmann has recused himself in this matter.

DATED: May 13, 1991

cc: See next page

EHB Docket No. 91-031-MJ

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

LOUIS COSTANZA t/d/b/a ELEPHANT SEPTIC TANK SERVICE	:	
v.	:	EHB Docket No. 91-140-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 13, 1991

OPINION AND ORDER
SUR APPELLANTS' PETITION FOR
DECLARATORY RELIEF

By: Richard S. Ehmann, Member

Synopsis

Appellants' Petition For Declaratory Relief pursuant to 1 Pa. Code §35.19 is denied because the Environmental Hearing Board is not empowered to grant declaratory relief.

OPINION

On April 11, 1991, Louis Costanza, individually and trading and doing business as Elephant Septic Tank Service ("Elephant"), filed a Notice of Appeal with the Environmental Hearing Board from DER's March 6, 1991 letter captioned Notice of Violation.

DER's letter asserts that it regulates the disposal of solid waste in Pennsylvania pursuant to the "Pennsylvania Solid Waste management [sic] Act PSWMA, July 7, 1980, P.L. 380 35 P.S. §6018.101, *et seq.*" It then asserts Elephant has failed to submit the $200 per site permit administration fee with fourteen annual reports, contrary to 25 Pa. Code §275.222(d)(1) "as well as Act 97, Section 610(9)" and, in addition, these reports are incomplete. The

letter says that to cure this violation, Elephant should forward these fees and the fees for the two prior years which are unpaid and which jointly total $7,400 and take other steps, including correcting, completing, and submitting these reports to DER. It adds that these steps should be taken in 30 days and that until they occur, Elephant's operations will continue to be considered to be in a state of non-compliance. The letter also advises Elephant that it is not a final DER action.[1]

Elephant's Notice of Appeal is captioned "Notice Of Appeal/Petition For Declaratory Relief" and after identifying who the appellants and appellee are and what Elephant seeks to have us review, begins to recite in paragraph 6 why declaratory relief is appropriate and necessary. This paragraph recites seven reasons why we should grant Elephant the declaratory relief it seeks as to the agricultural use of sewage sludge. As authority for this Board granting such relief, Elephant's Petition mentions 1 Pa. Code §35.19 and 25 Pa. Code §21.1. In the appeal's Prayer For Relief, Elephant asks that the Board:

> 1. make a determination of its obligation to pay this fee;
>
> 2. conduct fact finding with respect to the uniformity of DER's sewage sludge management program to determine whether it is constitutionally proper;
>
> 3. determine its own authority "to act as the adjudicatory branch of the Department" in matters where declaratory relief is sought or absent that authority determine what the tribunal is within DER for providing such relief; and

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[1]This raises questions as to whether this letter constitutes an appealable action, which questions are addressed below.

4. grant Elephant such other relief as "expungment of the claim of violation, on appeal."

In response to Elephant's Petition For Declaratory Relief, on May 6, 1991, DER filed its Objections To Petition For Declaratory Relief. Therein DER contends this Board is not empowered to grant declaratory relief and asks us to deny Elephant's Petition.

In examining this issue we must start with the act creating this Board. The Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.* (EHBA), establishes this Board as an independent quasi-judicial agency.[2] Section 4 of the EHBA provides that this Board "has the power and duty to hold hearings and issue adjudications under 2 Pa. C.S. Ch. 5 Subch. A (relating to practice and procedure of Commonwealth agencies) on orders, permits, licenses or decisions of the department." Nothing in the EHBA empowers the Board to grant the declaratory relief now sought from it. Further, we can find no statute which can be said to be a legislative authorization for us to exercise the power inherently necessary to grant declaratory relief. If Pennsylvania's General Assembly wishes us to have this power, it must confer it on us. It has not done so. Until that time, however, DER correctly points out, by citing Commonwealth, DER v. Butler County Mushroom Farm, 499 Pa. 507, 454 A.2d 1 (1982), that we cannot exercise

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[2]As pointed out by DER, the EHBA also repealed the Board's former enabling legislation insofar as it is inconsistent with the EHBA. This ends any suggestion that this Board is "the adjudicatory branch of the Department" (emphasis added) as set forth in paragraph 3 of the Prayer For Relief in Elephant's Petition.

this power. We hasten to add we have previously explicitly held we lack the authorization to consider Elephant's Petition. Eva E. Varos et al. v. DER, 1985 EHB 892; Giorgio Foods, Inc. v. DER, 1989 EHB 331.

In Varos, the appellants also argued that 1 Pa. Code §35.19 provides for declaratory orders in proceedings before this Board, just as is advanced in Elephant's Petition. In response, in Varos, we said:

> Although 1 Pa.Code §35.19 does pertain to declaratory orders, this provision, in and of itself, does not confer upon administrative agencies the power to issue declaratory orders. As previously noted, administrative agencies have only those powers which have been specifically conferred upon them by statute. Thus, 1 Pa.Code §35.19, which sets forth the contents of a petition for declaratory order, can only apply to agencies that have the underlying statutory power to grant declaratory relief. For example, the Public Utility Commission has such power pursuant to 66 Pa. C.S. §331(f). There is, however, no statute that grants such power to the Environmental Hearing Board. Inasmuch as the Board holds that it has no power to grant declaratory relief, the Board does not reach the merits of Varos's petition.

Here, Elephant's Petition fails to mention Varos, to distinguish it from Elephant's position or to offer us any citation to statutory authority for us to grant the relief sought.[3] We thus have no basis on which to depart from that decision and ample reason to follow same.

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[3]Elephant's petition also recites 25 Pa. Code §21.1 which is the first section of the Rules for procedure before this Board. Again, we point out these are rules of procedure. Nothing in 25 Pa. Code Chapter 21 authorizes us to grant declaratory relief and nothing in this Chapter could authorize us to grant such relief because it too is not a statutory authorization to this Board to grant such relief but only describes procedures where we are otherwise authorized to act.

In so doing, it is nevertheless clear that Elephant filed a "Notice Of Appeal/Petition For Declaratory Relief" and, thus, the issues raised thereby are still before us for adjudication on their merits. Accordingly, while the Petition cannot be reached, this is not grounds to dismiss this appeal. For this reason, we enter the following Order.

ORDER

AND NOW, this 13th day of May, 1991, it is ordered that the Petition For Declaratory Relief portion of Elephant's Notice Of Appeal/Petition For Declaratory Relief is denied, while jurisdiction over Elephant's Notice Of Appeal is retained. Since it appears that Elephant has filed an appeal from a DER letter which may not constitute a DER "final action", it is further ordered that within thirty days of the date of this Order, each party shall file with this Board a Memorandum of Law reciting its position on whether DER's letter constitutes "an action" of DER which is appealable to the Board.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 13, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

WILLIAM FIORE, d/b/a MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY	:	**EHB Docket No. 84-010-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 14, 1991**

OPINION AND ORDER SUR
MOTION TO DISMISS FOR MOOTNESS

By Maxine Woelfling, Chairman

Synopsis

An appeal of a National Pollutant Discharge Elimination System (NPDES) permit is dismissed as moot where, during the pendency of the appeal, the permit expires by operation of law as a result of the denial of the appellant's application for renewal of the permit.

OPINION

This matter was initiated with the filing of a January 10, 1984, notice of appeal by William Fiore (Fiore) challenging NPDES Permit No. PA 0046655 (NPDES permit), which was issued to Fiore by the Department of Environmental Resources (Department) on December 8, 1983. Fiore objected to the NPDES permit on the grounds that it was issued by a Department employee who had no authority to issue it and that the Department lacked regulatory authority to set the discharge parameters, specifically those established for coumarone.

The procedural history of this case is set forth in more detail in the Board's earlier opinion and order denying the Department's motion to dismiss for mootness because it was not properly supported or verified. Fiore v. DER, EHB Docket No. 84-010-W (Opinion issued December 17, 1990). The Board's order denying the motion directed the Department to file a properly verified motion to dismiss on or before January 11, 1991.

On January 11, 1991, the Department filed a motion for a continuance of thirty days to allow it sufficient time to revoke the NPDES permit at issue and then renew its motion to dismiss for mootness. The Board granted this request in an order dated January 16, 1991.

Rather than revoke Fiore's NPDES permit, as represented in its motion for continuance, the Department, by letter dated January 25, 1991, denied Fiore's application to renew the NPDES permit.[1] Thereafter, on February 11, 1991, the Department moved to dismiss Fiore's appeal as moot, since the NPDES permit expired by operation of law when the Department denied the renewal application and, as a result, there was no longer any relief that the Board could grant Fiore.

Fiore objected to the Department's motion in a response filed on February 28, 1991, but his response did not address the grounds of the Department's motion.

For the reasons which follow, we will grant the Department's motion.

An appeal before the Board becomes moot when an event occurs during the pendency of the appeal which deprives the Board of the ability to provide any meaningful relief. Willard M. Cline v. DER, 1989 EHB 1101. In the case

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[1] Fiore appealed the denial of his renewal application, as well as the Department's revocation of Water Quality Management Permits Nos. 0278203 and 0278204, in a February 15, 1991, notice of appeal filed at Docket No. 91-063-W.

of an appeal of an NPDES permit, that appeal becomes moot when the NPDES permit expires by operation of law as a result of the Department's taking final action on an application to renew the NPDES permit, New Jersey Zinc Company v. DER, 1986 EHB 1199.

The regulation at 25 Pa.Code §92.9 governing the duration of NPDES permits provides that:

> (a) All NPDES permits shall have a fixed term not to exceed five years.
>
> (b) The terms and conditions of an expired permit are automatically continued pending the issuance of a new permit when the following conditions are met:
>
> (1) The permittee has submitted a timely application for a new permit in accordance with §92.13 (relating to reissuance of permits).
>
> (2) The Director is unable, through no fault of the permittee, to issue or deny a new permit before the expiration date of the previous permit.
>
> (c) Permits continued under subsection (b) shall remain effective and enforceable against the discharger until such time as the Director takes final action on the pending permit application.

Fiore's NPDES permit was to expire on April 20, 1984 (Attachment to Notice of Appeal), and he submitted a renewal application to the Department on April 20, 1984 (Paragraph 3 and Exhibit A to Motion to Dismiss for Mootness).[2] By letter dated January 25, 1991, the Department denied Fiore's renewal

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[2] It appears to the Board that Fiore did not make a timely application for renewal of the NPDES permit under 25 Pa.Code §92.13. But, because the Department did not raise this issue, we need not decide it.

application (Exhibit A, Motion to Dismiss for Mootness).[3] As a result of 25 Pa.Code §92.9, then, Fiore's NPDES permit ceased to exist on January 25, 1991, and there is no further relief the Board can afford him, New Jersey Zinc, *supra*. Consequently, his appeal must be dismissed as moot.

O R D E R

AND NOW, this 14th day of May, 1991, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of William Fiore is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

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[3] Paragraph 2 of the Department's motion erroneously states that the Department revoked Fiore's NPDES permit; Exhibit A revokes Fiore's Water Quality Management Permits, not his NPDES permit. Obviously, if Fiore's NPDES permit expires by operation of law upon the denial of his renewal application, there is no NPDES permit to be revoked by the Department.

JOSEPH N. MACK
Administrative Law Judge
Member

Member Richard S. Ehmann did not participate in this decision.

DATED: May 14, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

E. P. BENDER COAL COMPANY :
:
v. : EHB Docket No. 90-487-MJ
: (Consolidated)
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: May 14, 1991

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

A Motion for Summary Judgment filed by the Department of Environmental Resources (DER) is denied. The doctrine of administrative finality does not operate to bar this consolidated appeal of two compliance orders where the appellant did not appeal a prior bond release denial, since the bond release denial involved different legal and factual issues and did not specifically refer to the particular violation stated in the compliance orders.

OPINION

This matter was initiated with the filing of a Notice of Appeal on November 16, 1990 by E. P. Bender Coal Company ("Bender") from Compliance Order No. 90-3-161-S issued by the Department of Environmental Resources ("DER") on November 5, 1990. The compliance order charged Bender with degrading the water supply of the Elder Township Water Authority ("Elder

Township" or "the Township") as a result of its surface mining activities, in violation of section 4.2 of the Surface Mining Conservation and Reclamation Act ("SMCRA"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., at §1396.4(b); sections 5, 316, 402, 501, 601, and 610 of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., at §§691.5, 691.316, 691.402, 691.501, 691.601, and 691.610; and section 5(c) of the Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, 35 P.S. §725.1 et seq., at §721.5(c). The compliance order required Bender to provide the Township with a water supply of equal quality and quantity as the pre-mining supply.

Simultaneously with the filing of its appeal, Bender filed a Petition for Supersedeas. DER responded to the Petition by filing an Answer with New Matter and a Brief in support thereof on November 28, 1990. The New Matter incorporated a Motion to Dismiss the Petition for Supersedeas on the basis of collateral estoppel. In its Motion, DER stated that prior to receiving the aforesaid compliance order, Bender had been issued a letter by DER on August 8, 1990 advising Bender that its Stage III bond release application had been denied based on DER's finding that Bender had degraded a public water supply. The letter informed Bender that it would be necessary to resubmit its application and provide treatment or replacement of the public water supply in order to secure the release of its bonds. Bender did not appeal the bond release denial.

DER argued in its Motion to Dismiss that since Bender did not appeal the denial of its bond release application and, thus, DER's finding that

Bender had degraded a public water supply, it was precluded from collaterally attacking that same finding which was the basis for the November 5, 1990 compliance order.

In an Opinion and Order dated December 11, 1990, Bender's Petition for Supersedeas was denied for failure to meet the requirements of 25 Pa.Code §21.77(a) (failure to provide supporting affidavits) and 21.77(c)(4) (failure to state grounds sufficient for the granting of supersedeas). Because the Petition for Supersedeas was denied on these grounds, it was not necessary to address DER's argument of collateral estoppel.

On December 24, 1990, Bender filed a second appeal, challenging Compliance Order No. 90-3-161-S(A), dated November 29, 1990, which amended the earlier compliance order. The second order required Bender to provide the Township's customers with a temporary supply of drinking water until a permanent replacement was implemented. This appeal, which was docketed at No. 90-565-MJ, was consolidated with the present appeal on February 20, 1991.

On March 18, 1991, DER filed a Motion for Summary Judgment and supporting Brief. DER's Motion is again based on its argument that because Bender did not appeal the bond release denial, it is precluded from collaterally attacking DER's determination that it had degraded the public water supply of Elder Township. Bender filed a Brief in Opposition to DER's Motion on March 29, 1991, to which DER responded on April 17, 1991.

In its Brief, Bender states that DER is actually basing its argument on the doctrine of administrative finality, which Bender asserts does not apply to this proceeding since "[t]he issue of liability for the [alleged

degradation to] the water supply was not present in the request for bond release." Therefore, Bender asserts it is not precluded from challenging the issue of degradation to the water supply at this time.

Under the doctrine of administrative finality, "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." Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 22 Pa.Cmwlth. 250, 348 A.2d 765, 767 (1975), aff'd 473 Pa. 432, 375 A.2d 320 (1977) (quoting Philadelphia v. Sam Bobman Department Store Co., 189 Pa.Super. 72, 78, 149 A.2d 518, 521 (1959)). We agree that DER is basing its argument on the doctrine of administrative finality, inasmuch as it is arguing that since Bender did not appeal the issue of liability for degradation of the water supply at the time of the bond release denial, that issue became final and may not now be attacked in this proceeding.

We note initially that the bond release denial letter never refers to the "Elder Township water supply," nor does it specify the manner of degradation. The letter, in pertinent part, simply reads as follows:

> The completion report 390090 filed on July 6, 1990 has been reviewed by this office. Based on the review, your application for Stage III bond release is denied. The reasons for the denial include the following:
>
> 1. Degradation of a Public Water Supply.
>
> In order to secure the release of your bonds, you must resubmit a new completion report and take the following corrective actions.
>
> 1. Provide treatment or replacement of the Public Water Supply.

Without continuity of factual background between the bond release denial and the subsequent compliance orders, the doctrine of administrative finality cannot come into play. See William L. Harger, EHB Docket No. 90-206-E (Opinion and Order issued August 28, 1990).

DER argues that Bender was fully aware of the location and type of contamination alluded to in the bond release denial letter, since DER had previously advised Bender by letter of July 16, 1990 ("the July 16, 1990 letter") that it had determined that Bender's mining had resulted in elevated sulfate levels in Elder Township's water supply, and both parties had been involved in discussions concerning what course of action Bender planned to take as a result of the alleged degradation. A review of the July 16, 1990 letter, a copy of which accompanies DER's motion, reveals that it appears to be a follow-up letter to a meeting held between Bender and DER officials on April 12, 1990 to discuss elevated sulfate levels in the Elder Township water supply which DER had determined to have resulted from Bender's mining.

However, despite the fact that Bender was aware of the alleged sulfate contamination of the Elder Township water supply at the time its bond release application was denied, we cannot, on that basis alone, make a blanket assumption that that is the same condition referred to in the bond release denial letter with its vague reference to "Degradation of a Public Water Supply." This is particularly so where, as here, DER is asking us to dismiss the appeal on the basis of that assumption. Moreover, it is not clear that the July 16, 1990 letter and the bond release denial letter do, in fact, refer to the same condition, since the captions of each letter refer to different

Mine Drainage Permit (MDP) numbers.[1] Therefore, despite the fact that Bender may have been aware of the problem with the Elder Township water supply at the time it received the bond release denial, there is not sufficient information in the denial letter to establish the factual continuity needed to apply the doctrine of administrative finality to this appeal.

Furthermore, even if we were to assume that the water supply degradation referred to in the bond release denial letter was the same problem as that covered by the compliance orders, the legal issues involved in the two actions are of a different nature. Whereas under the first action, i.e. the bond release denial, Bender was advised to replace or otherwise treat the public water supply as a condition of gaining release of its bonds, under the second action, i.e. the compliance orders, it was ordered to do so.

In support of its position on this matter, Bender relies on Kent Coal Mining Co. v. Commonwealth, DER, 121 Pa.Cmwlth 149, 550 A.2d 279 (1988), and Bologna Mining Co. v. DER, 1989 EHB 270, where the doctrine of administrative finality was held not to bar the appellants from challenging the underlying violations in their appeal of a civil penalty assessment, even though they had not appealed the compliance order or administrative order on which the penalty was based. We find neither of these cases to be applicable to Bender. Both involved civil penalties assessed under section 18.4 of SMCRA, 52 P.S. §1396.22. In both instances, the penalties were based on alleged violations contained in an abatement or compliance order, but were calculated at a date later than the order itself. The reasoning behind not applying the principle

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[1]The July 16, 1990 letter states that it is in reference to "MDP #4277SM10", whereas the August 8, 1990 bond release denial letter states it is in reference to "MDP #4277SM5". (Emphasis added)

of administrative finality, as stated in Kent Coal, was based on the specific language of §18.4 of SMCRA, 52 P.S. §1396.22, which addresses appeal procedures from civil penalties assessed under that statute.

In the present case, no civil penalty assessment is being challenged. Rather, this case involves a bond release denial followed by a compliance order. Bender argues that since no final penalty has yet been assessed, then under the reasoning of Kent Coal and Bologna Mining, the violation contained in the bond release denial letter is not yet final and is still subject to challenge. However, Bender's argument is based on a misreading of Kent Coal and Bologna Mining. Those cases held that if and when a penalty is assessed, based on violations contained in a prior order, then at that time if the party appeals the penalty assessment, he may also contest the violations. If we adopted Bender's approach, where an order is issued by DER but no penalty is assessed, a party would be able to appeal the order at any indefinite point in the future and there would be no finality to orders of DER.

We find this case to be more in line with Nemacolin, Inc. v. Commonwealth, DER, 115 Pa.Cmwlth. 462, 541 A.2d 811 (1988). In that case, Nemacolin's application for a bathing place permit for a condominium swimming pool was denied by DER for allegedly improper design of the pool. Nemacolin did not appeal the denial, but continued to operate the pool. Subsequently, DER entered an order requiring closure of the pool until such time as Nemacolin secured a permit. Nemacolin appealed, challenging, inter alia, whether the permit requirement of the statute applied to the pool in question. Summary judgment was granted to DER, which had argued that under the doctrine of administrative finality, when Nemacolin failed to appeal the denial of its permit application, that issue became final and could not be attacked in the

subsequent enforcement proceeding. On appeal, the Commonwealth Court reversed, holding that the doctrine of administrative finality did not apply in that case. In so holding, the Court stated, "Although the permit denial involved in the present case was an appealable adjudication, it was not an 'order' to Nemacolin..." 541 A.2d at 813. The Court further stated that

> "the permit denial involved here did not order Nemacolin to do or refrain from doing anything. The denial did not alter the status quo in any manner; it did not create any new obligation or burden that was binding upon Nemacolin. Therefore, Nemacolin was not 'aggrieved' by the permit denial."
>
> Id. at 813-814

Likewise, in the present case, although the bond release denial was an appealable action, it was not an "order" to Bender to provide treatment or replacement of the Township's water supply. It simply stated that if Bender sought to reapply for release of its Stage III bonds, it must first treat or replace the Township's water supply. If Bender chose not to reapply for bond release, no obligation was placed on it to treat or replace the water supply. Thus, the duty to appeal the requirement of replacing or treating the Township's water supply or to forever forego any challenge thereto was not triggered by the bond release denial. Id. at 814; See also Harger, supra.

We note that there is one final issue which neither party raised: whether the July 16, 1990 letter, referenced earlier, was an appealable action. If this is answered in the affirmative, then Bender's failure to appeal that action of DER may well bring the doctrine of administrative finality into play. The letter was appealable only if it constituted an action or adjudication which affected Bender's "personal or property rights, immunities, duties, liabilities, or obligations." 25 Pa.Code §21.2(a); Ed

Peterson and James Clinger v. DER, EHB Docket No. 90-269-MJ (Opinion and Order issued October 4, 1990). In determining whether correspondence from DER is an appealable action, the Board considers the substance of the document. Meadville Forging Co. v. DER, 1987 EHB 782. The operative language of the letter sent to Bender on July 16, 1990 reads as follows:

> Dear Mr. Bender:
>
> On April 12, 1990, Don Barnes and I met with you and discussed the impact of E. P. Bender's previous mining on the Elder Township water supply. The Department has determined that E. P. Bender Coal Company's mining on the above-referenced permit has resulted in elevated sulfate levels in the Elder Township water supply. These levels exceed the allowable levels for drinking water standards.
>
> E. P. Bender will, therefore, be required to either reduce the sulfate level in the Elder Township water supply to allowable drinking water standards or provide an alternate supply that meets current drinking water standards. We are requesting that you submit a proposal within fifteen (15) days to accomplish this, with the intent of entering a Consent Agreement with the Department.
>
> If you fail to submit a comprehensive proposal for the reduction of sulfates or replacement water supply by August 1, 1990, the Department may choose to initiate an appropriate enforcement action.
>
> (Emphasis added)

Although the language is not clear, it appears that the July 16, 1990 letter merely constituted a notice of violation and not an action affecting Bender's rights, duties, immunities, liabilities, or obligations. As such, it was not an appealable action. Sunbeam Coal Corp. v. Commonwealth, DER, 8 Pa.Cmwlth. 622, 304 A.2d 169 (1973); Chester County Solid Waste Authority v. DER, 1986 EHB 1169. The letter does not order Bender to take any action; it

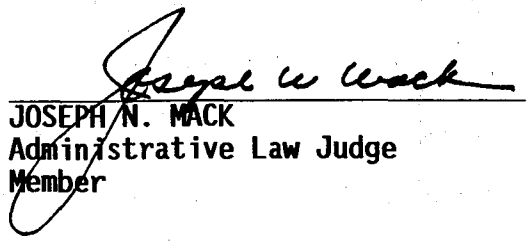
merely asks Bender to provide a proposal for reducing the sulfate level or replacing the water supply. See Mark Basalyga v. DER, 1989 EHB 388, 390. Further, the possibility of enforcement action addressed therein was "only hypothetically and prospectively contingent upon [Bender's] failure...to remedy the identified violation." Chester County, supra, at 1171. Thus, since the July 16, 1990 letter was not an appealable action or adjudication, the doctrine of administrative finality was not triggered by that event.

In conclusion, for the reasons stated herein, Bender is not barred by the doctrine of administrative finality from challenging the compliance orders here in question and, thus, DER's Motion for Summary Judgment will be denied.

O R D E R

AND NOW, this 14th day of May, 1991, the Motion for Summary Judgment filed on behalf of the Department of Environmental Resources is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 14, 1991

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M. DIANE SMITH
SECRETARY TO THE BOAR

NEW HANOVER CORPORATION	:	
	:	
v.	:	EHB Docket No. 90-558-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 14, 1991

OPINION AND ORDER SUR
PETITION TO INTERVENE BY
NEW HANOVER TOWNSHIP

By Maxine Woelfling, Chairman

Synopsis

An order denying a municipality's petition to intervene in a solid waste permittee's appeal of a county solid waste plan is confirmed. The petitioner's interest will be adequately represented by the county, since the county is responsible for planning for solid waste processing and disposal capacity for all municipalities within its boundaries. The municipality's participation in appeals of decisions relating to the design and operation of the appellant's landfill is not grounds for intervention, since those issues are not germane to the plan's approval. Furthermore, allowing intervention to raise such issues would confuse and complicate the appeal, thereby impeding the Board's deliberations.

DISCUSSION

This matter was initiated with the December 20, 1991, filing of a notice of appeal by New Hanover Corporation (Corporation) challenging the Department of Environmental Resources' (Department) November 20, 1990,

approval of the Montgomery County Municipal Waste Management Plan (Plan). The Corporation is the permittee of Solid Waste Permit No. 101385 which authorizes it to construct and operate facilities in New Hanover Township (Township), Montgomery County, and alleges that it has been aggrieved by the plan approval and that the Department's approval of the plan was arbitrary, capricious, an abuse of discretion and contrary to the Municipal Waste Planning, Recycling and Waste Reduction Act, The Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.101 (Act 101). Specifically, the Corporation contends that the plan failed to meet minimum requirements for providing for disposal for a 10-year period; did not designate an adequate number of County facilities; failed to explain its methodology for choosing disposal sites; and did not meet Act 101 plan content requirements.

On March 29, 1991, the Township filed a petition for leave to intervene, contending that the Corporation's appeal relates to its intention to establish a landfill in the Township which was not contemplated by the Plan and which will affect the safety, health, welfare, and property of its citizens. The Township states it will not be adequately represented by the Montgomery County (County) since the Township has distinct knowledge of local conditions and is liable on the local level for the Plan's administration and implementation. The Township maintains its interests also cannot be adequately represented by the Department since it is the Department's adversary in a related appeal at Docket No. 88-119-W. The Township proposes to present expert testimony showing the landfill was properly excluded from the Plan. Finally, the Township asserts that it may lose rights and be prejudiced in the related appeals in which it is involved if intervention is not granted here.

Neither the Department nor the County filed any response to the

Township's petition. The Corporation opposed the Township's petition in its April 9, 1991, answer, arguing that the Township's interests were irrelevant, raised in related appeals, or adequately protected by the Department or the County.

On April 18, 1991, the Township replied to the Corporation's answer, arguing, inter alia, that the issues in this appeal and the Corporation's appeal of the Department's denial of the Corporation's re-permitting application at Docket No. 90-225-W are the same. The Township also asserts that because the Township and the County were recognized as having separate interests in that appeal and both were allowed to intervene, that ruling provides a basis for the Township's intervention in this appeal.

On April 22, 1991, the Board issued an order denying the Township's petition to intervene. This opinion is in confirmation of that order.

Intervention before the Board is governed by 25 Pa. Code §21.62. The decision to grant intervention is discretionary and the prospective intervenor has the burden of showing that intervention should be granted. Del-Aware Unlimited v. DER, 1988 EHB 547. The factors considered by the Board in ruling on a petition to intervene include the prospective intervenor's relevant interest; the adequacy of representation provided by the existing parties; and the ability of the prospective intervenor to present relevant evidence. Bethenergy Mines, Inc. v. DER, 1987 EHB 873. Intervention is not permitted where it would surely broaden the scope of the appeal and impede the Board's deliberations. Franklin Township Board of Supervisors et al v. DER, 1985 EHB 853. For the reasons set forth below the Township's petition to intervene has been denied.

The Township contends that it has a relevant interest in this proceeding because of the siting of the Corporation's landfill in the

municipality. A prospective intervenor's interest in a proceeding must be assessed in the context of the subject of the proceeding. What is at issue here is whether the Department abused its discretion in approving the Plan, not whether a particular solid waste disposal facility incorporated in the Plan satisfies the technical and environmental requirements promulgated pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. and other relevant statutes. Thus, the grant of intervention to the Township at Docket No. 90-225-W is not determinative of whether the Township should be permitted to intervene in the Corporation's present appeal of the Plan.[1]

As for the protection of the Township's interests by the County and the Department, it cannot be concluded that whatever interest the Township has in the integrity of the Plan will not be adequately represented and protected by either of these parties. The Township broadly asserts that it is liable on the local level for administration and implementation of the Plan. However, the Corporation's appeal does not concern either administration or implementation of the Plan, but rather approval of the Plan. Under Act 101 counties[2] are given the responsibility to "plan for the processing and disposal of municipal waste generated within their boundaries...." 53 P.S. §4000.102(a)(5) Because of this statutory duty, it is difficult to conclude

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[1] Similarly, the Township's appeal of the Department's issuance of a solid waste permit to the Corporation at Docket No. 88-119-W does not necessarily confer intervenor status on the Township in this appeal.

[2] Municipalities are given the responsibility to assure the proper and adequate transportation, collection and storage of municipal waste which is generated or present within its boundaries, to assure adequate capacity for the disposal of municipal waste generated within its boundaries by means of the procedure set forth in section 1111, and to adopt and implement programs for the collection and recycling of municipal waste or source-separated recyclable materials, 53 P.S. §4000.304(a).

that the County will not adequately protect the Township's interest in the approval of the Plan.

The Township is concerned that it will be prejudiced in the other pending appeals regarding various regulatory approvals and denials for the Corporation's landfill if it is not permitted to intervene in this appeal. But, the Township has failed to explain the rationale for its assertion. Moreover, if the integrity of the Plan is jeopardized in any of these appeals, the County has the primary interest in protecting it.[3]

Finally, it is apparent from the nature of the evidence the Township intends to present that it is seeking to broaden the scope of the Corporation's appeal to include issues relating to permitting of the Corporation's landfill under the Solid Waste Management Act and other pertinent regulatory statutes. Because these issues are not before the Board in this appeal, allowing the Township's intervention would only unduly complicate and confuse this appeal. Douglas and Sandra Barry v. DER, 1990 EHB.

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[3] The County's petition to intervene at Docket No. 90-225-W, the Corporation's appeal of the denial of its re-permitting application was granted in light of the Corporation's challenge to the validity and application of the Plan in the context of the Department's permit denial. See New Hanover Corporation v. DER, EHB Docket No. 90-225-W (Opinion issued March 21, 1991).

ORDER

AND NOW, this 14th day of May, 1991, it is ordered that the April 22, 1991, order denying New Hanover Township's petition to intervene is confirmed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: May 14, 1991

cc: **Bureau of Litigation**
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For Permittee:
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M. DIANE SMITH
SECRETARY TO THE BOARD

CLEMENTS WASTE SERVICES, INC., RECYCLING WORKS, INC., and BRIAN CLEMENTS	:	
v.	:	**EHB Docket No. 91-075-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and BERKS COUNTY, Permittee	:	**Issued:** May 17, 1991

OPINION AND ORDER SUR
WESTERN BERKS REFUSE AUTHORITY'S
PETITION TO INTERVENE

By: Richard S. Ehmann, Member

Synopsis

Intervention is sought by Western Berks Refuse Authority ("WBRA") in an appeal of the Department of Environmental Resources' ("DER") conditional approval of Berks County's Municipal Solid Waste Management Plan under Act 101. WBRA asserts that it has an interest in this appeal since it is a party to a Waste Management Agreement with Berks County which is part of Berks County's Plan and because of its ownership of real property identified by the Plan as a desirable site to locate a recycling facility.

Intervention is denied. WBRA's interest in having its site used as a recycling facility is remote and speculative. Although WBRA has averred an interest in its landfill which is direct, immediate, and substantial, it has

not convinced us that Berks County and DER will not adequately defend the Plan and its approval, nor has it offered to produce any evidence which could not be produced by Berks County and DER.

OPINION

On February 25, 1991, Clements Waste Services, Inc., Recycling Works Inc., and Brian Clements commenced an appeal with us from DER's conditional approval of the Berks County Solid Waste Management Plan ("Plan") under the Municipal Waste Planning, Recycling, and Waste Reduction Act, Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.101 *et seq.* ("Act 101"). The appeal asserts that the Plan failed to meet the requirements of Act 101 for a variety of reasons and that DER erroneously gave its conditional approval of the Plan.

On March 26, 1991, we received WBRA's petition to intervene, and on April 5, 1991, we received a supplement to that petition. On April 11, 1991, we received Berks County's response to WBRA's petition in which it stated its concurrence with DER's position vis a vis the petition. DER filed its response to WBRA's petition and supplement on April 15, 1991. On April 16, 1991, we received WBRA's reply to DER's response. We received appellants' objections to the petition and supplement on April 18, 1991. Subsequently, on April 22, 1991, WBRA filed its Reply to Appellants' Brief in Opposition to Petition to Intervene, along with an affidavit of WBRA's chairman.[1]

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[1]The affidavit was filed for the purpose of verifying the facts set forth in the petition and supplement, since the appellants' objections had challenged the petition on the basis of its being unverified. Although there is no requirement in our rules of practice and procedure or in the Rules of Civil Procedure, in general, that motions containing factual allegations not of record be verified by affidavit, Pa.R.C.P. 206 requires petitions and answers containing factual allegations not of record be verified by affidavit. See William Fiore, d/b/a Municipal and Industrial Disposal Co. v. DER, EHB Docket No. 84-010-W (Opinion issued December 17, 1990). Appellants have not pointed to any facts alleged by the petition which are not of record, but (footnote continued)

The petition asserts WBRA is the owner of real property in Berks County on which it has developed and currently operates a municipal and solid waste landfill ("landfill") and related waste management facilities. The petition further avers WBRA owns lands known as the Poplar Neck Site, which the Plan has identified for the development of additional waste management facilities, including a proposed recycling facility. WBRA alleges that in preparation for the Plan, it and Berks County entered into a Waste Management Agreement ("Agreement") which provides for: 1) the continued use and operation of the WBRA landfill to provide interim waste disposal capacity for Berks County; 2) the obligation of WBRA to accept up to 450 tons per day of municipal waste; 3) the specific direction of municipal waste to the landfill through county-adopted flow control ordinance; 4) the establishment of a tipping fee to be paid to WBRA for municipal waste directed to the landfill; and 5) the development, ownership, and operation by a contractor selected by Berks County, at the Poplar Neck site of a recycling facility pursuant to a lease between the contractor and WBRA under which WBRA would receive a rental of $75,000 per year. WBRA further asserts the commitments by Berks County to enact a flow control ordinance directing specific volumes of waste to the landfill and to pursue development of the recycling facility at Poplar Neck provide a substantial portion of the consideration to WBRA under the Agreement.

The petition urges WBRA has a "direct, proprietary" interest in this appeal because it is a party to the Agreement, which is part of the Plan, and

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(continued footnote)
clearly WBRA's chairman's affidavit, which does not allege any facts not contained in the petition, cures any question of facts in the petition being unverified.

because of its ownership of the Poplar Neck site identified by the Plan. WBRA's petition states that flow control to its landfill under the Agreement is designed to allow orderly closure of the landfill, while the tipping fee for this flow-controlled waste is intended to provide financial reserves to cover a substantial portion of closure and post-closure care costs. It further claims that the development of the recycling facility at Poplar Neck would provide revenue to help defray long-term costs of closure and post-closure of the landfill, and the rental fees and tipping fees derived from the recycling facility are intended to provide WBRA with resources to be used in maintaining the landfill site in a manner which "protects public health, safety and the environment in accordance with applicable DER regulations." WBRA's petition asserts WBRA's interests may not be adequately represented by Berks County and DER. It also describes five matters on which WBRA desires to present evidence if intervention is granted. These items show WBRA is seeking to intervene on the side of DER and Berks County.[2]

Intervention before the Board is governed by 25 Pa.Code §21.62. We have consistently held that intervention is discretionary and that petitioners must demonstrate a direct, immediate, and substantial interest in the outcome of the litigation. Keystone Sanitation Co., Inc. v. DER, 1989 EHB 1287. In ruling on a petition to intervene, the Board considers five factors, including: 1) the nature of the prospective intervenor's interest; 2) the adequacy of representation of that interest by other parties; 3) the nature of the issues before the Board; 4) the ability of the prospective intervenor to present relevant evidence; 5) the effect of intervention on administering the

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[2]We note that WBRA took no appeal from DER's approval of the Plan.

statute under which the proceeding is brought. City of Harrisburg v. DER, 1988 EHB 946. Additionally, intervention is not permitted where it will overly broaden the scope of the original appeal or result in a multiplicity of arguments or confusion of issues. *Id.* The burden of showing that intervention should be granted rests with the prospective intervenor. Sunny Farms, Ltd. v. DER, 1982 EHB 442.

In their responses, the parties argue WBRA's petition does not demonstrate a direct, substantial, and immediate interest because WBRA's contractual rights do not give it a cognizable interest before this Board. Citing Skotedis et al. v. DER, 1988 EHB 533, and Franklin Township Board of Supervisors v. DER, 1985 EHB 853,[3] appellants argue we have held third party contractors do not have the type of interest which warrants the granting of intervention.

In its reply to the parties' responses, WBRA responds that it is not "merely a contractor with contractual rights at stake," but, rather, it has protectible interests under the Plan and Act 101 which must be resolved as part of any disposition with respect to the Plan.

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[3]In Skotedis, a contractor who conducted a fill operation authorized by an encroachment permit issued to a borough under the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.*, sought to intervene in a third party appeal of the issuance of the permit. We denied intervention, reasoning, in part, that the contractor's contractual relationship with the borough-permittee was not relevant to the issues before the Board. We also relied upon our decision in Franklin Township, which had involved a petition to intervene brought by trash haulers in an appeal of a landfill permit denial. The trash haulers in Franklin contended, *inter alia*, that the permit denial would have an adverse economic impact on them and would impair contracts between them and the permit applicant. We denied the petition in Franklin, holding, *inter alia*, that the haulers' contractual interests vis-a-vis the permit applicant were not cognizable before the Board and that the economic impact of permit denial on the haulers was irrelevant to the issues before the Board.

Initially, we point out that the fact that WBRA intends to use the money generated by the tipping fee (provided in the Agreement for the flow-controlled waste) and the revenue from the recycling facility lease agreement to defray closure and post-closure costs for its landfill, while important to WBRA, does not create a right to intervene. WBRA operates a landfill which it was operating prior to DER's approval of the Plan, and WBRA is obliged to pay for the cost of its landfill's closure, in compliance with the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, regardless of whether the Plan stands or falls as a result of this appeal.

However, we believe WBRA does have the type of interest in having the Plan naming its landfill and DER's approval thereof upheld which would warrant intervention. The Plan, at Section 2.3, states that under the terms of the Agreement between Berks County and WBRA, the County will be obligated to direct up to 450 tons of residential and business waste to the WBRA landfill until the landfill closes (on or about January 1, 1994). Unlike the situation in Skotedis and Franklin, the contract between WBRA and Berks County is part of the Plan which DER approved. The selection process for the interim landfill capacity is challenged by this appeal, so that the Agreement may be relevant to this proceeding. Since it appears from the appendix to the notice of appeal that WBRA is currently operating a permitted landfill which is preparing for closure, its interest in having the Plan approved is not remote and speculative, as we found BFI's proposed landfill to be in ruling on BFI's petition to intervene in this matter. See Clements Waste Services, Inc. et al. v. DER and Berks County, Permittee, EHB Docket No. 91-075-E (Opinion issued April 29, 1991, Order issued May 7, 1991).

To the extent that WBRA is claiming to have an interest in this appeal because the Plan identifies a piece of real estate owned by WBRA as the site for a proposed recycling facility, however, we find that interest to be remote and speculative at present. This interest will only be affected after Berks County selects a contractor, a lease is signed with the contractor, an application for permit for operations on that site is submitted to DER, DER issues the appropriate permit for the facility to the contractor, Berks County's contractor constructs the permitted recycling facility, and the Plan is overturned by a successful appeal in this matter. DER might deny the contractor's permit application. Other unforeseen circumstances could occur rendering the recycling facility mutually undesirable. Thus, the fact that the recycling facility is only a "gleam in the eye" of Berks County shows this interest to be remote and speculative. See Clements, *supra*; Montgomery County v. DER and Berks County, Permittee, EHB Docket No. 91-053-E (Opinion issued April 12, 1990, Order issued May 7, 1991).

Further, WBRA has failed to convince us that its interest in its landfill being designated by the Plan will not be adequately represented by Berks County and DER in this appeal. The petition alleges as to WBRA's landfill that Berks County and DER have "no particular incentive to ensure that the entire contemplated flow control volumes are upheld", and, as to the recycling facility, that Berks County has "no specific interest in ensuring that the selection of a particular facility or site withstand challenge." Further, WBRA is concerned that any settlement which Berks County might enter which would involve reopening of the Plan would delay the effective date of the proposed county flow ordinance and the Agreement. WBRA's supplement adds that based upon information reported on April 3, 1991, in the Reading Eagle,

WBRA believes that representatives of Berks County and DER met to discuss "possible amendments to the Berks County Plan under which the commitments to develop a recycling facility at WBRA's Poplar Neck site would be broken, in favor of a new 'plan' involving dispersal of multiple recycling facilities in various locations around the County." The supplement claims the proposal for a new recycling plan was made by the County's representatives without notice to WBRA of the County's intent to modify the Plan or breach commitments made in the Agreement.

Both Berks County and DER have an interest in defending this appeal. WBRA's petition does not allege any basis for the assertion that these entities would not adequately defend the entire Plan. The article attached to WBRA's supplement at best might be construed as evidencing consideration by Berks County of modifying the Plan as to recycling. Since Berks County could be evaluating alternative recycling plans to adopt in the event this appeal should succeed, at this point, WBRA's assumption that Berks County will not defend the Plan because it intends to breach its agreement with WBRA is based upon conjecture. Further, WBRA's argument that Berks County might enter into a settlement of this appeal which would not be favorable to WBRA's interest does not persuade us to permit WBRA to intervene. If Berks County agrees to a settlement which results in a breach of the Agreement or a delay in its effective date, we can do nothing about that. The Board's jurisdiction is not broad enough to permit us to address claims of breach of agreement. See The Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No. 84, 35 P.S. §7511 *et seq.*; Montgomery County, *supra*. Moreover, if Berks County attempts to modify its Plan, WBRA has the right to appeal DER's approval of such a modification to this Board.

Finally, the evidence which WBRA offers to present if intervention is granted pertains to the suitability of the landfill and the Poplar Neck site to meet Berks County's needs under the Plan; to the determination by Berks County of the need for additional municipal waste management capacity, including the limitations of the WBRA landfill; to the process by which WBRA and Berks County reached the agreements; and to the relationship between the Agreement and the Plan. WBRA states that Berks County will "obviously take the lead in this appeal" and it offers no reasons why Berks County cannot present these evidentiary matters. The items offered by WBRA show no evidence which Berks County and DER would be unable to present.[4] To the extent that

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[4]We reject the suggestion made by WBRA in its Reply to Appellants' Brief in Opposition that we cannot deny its petition without a hearing. Quoting an unreported Commonwealth Court opinion, Cost Control Marketing and Management, Inc. v. Commonwealth, DER, No. 1692 C.D. 1989, WBRA states that a hearing is appropriate and necessary for intervention determinations. We emphasize that this is an unreported opinion and thus of questionable precedent value. Melandez v. Pennsylvania Assigned Claims Plan, 384 Pa. Super 48, 557 A.2d 767 (1989).

We point out that this opinion does not dispute the factual allegations in WBRA's Petition. This opinion assumes those "facts" and proceeds from them to conclude that the Petition should be denied. Accordingly, a hearing would serve no purpose. Moreover, unlike Common Pleas Courts where hearings on Petitions are mandated by the rules of civil procedure, our rules do not require same. Appeal of Municipality of Penn Hills 519 Pa. 164, 546 A.2d 50 (1988)

Finally, Cost Control involved the Commonwealth Court's review of our denial of Cost Control Marketing and Management, Inc.'s ("CCM") petition to intervene in an appeal brought by Wallenpaupack Lake Estates Property Owners Association. In Wallenpaupack Lake Estates Property Owners v. DER, 1989 EHB 446, we denied CCM's petition, stating that CCM had not demonstrated why DER could not protect CCM's interest in its defense of its disapproval of the plan revision involved in the appeal. The Commonwealth Court issued a consent order, remanding the petition to us. Its unreported Opinion stated that the petition contained adequate averments of interests of CCM and that DER could not adequately represent CCM's interest because CCM, and not DER, could provide evidence of the plans for development in the area in question. Unlike the circumstances in Cost Control, in the present petition there is a party other than DER, i.e. Berks County, which can produce the evidence proffered by (footnote continued)

WBRA believes it could be helpful in resolving this appeal, it is free to raise its legal arguments in an *amicus curiae* brief at the end of this proceeding. See City of Harrisburg, *supra*.

ORDER

AND NOW, this 17th day of May, 1991, it is ordered that the Petition to Intervene of Western Berks Refuse Authority is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 17, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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For Permittee:
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For Petitioning Intervenor:
R. Timothy Weston
Harrisburg, PA

med

(continued footnote)
WBRA in support of Berks County's Plan. Thus, we believe it is unnecessary to hold a hearing on whether to grant WBRA's petition in this matter.

COMMONWEALTH OF PENNSYLVANIA
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M. DIANE SMITH
SECRETARY TO THE BOARD

BETHAYRES RECLAMATION CORPORATION	:	**EHB Docket No. 91-008-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
LOWER MORELAND TOWNSHIP, Intervenor	:	**Issued:** May 22, 1991

OPINION AND ORDER SUR PETITION FOR SUPERSEDEAS

By Maxine Woelfling, Chairman

Synopsis

A petition for supersedeas of an order directing a demolition waste landfill operator to cease waste disposal after December 31, 1990, is denied where the operator has demonstrated little likelihood of succeeding on the merits. The operator was not re-permitted under the municipal waste management regulations, did not have an application for permit modification pending, and did not have an approved closure plan, so it was required to cease waste disposal. Because the petitioner did not demonstrate any likelihood of succeeding on the merits, it was unnecessary to consider the other elements for grant of a supersedeas.

OPINION

This matter was initiated with the January 4, 1991, filing of a notice of appeal by Bethayres Reclamation Corporation (Bethayres) seeking review of a December 24, 1990, letter to Bethayres from the Department of

Environmental Resources (Department).[1] The Department's letter directed Bethayres to cease accepting demolition waste at its landfill in Lower Moreland Township, Montgomery County, because Bethayres' closure plan was deficient, the site was not properly bonded, malodors were being emitted across the property line of the landfill, and the landfill, which is an old quarry site, is in danger of flooding in a 100-year storm event. Thereafter, on January 8, 1991, Bethayres filed a petition for supersedeas, to which the Department responded on January 11, 1991.

A hearing on the petition for supersedeas was conducted on January 11, 1991. At the outset of the hearing, Lower Moreland presented a petition to intervene and was permitted to participate in the hearing pending a final ruling on its petition; the petition was granted by order dated May 2, 1991. The parties agreed, after questioning by the Board regarding the scope of the supersedeas hearing, that the only issue was whether the Department had the authority to direct Bethayres to cease accepting demolition waste because of the absence of an approved closure plan (N.T. 10-41).

Bethayres filed its post-hearing memorandum in support of its petition for supersedeas on January 25, 1991. It contends that the Department lacked authority to direct Bethayres to cease disposing of demolition waste since Bethayres had properly filed an application for permit modification under 25 Pa.Code §§271.111 and 271.112 and could, therefore, dispose of waste up to its final permitted elevations as of December 15, 1987. Because the Department lacked authority to direct Bethayres to cease accepting and disposing of waste, Bethayres argues that it did not have to establish

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[1] This is the latest event in an on-going controversy among the Department, Bethayres, and Lower Moreland Township (Lower Moreland). A more detailed account of that controversy is set forth in Bethayres Reclamation Corporation v. DER and Lower Moreland Township, 1990 EHB 570.

irreparable harm or lack of injury to the public. In the alternative, Bethayres contends that it has satisfied all three elements for grant of a supersedeas in 25 Pa.Code §21.78. With respect to irreparable harm, Bethayres asserts that its loss of income as a result of not being able to accept waste, its costs of pumping leachate, and its deprivation of due process constitute irreparable harm.

Lower Moreland filed its memorandum of law in opposition to the petition on January 25, 1991, contending, in general, that Bethayres had failed to demonstrate it was entitled to a supersedeas pursuant to 25 Pa.Code §21.78. More particularly, Lower Moreland asserts that Bethayres is unlikely to succeed on the merits because Bethayres neither possessed a permit issued pursuant to 25 Pa.Code §271.1 *et seq.* nor had complete application for a permit modification pending before the Department, and, therefore, was required by 25 Pa.Code §271.112(b) to cease disposal as of April 9, 1990.

The Department did not file a memorandum of law in opposition to the petition, choosing instead to rely upon its response to the petition. To the extent the Department's response reflects the issue agreed upon by the parties at the hearing, it argues that the Department was mandated by its regulations to direct Bethayres to cease waste disposal.

Bethayres must, to obtain a supersedeas, show by a preponderance of the evidence that it has met the criteria set forth in §4(d) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d) and 25 Pa.Code §21.78. Where a petitioner cannot demonstrate a likelihood of success on the merits, the Board need not reach the issues of whether there will be harm to the public or the petitioner will suffer irreparable harm. Adams Sanitation Company, Inc. v. DER, EHB Docket No. 90-479-W (Opinion issued February 20, 1991). For the reasons which are set

forth below, Bethayres is unlikely to succeed on its claim that the Department lacked authority to direct Bethayres to cease waste disposal.

As was pointed out in City of Bethlehem v. DER, EHB Docket No. 90-319-MR (Opinion issued February 15, 1991), landfill operators were given two choices in the municipal waste management regulations adopted by the Environmental Quality Board on April 9, 1988: be re-permitted under the stringent new standards or cease operations in accordance with an approved closure plan, 25 Pa.Code §271.111(a). No landfill could continue in operation after April 9, 1990, unless it had received a permit under the new regulations or was awaiting Department action on an application for permit modification, 25 Pa.Code §271.112(b). If neither condition was satisfied by the landfill, it could not accept waste after April 9, 1990.

The record here is clear on whether Bethayres had a permit under the 1988 municipal waste regulations. The only permit Bethayres possessed was that issued by the Department on December 8, 1987 (N.T. 66; Ex. I-1, P-11). The record is somewhat murkier as to whether an application for permit modification was pending before the Department as of April 9, 1990. Bethayres contends that such an application was pending (N.T. 64-66), while the Department appears to characterize the submission as a closure plan (N.T. 65; Ex. P-1, P-2). The submission cannot be regarded as a permit modification application since, as Lower Moreland pointed out in its questioning of Mr. Farrington of Walter B. Satterthwaite Associates, the project manager for Bethayres Landfill, it did not propose a synthetic or composite liner (N.T.

64-65), as required by the municipal waste regulations. Given these facts, Bethayres was required by the municipal waste regulations to cease waste disposal as of April 9, 1990.[2]

Because Bethayres has little likelihood of succeeding on the merits, it is unnecessary to address the remaining elements for grant of a supersedeas.

O R D E R

AND NOW, this 22nd day of May, 1991, it is ordered that Bethayres Reclamation Corporation's petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: May 22, 1991

cc: **Bureau of Litigation**
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COHEN, SHAPIRO, POLISHER,
SHIEKMAN & COHEN
Philadelphia, PA

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[2] There is testimony in the record alluding to Department "guidance" which sets forth circumstances in which a municipal waste landfill could remain operational after April 9, 1990, in the absence of an approved closure plan (N.T. 136-137). While it is a mystery how Department guidance can supersede the mandatory provisions in a duly adopted regulation, Bethayres did not raise this guidance as an issue.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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M. DIANE SMITH
SECRETARY TO THE BOA

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	EHB Docket No. 90-313-E
ALLEGRO OIL AND GAS COMPANY	:	Issued: May 23, 1991

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

Where liability for a civil penalty has been found by the Board, based upon the Defendant's failure to answer a Complaint For Civil Penalties, so the sole remaining issue is the amount of the penalty, and the parties stipulate to the evidence supporting the penalty amount sought by DER and fail to offer any evidence rebutting same, the Board will assess the amount of the penalty sought in DER's Complaint.

Background

On July 27, 1990, the Commonwealth of Pennsylvania's Department of Environmental Resources ("DER") filed with this Board its Complaint For Civil Penalties against Allegro Oil and Gas Company ("Allegro"). The Complaint contained five counts under the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* and a sixth count filed pursuant to the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, as amended, 58

P.S. §601.101 *et seq.* It sought a total of $45,300 for violations of these statutes alleged to have occurred at Allegro's oil and gas well operations in Sharon Township, Potter County.

On August 2, 1990, DER filed with this Board a Proof Of Service of its Complaint on Allegro. On August 31, 1990, DER filed the Notice Of Praecipe For Entry Of Default Judgment required under Pa. R.C.P. 237.1 with this Board, and on November 19, 1990, we received DER's Praecipe For Entry Of Default Judgment. By an Opinion and Order dated January 7, 1991, we granted DER a judgment by default as to liability only and refused to grant it a default judgment on the penalty amount, but indicated that we would schedule a hearing on the issue of the amount of the penalty to be imposed.[1]

Thereafter, this Board scheduled March 4, 1991 as the date for the hearing as to the amount of the penalty to be assessed. Prior to that date, the Board held a conference telephone call with counsel for DER and James Lee ("Lee"), President of Allegro. Lee advised that Allegro had neither counsel nor the money to hire same. He further said that Allegro would not appear at the hearing on March 4, 1991 and that on behalf of Allegro, he stipulated to all of the assertions contained in the draft joint Pre-Hearing Stipulation prepared by counsel for DER.[2] Based upon these representations by Lee, we issued our Order of March 4, 1991, cancelling the aforesaid hearing and setting a schedule for the filing of the parties' Post-Hearing Briefs.

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1 The decision not to grant DER a default judgment as to the amount of the penalty it sought was not unanimous. See footnote 1 to that Opinion.

2 Mr. Lee also stated that Allegro was essentially defunct and was contemplating filing a bankruptcy proceeding.

DER filed its Post-Hearing Brief with us on March 25, 1991. We have received no Post-Hearing Brief or further communication of any kind from Allegro.

Based upon a full review of the record in this appeal, we make the following findings of fact.

FINDINGS OF FACT

1. Plaintiff is DER, which institutes Counts 1 through 5 of this action pursuant to Section 605 of the Clean Streams Law, 35 P.S. §691.1 *et seq.*, and Count 6 of this action pursuant to Section 506 of the Oil and Gas Act, 58 P.S. §601.506. (Paragraph 1 of DER's Complaint).

2. Defendant is Allegro, a corporation based in New York State whose mailing address is P. O. Box 1077, Jamestown, New York 14702. (Paragraph 2 of DER's Complaint).

3. Allegro has stipulated that DER may introduce all of the inspection reports, notes, memos, photographs, and water samples prepared or taken by Richard Ford and Andrew Harold, and the Bureau of Oil and Gas Management's Compliance (Policy and Procedures) Manual at Section 3.3.4. (Pre-Hearing Stipulation at Section "a", Affidavit of Steven Lachman dated February 28, 1991).

4. Allegro has stipulated to all facts stated in DER's Complaint for Civil Penalties, Praecipe for Entry of Default Judgment and the Affidavit in support of Complaint for Civil Penalties which was submitted by David English. (Pre-Hearing Stipulation at Section"e").

5. At the time of the incidents addressed in DER's Complaint, Allegro was engaged in the drilling and operation of oil and gas wells in Sharon Township, Potter County, Pennsylvania. (Paragraph 3 of DER's Complaint).

6. Allegro has operated several oil wells in Sharon Township on a site known as the Prince lease, permitted under Department Project No. HMT-1. On January 28, 1989 and before, oil from these wells was piped to and stored in a storage tank at the headwaters of a small stream known as the Wapsena Hollow. (Paragraph 4 of DER's Complaint).

7. Wapsena Hollow is an approximately one and a half mile long tributary to Honeoye Creek, which in turn is an approximately three mile long tributary to Oswayo Creek. All of these waterways are waters of the Commonwealth of Pennsylvania. (Paragraph 5 of DER's Complaint).

8. On or about January 28, 1989, Allegro's storage tank developed a leak causing oil in the storage tank to flow into the impoundment surrounding this storage tank. (Paragraph 6 of DER's Complaint, Exhibit 26).

9. On or about January 28, 1989 and continuing until June 9, 1989, the oil which leaked into the impoundment from Allegro's tank escaped from the impoundment, entered Wapsena Hollow, and flowed downstream into Honeoye Creek. Some of this oil was deposited on the banks and on vegetation surrounding Wapsena Hollow and Honeoye Creek. (Paragraph 7 of DER's Complaint).

10. The oil spill was first observed on January 28, 1989 by David Perry, a landowner downstream of the Allegro site. Mr. Perry contacted Gerald Crayton, an officer of the Pennsylvania Fish Commission, on January 30, 1989. Mr. Crayton notified the Bureau of Oil and Gas Management at its office in Meadville, at 2 p.m. on January 30, 1989. (Exhibit 26).

11. Allegro was aware of the oil spill prior to the arrival at the site of representatives of the Pennsylvania Fish Commission or the Department. (Exhibit 26).

12. The oil spill, which was first observed on January 28, 1989, created a film of oil on the surface of Wapsena Hollow and Honeoye Creek and deposited oil on the shores of those streams. (Exhibits 6b, 6g, 7a, 7b, 7d, 7e, 7f, 7g, 8b, 8c, 9a, 9b, 9c, 9d, 9e, 14, 30). As reflected in the referenced Exhibits which are photographs, the accumulations were especially heavy in the areas of the absorbent booms, designed to impede and collect the flow of oil. This oil scum was found along the entirety of Wapsena Hollow (Exhibit 16), and in low lying grassy areas where the stream had overrun its banks. (Exhibits 18, 23)

Count 1

13. Count 1 of the Complaint seeks an assessment of $20,900 for Allegro's failure to take necessary measures to prevent pollutional substances from reaching the waters of the Commonwealth on 19 days. (DER's Complaint at Count I)

14. The Department conducted inspections of the storage tank and impoundment described in Paragraphs 6 and 8 above on January 31, February 3, 7, 9, 16, 22, 24, 25, 26, 27, March 3, 6, April 10, 27, May 3, 9, 10, 30, and June 6, 1989, and found that the walls of the impoundment surrounding the storage tank were not impervious to oil and other fluids. Additionally, a two-inch open drain pipe in the low side of the impoundment created a pathway out of the impoundment. (Paragraph 12 of DER's Complaint, Exhibits 13-25, 30-32).

15. Because the impoundment at Allegro's tank was not impervious, oil which had leaked from the storage tank into the impoundment was discharged into Wapsena Hollow. (Paragraph 13 of DER's Complaint, Exhibits 15-16, 20, 22-26 and 30).

16. The oil, grease and brine from Allegro's Prince Lease operation and specifically the aforesaid tank and impoundment polluted the waters of Wapsena Hollow and Honeoye Creek. (Paragraph 19 of DER's Complaint, Exhibit 26).

Count II

17. Count II of DER's Complaint seeks a $2,700 penalty for Allegro's unpermitted discharge of oil from the storage tank and impoundment identified above into Wapsena Hollow. (DER's Complaint at Count II).

18. Allegro discharged oil from the storage tank and impoundment into Wapsena Hollow on January 28, 1989, which discharge continued until June 9, 1989, when the United States Environmental Protection Agency ("EPA") cleaned up the site. (Paragraph 20 of DER's Complaint).

19. Allegro has never obtained a permit from DER to discharge oil or any other substances into the waters of the Commonwealth. (Paragraph 19 of DER's Complaint).

Count III

20. Count III of DER's Complaint seeks a $5,700 penalty for Allegro's unpermitted discharge of oil sludges into Wapsena Hollow. (DER's Complaint at Count III).

21. On or about April 27, 1989, Allegro attempted to remove the oil remaining in the storage tank and surrounding impoundment by burning that oil at the site of the storage tank and impoundment. (Paragraph 24 of DER's Complaint, Exhibits 24-25 and 31).

22. The fire started by Allegro burned out of control, burning at least 70 acres of land. (Paragraph 25 of DER's Complaint, Exhibits 24-25 and 31).

23. Allegro's brush fire burned a wooden oil-water separator, containing an oil sludge, at a separate location on the Prince Lease. The fire melted

the oil sludge, causing the sludge to discharge into Wapsena Hollow. (Paragraph 26 of DER's Complaint, Exhibits 24, 31).

24. Allegro had not obtained a permit from DER for the discharge of oil sludge into the waters of the Commonwealth. (Paragraph 19 of DER's Complaint).

Count IV

25. Count IV of the Complaint seeks the assessment of a $2,000 civil penalty based on Allegro's failure to notify DER of a polluting incident. (DER's Complaint at Count IV).

26. Neither Allegro nor its agent ever notified DER of the discharge which originated on or about January 28, 1989 and was observed by DER on January 31, 1989, or the discharge of oil sludge which occurred on or about April 27, 1989. DER learned of the first incident from the Pennsylvania Fish Commission, which had been notified by a downstream landowner, David Perry. DER learned of the second spill from a downstream landowner. (Paragraph 30 of DER's Complaint, Exhibits 13, 26).

Count V

27. Count V of DER's Complaint seeks the assessment of a $13,000 civil penalty based on Allegro's failure to prevent spilled oil and oil sludge from reaching Wapsena Hollow and Honeoye Creek, its failure to promptly and efficiently clean up these oil and oil sludge spill sites, and its failure to promptly and efficiently clean up the oil and oil sludges in Wapsena Hollow and Honeoye Creek themselves on the downstream banks of the Wapsena Hollow and Honeoye Creek and on low lying downstream areas adjacent to both waterways. (DER's Complaint at Count V).

28. Under the direction of James Lee, Allegro's president, Allegro installed at least six booms accompanied by absorbent pads along Wapsena

Hollow on or before January 31, 1989. These booms and pads restricted the flow of oil downstream. Allegro placed oil that it collected at these boom and pad locations into two fifty-five gallon drums which were positioned alongside Wapsena Hollow. (Paragraph 35 of DER's Complaint, Exhibits 11b, 13).

29. Allegro did not empty or remove the fifty-five gallon drums. As a result, the oil and rainwater collected in the drums, overflowed, or leaked out of the drums, reentering Wapsena Hollow. (Paragraph 36 of DER's Complaint, Exhibit 11b).

30. Allegro did not regularly collect the oil backed up behind the booms and pads it had installed, and consequently this oil flowed downstream into Honeoye Creek. (Paragraph 37 of DER's Complaint, Exhibits 6b, 7a, 7f, 8c, 9e, 14-21)

31. Allegro never removed all of the oil which had drained into the impoundment and surrounding area, nor did Allegro repair the storage tank or the impoundment. Therefore, the oil continued to discharge into Wapsena Hollow and Honeoye Creek until approximately June 9, 1989, when the site was cleaned up by EPA. (Paragraph 38 of DER's Complaint, Exhibit 21).

32. Allegro did not remove ice which had accumulated behind its booms, thus allowing the ice to push oil beneath the booms, sending it downstream. (Exhibits 15, 18, 20)

33. Allegro failed to remove oil deposited along the banks of Wapsena Hollow and Honeoye Creek. (Paragraph 39 of DER's Complaint, Exhibits 15-16, 20-21, 32).

34. DER's inspectors observed Allegro's failure to remove the oil it had discharged into Wapsena Hollow and Honeoye Creek, as described in Paragraphs 35-39 of the Complaint, on February 16, 22, 24, 25, 26, 27, March 3, 6, 16,

April 10, 19, May 30, and June 6, 1989. (Paragraph 40 of DER's Complaint, Exhibits 6-9, 12-23, 25-26, 30-32).

35. The visual observation, that oil was deposited into Wapsena Hollow and Honeoye Creek, was confirmed by laboratory analysis. (Exhibit 32).

Count VI

36. Count 6 of the Complaint seeks an assessment of $1,000 for Allegro's failure to install its permit number on one of its wells. (DER's Complaint at Count VI).

37. Allegro's well No. 9 under Project No. HMT-1 did not, as of March 6, 1989, have its permit number (Permit No. 37-105-00195-00) affixed to its well head or otherwise visibly displayed on the well. (Paragraph 44 of DER's Complaint, Exhibit 6).

38. The amount of the civil penalties requested by DER against Allegro was calculated by David English, Chief of the Division of Enforcement and Administration, Bureau of Oil and Gas Management, Department of Environmental Resources, in accordance with the Policies and Procedures of DER's Bureau of Oil and Gas Management. (Exhibits 2, 35).

39. Allegro agrees that the civil penalty sought by DER in its Complaint for Civil Penalties is reasonable and in accordance with law. (Exhibit 4 and Pre-Hearing Stipulation at Paragraph (e)).

DISCUSSION

Before us, at this time, is the sole issue of whether the penalties requested by DER in its six count Complaint For Civil Penalties should be assessed against Allegro. We have previously entered a judgment by default as to liability in favor of DER in DER v. Allegro Oil and Gas Company, EHB Docket No. 90-313-E (Opinion issued January 7, 1991).

DER contends and we agree that Allegro has stipulated to the facts found above by virtue of its agreement to DER's proposed factual stipulation and its failure to offer any factual rebuttal thereto. Allegro has also abandoned any legal contentions concerning the relief sought by DER's Complaint which it might advance to defeat or mitigate DER's claims because it has failed to file any Post-Hearing Brief. Lucky Strike Coal Co., et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). Finally, DER says Allegro has stipulated that the amounts sought in DER's Complaint are reasonable and in accordance with law.

As pointed out by the February 28, 1991 Affidavit of DER's counsel, James Lee, Allegro's president, agreed to the terms of DER's proposed joint Pre-Hearing Stipulation. Paragraph (a) of the stipulation lists the documents DER proposed to introduce. Paragraph (e) thereof provides:

> The parties agree upon all facts stated in the Department's Complaint for Civil Penalties, the Department's Praecipe for Default Judgment, and to all facts and opinions stated in the Affidavit in Support of Complaint for Civil Penalties submitted by David English.

Paragraph (f) of the draft Pre-Hearing Stipulation says the legal issue on which the matter turns is whether the civil penalty sought by DER is reasonable in light of the alleged violations by Allegro of the Clean Streams Law and the Oil and Gas Act.

The burden of support for the contention that Allegro agreed to this Pre-Hearing Stipulation, since no one signed it on Allegro's behalf, does not rest solely on the affidavit of DER's counsel. Immediately prior to the merits hearing scheduled in this matter for March 4, 1991, Board member Ehmann, who was assigned this case to conduct the merits hearing thereon, held

a conference telephone conversation with Allegro's James Lee and DER's counsel in which Mr. Lee indicated that Allegro would not participate in the scheduled hearing and that Allegro did indeed concur with the terms of DER's proposed Pre-Hearing Stipulation.

As quoted above, Paragraph (e) of the proposed Pre-Hearing Stipulation says the parties agree to the facts stated in DER's Praecipe for Default Judgment. Paragraph 8 of DER's Praecipe says the amounts sought in DER's Complaint for the violation alleged therein are "just and legally proper". There can be no question that Allegro is bound as to the assertion that these penalties are just. There also can be no doubt that Allegro's agreement that the penalties are just is agreement that they are fair or reasonable, as DER urges. Moreover, a stipulation that the penalties are legally proper also removes any challenge from this direction by Allegro.

When DER filed its Praecipe for Default Judgment it not only sought a judgment by default on liability but also sought a default judgment as to the amount of the damages set forth in its Complaint. We rejected the latter portion of DER's request and refused to enter a default judgment on the penalty amount because of our duty to conduct our own assessment of the "appropriate civil penalty through the hearing procedure." Our opinion went on to say:

> To do this we must consider the evidence offered by the parties and exercise our discretion to determine the appropriate amount of such a penalty.

Our adoption of that position comported with the procedure for addressing

complaints for civil penalties which we had used in the past. See DER v. Canada PA Ltd., 1987 EHB 177; DER v. Canada PA Ltd., 1989 EHB 319; and DER v. Marileno Corporation and Cuyahoga Wrecking Corporation, 1989 EHB 206.

There is need to conduct such an analysis in this case. No legal issues are before us since Allegro filed no Post-Hearing Brief with us raising same and it agrees the penalties sought are just and legally proper. Factually, Allegro offers us no rebuttal evidence of any type. We have nothing on which we could base a disagreement with DER, no evidence showing either a lack of intent or negligence, and no evidence which mitigates the severity of what is clearly shown in DER's factual allegations and in its exhibits. In short, where the parties agree to the facts, do not dispute the applicable law, raise no legal defenses to the penalties sought, and agree the amounts are just, we have no basis on which to exercise our discretion to conclude the penalties sought should not be assessed.

Accordingly, we grant DER that which it seeks in its Complaint and enter the following order.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this complaint for civil penalties.

2. This Board has the authority to assess civil penalties under Section 605 of the Clean Streams Law, 35 P.S. §691.605, and Section 506 of the Oil and Gas Act, 58 P.S. §601.506.

3. The oil and oil sludges discharged from Allegro's operations were a polluting substance, as defined by 25 Pa.Code §101.1, and an industrial waste, as defined in Section 1 of the Clean Streams Law, 35 P.S. §691.1.

4. Allegro's discharge of oil and oil sludge to Wapsena Hollow resulted in pollution, as defined by Section 1 of the Clean Streams Law, 35 P.S. §691.1.

5. Allegro's failure to install and maintain an adequate impoundment to prevent the crude oil leaking from its tank from reaching the waters of the Commonwealth was a violation of 25 Pa.Code §101.3 and Section 611 of the Clean Streams Law, 35 P.S. §691.611.

6. Allegro's failure to operate and maintain or use a structurally sound and impermeable impoundment for the storage of the crude oil constituted a violation of 25 Pa.Code §101.4(a) and Section 611 of the Clean Streams Law, *supra*.

7. A civil penalty of $20,900 for the violations established in Conclusions of Law 5 and 6 above, and in Count I of DER's Complaint is reasonable under the Clean Streams Law.

8. Allegro's unpermitted discharge of oil into Wapsena Hollow from its leaking tank and surrounding impoundment was a violation of Sections 301, 307, 401 and 611 of the Clean Streams Law, 35 P.S. §§691.301, 691.307, 691.401 and 691.611.

9. A civil penalty of $2,700 for the violation established in Conclusion of Law 8 and in Count II of DER's Complaint is reasonable under the Clean Streams Law.

10. Allegro's unpermitted discharge of oil sludges into Wapsena Hollow was in violation of Sections 301, 307, and 401 of the Clean Streams Law, *supra*.

11. A civil penalty of $5,700 for the violation established in Conclusion of Law 10 and Count III of DER's Complaint is reasonable under the Clean Streams Law.

12. Allegro's failure to notify DER of the discharges of oil and oil sludge into Wapsena Hollow is a violation of 25 Pa.Code Section §101.2(a) and Section 611 of the Clean Streams Law.

13. A civil penalty of $2,000 for the violation established in Conclusion of Law 12 and Count IV of DER's Complaint is reasonable under the Clean Streams Law.

14. Allegro's failure to remove oil from the impoundment and adjacent areas and from Wapsena Hollow and Honeoye Creek and their banks is a violation of 25 Pa.Code §101.2(b) and Section 611 of the Clean Streams Law.

15. A civil penalty of $13,000 for the violation established in Conclusion of Law 14 and Count V of DER's Complaint is reasonable.

16. Allegro's failure to install a permit number on its well No. 9 is a violation of Section 201(h) of the Oil and Gas Act, 58 P.S. §601.201(h).

17. A civil penalty of $1,000 for the violation established in Conclusion of Law 16 above and Count VI of DER's Complaint is reasonable.

ORDER

AND NOW, this 23rd day of May, 1991, it is ordered that civil penalties are assessed against Allegro in the total amount of $45,300. Of this penalty, $44,300 is assessed for violations of the Clean Streams Law; this amount is due and payable immediately into the Clean Water Fund. The remaining $1,000 is assessed for violations of the Oil and Gas Act; this amount is due and payable immediately into the Well Plugging Restricted Revenue Account of the State Treasury. The Prothonotary of McKean County is ordered to enter the full amount of the civil penalty as a lien against any property of Allegro,

together with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 23, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Steven Lachman, Esq.
Western Region
For Appellant:
Allegro Oil and Gas Company
Jamestown, NY

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M. DIANE SMITH
SECRETARY TO THE BO

ESTATE OF CHARLES PETERS, JANE P. ALBRECHT, and LINDA P. PIPHER	:	**EHB Docket No. 90-421-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, WESLAND DEVELOPMENT, INC., Permittee, and PIKE COUNTY HOTELS CORPORATION, Intervenor:	:	**Issued:** May 24, 1991

OPINION AND ORDER SUR
MOTION TO COMPEL DISCOVERY

By Maxine Woelfling, Chairman

Synopsis

A motion to compel answers to interrogatories is denied. The Board will not compel discovery where the requested discovery is irrelevant or unduly burdensome. Portions of the motion to compel will be denied as moot where the information requested by the interrogatories has been provided.

OPINION

This matter was initiated by the Estate of Charles Peters, Jane P. Albrecht, and Linda P. Pipher (collectively, Peters) on October 10, 1990, with the filing of a notice of appeal from the Department of Environmental Resources' (Department) September 10, 1990, issuance of a National Pollutant Discharge Elimination Discharge System (NPDES) permit to Wesland Development, Inc. (Wesland) under §202 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.202 (the Clean Streams Law). Peters

contends that, by issuing the NPDES permit, the Department exceeded its authority, abused its discretion, acted in an arbitrary and capricious manner, or otherwise violated the law. Pike County Hotels Corporation (Pike County Hotels), the owner and operator of Unity House, which is jointly financing the treatment plant with Wesland, filed a petition to intervene on November 13, 1990; the Board granted the petition on December 13, 1990.

The present controversy arises out of a discovery dispute. On April 1, 1991, Peters filed a motion to compel Wesland and Pike County Hotels to respond to certain interrogatories. The motion also requested that the Board order the Department to produce copies of certain documents for Peters, to provide a copy of a computer model to Peters, and to respond to particular interrogatories. On April 11, 1991, Wesland filed a reply to the motion, as well as supplemental answers to Interrogatories 8, 9, 15, 16, 18, and 19. Pike County Hotels also filed a reply to the motion to compel on April 11, 1991.

In an order dated April 15, 1991, this Board ruled upon those aspects of the motion to compel which pertained to the Department. Here, therefore, we rule on the motion only insofar as it seeks to compel responses from Wesland and Pike County Hotels.

Discovery Requested from Wesland

Peters asserts in its motion to compel that Wesland failed to provide satisfactory responses to Interrogatories 8, 9, 11, 13, 15, 16, 18, and 19.

Interrogatories 8 and 9 pertained to communications and meetings between the Department and Wesland. Interrogatory 8 asked for a list of the communications and meetings, while Interrogatory 9 asked which persons were involved in each one. Wesland responded with a list of oral communications, but refused to identify any meetings or written communications, arguing that,

because neither "meetings" nor "communications" is defined in the interrogatories, it could not determine what information was sought by Peters.

Peters countered in its motion to compel that neither term was ambiguous and referred to the definitions of each in the American Heritage Dictionary. In its answer to the motion, Wesland stated that the definitions Peters provided in the motion sufficiently clarified the terms. Wesland filed supplemental answers to both interrogatories listing the meetings and written communications and the persons involved in each. As a result, the motion to compel is moot with regard to Interrogatories 8 and 9. See Cox v. City of Chester, 76 Pa.Cmwlth 446, 464 A.2d 613 (1983).

Interrogatory 11 asked for a list of all the "alternatives the Permittee [Wesland] considered to the capacity of the plant." Wesland objected that the phrase is so vague and broad that it failed to afford it a meaningful idea of what Peters actually requested. Nevertheless, Wesland attempted to respond, listing the studies which evaluated alternatives to the proposed treatment plant and discharge.

Peters argues, in its motion to compel, that the Social and Economic Report for the Tamiment Resort should also have been listed in response to Interrogatory 11 and attached to Wesland's answers and objections. While Wesland contends that the social and economic report was separate from the alternatives analysis--and, therefore, outside the scope of Interrogatory 11--Wesland did offer to provide Peters with the report upon request. This issue, therefore, is also moot.

Interrogatory 13 asked Wesland to identify all cost estimates for the treatment and spray irrigation systems. Wesland, however, objected that this information is irrelevant and that providing it would impose an undue burden under Rule 4011(b) of the Pennsylvania Rules of Civil Procedure.

We agree. Wesland has already provided all of its current information to Peters pertaining to the cost of the waste treatment plant. (Wesland's answer to the motion to compel, ¶ 14).[1] The spray irrigation system, meanwhile, has yet to be designed. Requiring Wesland to design the spray irrigation system merely to answer an interrogatory about the projected costs of the system would place an unreasonable burden on Wesland.

Interrogatories 15, 16, 18, and 19 pertain to plans for spray irrigation mandated in Condition No. 6 of Part C of the NPDES permit. That condition of the permit provides:

> The permittee shall utilize spray irrigation of the treated effluent to the maximum extent possible in order to minimize the amount of treated effluent that is discharged to the receiving stream.

Interrogatory 15 asked Wesland to identify the maximum usage of spray irrigation to be utilized under Condition No. 6 of the permit. Wesland, however, objected that the information sought is irrelevant and that it lacked sufficient information to answer the interrogatory.

Even assuming the information Peters requests is relevant, it would impose an undue burden on Wesland to provide it. In its initial response to the interrogatory, Wesland stated that the amount of treated effluent disposed of through spray irrigation will depend, in part, upon the results of soil studies which have yet to be conducted. Requiring Wesland to conduct the studies now, simply to generate data to respond to the Peters' interrogatory, would impose an unreasonable burden upon Wesland.

Interrogatory 16 is also unduly burdensome. That interrogatory requested the volume of the minimum discharge to the stream when using the

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[1] This information is in the Sewage Facilities Planning Module which is at Exhibit B of Wesland's answers to Peters' first set of interrogatories.

spray irrigation system consistent with Condition No. 6. Wesland objected to the interrogatory, arguing that the request was irrelevant and unduly burdensome.

As with Interrogatory 15, even assuming Interrogatory 16 is relevant, requiring Wesland to provide the information would impose an unreasonable burden upon it. The amount of effluent disposed of by discharge depends on the amount disposed of through spray irrigation, and that, in turn, depends on the results of soil studies yet to be conducted. Requiring Wesland to conduct the studies now simply to generate data to respond to the Peters' interrogatory would constitute an unreasonable burden.

Although the Board normally construes the concept of relevancy broadly during discovery, Tenth Street Building Corporation v. DER, 1987 EHB 151, Interrogatories 18 and 19 are both irrelevant. Interrogatory 18 asked Wesland to explain how it plans to use spray irrigation in the summer months and, specifically, asks whether spray irrigation or golfing would take priority on the golf course. Interrogatory 19, meanwhile, requested the size of any holding tanks or impoundments which would be used with the spraying system to mining discharges to the receiving stream.

Wesland objected that both interrogatories are irrelevant. This Board agrees. Applicants for NPDES permits with discharges to High Quality Streams, as is the case here, must, under 25 Pa.Code §95.1(d), utilize the best available combination of treatment and land disposal technologies and practices. While some aspects of the design or operation of the proposed system may be relevant to the assessment under §95.1(d) of the regulations, that provision does not open the door to all the particulars of design and operation. The provision must be read in the context of the regulatory scheme set forth in Chapters 71, 91-93, and 95 of the regulations. Under this

scheme, three water quality approvals are required before one can build a sewage facility which discharges to surface waters. The first is approval under 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 next step is an NPDES permit for sewage discharge; the permit authorizes discharges and establishes discharge limitations, monitoring requirements, and compliance schedules. See 25 Pa.Code §§92, 93, and 95. The third, finally, is a water quality management permit, which authorizes the construction and operation of the sewage facility and is based upon a review of the system's proposed operation and design. See §207 of the Clean Streams Law and 25 Pa.Code §91.1 *et seq.*

The distinction between the NPDES review process and the water quality management review process is significant here. The former is concerned primarily with the quality of the discharge. Some of the essential concepts of the design and operation of the system are involved, but review of the details of the design and operation is left for the water quality management permit review process. The information sought in the motion to compel with regard to Interrogatories 18 and 19--particulars pertaining to the operation of the spray irrigation system during the summer and the volume of any holding tanks or impoundments associated with the spray irrigation system--is simply too attenuated from the NPDES permitting process to be relevant in this appeal, even given the Board's liberal relevancy standards during discovery.

Discovery Requested from Pike County Hotels

Peters asserts in its motion to compel that Pike County Hotels did not provide satisfactory responses to Interrogatories 1, 4, and 7. Interrogatory 1 asked the reasons for the agreement to move the Tamiment plant

discharge point to its present location. Interrogatory 4 asked Pike County Hotels to list the reasons why it opposes moving the discharge location downstream. Interrogatory 7, finally, asked Pike County Hotels to identify the name and location of all the facilities involved in the transport of Pike County Hotel's sewage to Wesland's treatment facilities.

Pike County Hotels objected that the information requested in Interrogatories 1 and 4 is irrelevant. According to Peters, Interrogatories 1 and 4 are relevant because the location of the discharge affects water quality and the environment:

> The permit...authorizes a discharge at a particular location. The discharge location is directly relevant to the environmental and water quality issues raised by Appellants in this appeal. Movement of the present discharge location to a location immediately downstream from the present treatment facility or into Second Pond may significantly reduce the adverse environmental and water quality impacts on Pond run. [The Department's] consideration of this issue... is necessary to a proper consideration of [the Department's] actions.
>
> (Peters' motion to compel, ¶ 18)

Interrogatories 1 and 4, however, are not relevant. The location of the discharge was evaluated and approved during the Sewage Facilities Act planning module review and plan revision process, completed on December 13, 1989, and published in the Pennsylvania Bulletin on December 30, 1989 (19 Pa.Bull. 5533-5534). Peters did not appeal the plan approval but now seeks to contest the location of the discharge.

This Board confronted a similar situation in Bobbi L. Fuller *et al.* v. Commonwealth of Pennsylvania Department of Environmental Resources and Paradise Township Sewer Authority, 1990 EHB 1726. The appellants in Fuller contended that §5(a)(1) of the Clean Streams Law and the planning requirements

of the Sewage Facilities Act required that the Department examine alternative sites for a treatment plant when the Department reviewed the application for a permit to construct the plant. This Board held that neither the Clean Streams Law nor the regulations promulgated pursuant to the Sewage Facilities Act required an evaluation of alternative sites after the plan approval.

> Section 5(a)(1) of the Clean Streams Law requires the Department, "where applicable," to consider water quality management and pollution control in the watershed in issuing permits. Nowhere in that language is a duty to undertake evaluation of alternatives. Evaluation of alternatives is a requirement under the regulations adopted pursuant to the Sewage Facilities Act, but that requirement attaches at the planning, rather than the permitting, phase of a project, [25 Pa.Code §71.21(a)(7) and (8)] and Dwight L. Moyer et al. v. DER and Horsham Township, 1989 EHB 928. Quite simply put, this is not the planning phase of this project and it is not permissible for Appellants to challenge siting alternatives.

Our decision in Fuller controls here. Except to the extent Peters contends that the NPDES permit is inconsistent with the plan approval, Peters waived its challenges to the location of the discharge when it failed to file a timely appeal to the plan approval. We must regard Peters' motion in the light most favorable to Pike County Hotels, the non-moving party, Columbia Park Citizens Association v. DER and Altoona City Authority, 1989 EHB 899, 903, and, since Peters does not contend in its motion to compel that the NPDES permit is inconsistent with the plan approval, Interrogatories 1 and 4 are

irrelevant.[2]

Interrogatory 7 requested the name and location of all facilities involved in the transport of Pike County Hotels' sewage to Wesland's treatment facilities. According to Peters, the information requested is relevant because neither the Department nor Lehman Township considered the effect construction of the facilities would have on water quality of the receiving stream. Pike County Hotels, meanwhile, argues that the request would cause unreasonable annoyance, burden, and expense because sewage conveyance facilities have not been designed yet.

The Board agrees with Pike County Hotels. Like the treatment plant, the construction and operation of the conveyance facilities require a permit under §207 of the Clean Streams Law and that permit is not before us. As it made clear in its response to Interrogatory 7, Pike County Hotels has yet to design sewage conveyance facilities for the development. Requiring Pike County Hotels to design a conveyance system and corresponding map simply to answer Interrogatory 7 would place an unreasonable burden on Pike County Hotels under Pa.R.C.P. No. 4011(b).

---

[2] As in Fuller, we recognize that the consideration of alternatives may be compelled under the Payne test where there is a likelihood of significant environmental harm, Frances Skolnick, et al. v. DER and GPU Nuclear Corporation, 1990 EHB 607. Evaluation of alternative is not, however, required here because we have found no likelihood of significant environmental harm and because the consideration occurred under the Sewage Facilities Act and appellants did not challenge it (See Fuller, note 20).

O R D E R

AND NOW, this 24th day of May, 1991, it is ordered that Peters' motion to compel is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: May 24, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

BETHENERGY MINES, INC.	:	
	:	
v.	:	EHB Docket No. 90-050-MJ
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 28, 1991

OPINION AND ORDER
SUR MOTION FOR SANCTIONS

By Joseph N. Mack, Member

Synopsis

Where the hearing in this matter has been continued once and the discovery period extended 30 days for the purpose of allowing the Department of Environmental Resources ("DER") to conduct discovery with respect to newly identified expert witnesses and expert opinions contained in the appellant's amended pre-hearing memorandum, the discovery period will not be further extended. Moreover, the appellant will be precluded from introducing evidence or testimony as to reports and expert opinions not completed at the time depositions thereon were to have taken place during the extended discovery period.

OPINION

This matter was initiated on January 26, 1990 with the filing of an appeal by BethEnergy Mines, Inc. ("BethEnergy") seeking review of an order

issued by DER on December 27, 1989, which found that BethEnergy's underground mining activities at Cambria Mine No. 33 in Cambria County had adversely affected the watersheds of Howells Run and Roaring Run in violation of the Mine Subsidence Act, Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §1406.1 et seq., and the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. A hearing on the merits of the case was scheduled for March 18 through March 26, 1991.

On or about March 12, 1991, BethEnergy filed an amended pre-hearing memorandum which contained the names of certain fact and expert witnesses and certain expert opinions which had not been previously identified in its original pre-hearing memorandum.

On March 15, 1991, due to the limited time remaining before the scheduled start of hearing, a telephone conference was held between the presiding Board member and the parties. By oral motion, DER requested that BethEnergy be precluded from presenting any testimony from the newly identified witnesses unless DER were first given an opportunity to depose them. BethEnergy moved for a continuance, which DER did not oppose. By Order of March 15, 1991, the hearing was continued to June 3 through June 11, 1991, and the discovery period was extended for 30 days to allow DER the opportunity of conducting the following limited discovery:

> ...deposing newly identified witnesses in Appellant's Amended Pre-Hearing Memorandum filed on or about March 12, 1991, deposing previously identified witnesses with respect to expert testimony not previously made available to DER, and to provide DER with an opportunity to obtain any other information regarding matters identified for the first time in Appellant's Amended Pre-Hearing Memorandum.

In response to the March 15, 1991 Order, DER conducted a second round of depositions of expert witnesses from April 10 through April 12, 1991. This included the depositions of Donald L. Streib, who had been previously deposed by DER, and a Mr. Barone, who had been identified in BethEnergy's amended pre-hearing memorandum simply as "A representative of Michael Baker Engineers." On or about May 6, 1991 and May 17, 1991, DER filed a motion for sanctions and a supporting brief, respectively. The motion for sanctions asserts that problems encountered during the depositions of Mr. Streib and Mr. Barone prevented DER from conducting effective depositions of these expert witnesses, and requests that BethEnergy be precluded from presenting a portion of Mr. Streib's testimony and all of Mr. Barone's testimony at the hearing. BethEnergy filed a response and supporting brief on May 16, 1991, asserting inter alia, that it had agreed to make its witnesses available for further deposition in response to DER's contentions. The specific problems asserted by DER are as follows:

Mr. Streib's Deposition

Mr. Streib had been previously deposed by DER in March 1991. A second deposition was held on April 10, 1991 for the purpose of questioning Mr. Streib with respect to his conclusions derived from his review of certain stream elevation drawings and cross sections ("drawings"), which DER states Mr. Streib did not have with him at the earlier deposition. DER's motion states that at the April 10, 1991 deposition, when DER's counsel sought to question him as to the drawings, Mr. Streib said he was not able to state his conclusions at that time because he had just received a revised copy of the drawings. DER's motion also asserts that when counsel for DER attempted to question Mr. Streib regarding BethEnergy's contention that reduction in the

water table in Roaring Run was due to precipitation and groundwater movement. Mr. Streib said he was preparing a report which would cover that issue. At the time of filing its motion for sanctions, DER had not yet received a copy of the report. DER asserts that there is insufficient time remaining before hearing to depose Mr. Streib yet again concerning the aforesaid drawings, precipitation data, and waterwell loss tables, and that to allow BethEnergy to introduce this information at hearing would constitute unfair surprise. Therefore, DER asserts that BethEnergy should be precluded from introducing the aforesaid drawings into evidence and from presenting any testimony from Mr. Streib based on the drawings, precipitation data, and waterwell loss files.

BethEnergy, on the other hand, contends that Mr. Streib is not precluded from continuing to conduct his review and that DER has no authority to impose any such deadline on the preparation of BethEnergy's case. BethEnergy also states that at the end of Mr. Streib's second deposition, it agreed to make him available for a third deposition when he completed his review of certain data.

Mr. Barone's Deposition

Mr. Barone was simply identified in BethEnergy's amended pre-hearing memorandum as "A representative of Michael Baker Engineers," to be called as an expert witness in the field of hydrogeology. The summary of his testimony stated, "If called, this representative will testify concerning calculations of predicted or modelled flows in Roaring Run using recognized hydrologic methodology. Copies of such calculations will be furnished to the Department as soon as they are completed."

DER's motion states that DER understood that Mr. Barone would be testifying as to "methods for obtaining a reasonable estimate as to the ration of direct precipitation, surface water runoff and groundwater discharge contributing to the flow of water in Roaring Run." DER states that this understanding was communicated to BethEnergy's counsel via two letters prior to Mr. Barone's deposition and that this understanding was not contradicted. However, DER's motion asserts, when counsel for DER arrived at the deposition of Mr. Barone on April 12, 1991, he learned that Mr. Barone would, instead, be providing expert opinions on whether a report prepared by DER (1) achieved its objectives, (2) was adequately supported by scientific evidence, and (3) whether it was a proper multidisciplinary study. DER's counsel also learned at that time that Mr. Barone was working on an expert report which was not yet finalized and which DER had not yet received at the time of filing its motion. DER asserts that its counsel was not able to effectively question Mr. Barone on these matters due to the lack of prior notice, and was forced to suspend its deposition of Mr. Barone on April 12, 1991. As a result, DER requests that BethEnergy be precluded from introducing any of Mr. Barone's testimony as well as the report he is preparing. To this, BethEnergy responds that DER had ample opportunity to discover the substance of Mr. Barone's opinions and the basis thereof at the April 12 depostition, and that any prejudice which may result to DER was caused by its own failure to proceed with the deposition as scheduled.

* * *

We note initially that our March 15, 1991 Order continuing the hearing in this matter and extending the discovery period was for the limited purpose of allowing DER to depose new witnesses listed in BethEnergy's amended

pre-hearing memorandum or to depose previously identified witnesses as to new expert opinions contained in the pre-hearing memorandum. It was not for the purpose of allowing the parties to develop yet additional expert theories, opinions, reports, and studies to generate even further requests for extended discovery. Therefore, BethEnergy is incorrect in making the assertion that it was entitled to continue developing new evidence and new expert opinions up to the date of hearing.

Nor is the situation rectified by BethEnergy's offer to allow DER to depose the witnesses again as to the newly developed material. With the hearing scheduled to begin in approximately one week, there is insufficient time for further depositions to take place. Furthermore, Mr. Streib has already been deposed twice, and based on performance of the parties thus far, it seems more likely that a third deposition, rather than clarifying matters, will simply open up new questions generating renewed requests for additional discovery. As stated in City of Harrisburg v. DER, EHB Docket No. 88-120-F (Opinion & Order Sur Pending Motions Regarding Discovery, January 30, 1991), "...a party can always think of more information that it would like to have regarding the opposition's case. And yet, discovery must end at some point if a hearing is to be held." Id. at p. 3.

In this case, a hearing was originally scheduled for March 18 through March 26, 1991. BethEnergy should have been ready to proceed with its case at that time. The extension to June 3, 1991 was granted not for the purpose of providing BethEnergy with more time to develop its case, but solely to provide DER with an opportunity for discovery of new information introduced by BethEnergy six days before the hearing was to begin. Thus, the following order is entered:

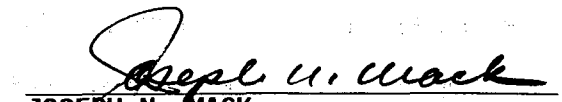
O R D E R

AND NOW, this 28th day of May, 1991, DER's Motion for Sanctions is granted in part, and BethEnergy's presentation of testimony and evidence at the hearing on the merits of this case is limited as follows:

1. BethEnergy is precluded from introducing any drawings, reports, studies, or other documents which were not made available to DER prior to the April 10 and 12, 1991 depositions of Mr.Streib and Mr. Barone, nor shall Mr. Streib and Mr. Barone be permitted to present testimony based on any such documents.

2. Mr. Barone is precluded from testifying as to any matter other than the summary of testimony provided in BethEnergy's amended pre-hearing memorandum and only insofar as the data relied upon by him was made available to DER as of the April 12, 1991 deposition.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 28, 1991

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Central Region
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M. DIANE SMITH
SECRETARY TO THE BOARD

S. A. KELE ASSOCIATES	:	
	:	
v.	:	**EHB Docket No. 90-223-F**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and RICHLAND TOWNSHIP, Intervenor	:	**Issued: May 28, 1991**

OPINION AND ORDER SUR MOTION TO DISMISS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss filed by the Department of Environmental Resources (DER) is granted. Failure of DER to act upon a private request to revise an official sewage facilities plan under the Sewage Facilities Act does not constitute deemed approval of the request. DER's failure to act is not an action reviewable by this Board.

OPINION

This proceeding involves an appeal by S. A. Kele Associates (Kele) from DER's inaction on Kele's private request, dated October 4, 1989, for revision of the official sewage facilities plan of Richland Township, Bucks County. Kele, a developer owning land in Richland Township, sent the private request to DER pursuant to 25 Pa.Code §71.14 and the Sewage Facilities Act (SFA), the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750 *et seq.* On December 28, 1989, Richland Township submitted to DER written comments to the request pursuant to 25 Pa.Code §71.14(d). To date, DER has

not acted upon Kele's request. In its Notice of Appeal, Kele asserts that DER's failure to act on a private request within 120 days results in deemed approval of the request, according to 25 Pa.Code §71.14(f). On that basis, Kele requests the Board to issue an order approving the request.

This Opinion and Order addresses DER's motion to dismiss, filed on September 10, 1990. DER argues that its failure to act on Kele's request within 120 days does not result in deemed approval under the language of 25 Pa.Code §71.14(f). There being no deemed approval, DER concludes, Kele's appeal amounts to one of inaction by DER, which is not an appealable action before this Board.

Kele responded to the motion to dismiss, stating that, because the issues of this case are analogous to issues addressed by Section 508 of the Municipalities Planning Code (MPC)[1], 53 P.S. §10508, DER's failure to act on the private request within 120 days as required by 25 Pa.Code §71.14(f) should be deemed an approval[2] of the request. Kele cites, as well, EHB decisions which have found DER inaction regarding sewage facilities plans to be deemed approval of those plans. See Eyrich v. DER & Oley Township, EHB Docket No. 88-013-R, Slip Op. (February 16, 1990); Eyrich & Snyder v. DER, EHB Docket No. 88-015-E, Slip Op. (May 14, 1990). Finally, Kele urges that the drafters of §71.14 could not have logically intended to exclude a provision for deemed approval, when the Environmental Quality Board afforded this remedy under 25 Pa.Code §71.32 for DER's failure to act upon an official plan revision

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[1] As reenacted December 21, 1988, P.L. 1329, No. 170, 53 P.S. §10101 et seq.

[2] Section 508 of the MPC, 53 P.S. §10508, deals with approval of plats by a governing body. Section 508(3) states that the failure of a governing body to communicate a decision to the applicant within the allotted time "shall be deemed an approval of the application in terms as presented ...."

submitted by a municipality.

We find that the language of 25 Pa.Code 71.14(f) does not afford deemed approval of a private request if DER fails to act on this request within 120 days of receiving comments by the municipality. Section 71.14(f) states:

> (f) The Department will render its decision, and inform the person requesting the revision and the appropriate municipality, in writing, within 120 days after either receipt of the comments required by subsection (d) or the expiration of the 60-day comment period when no comments have been received. If the Department refuses to order a revision requested under subsection (a), it will notify the person, in writing, of the reasons for the refusal.

Contrasting this language to the language of MPC §508, 53 P.S.§10508, and 25 Pa.Code §71.32, both of which specifically provide for deemed approval upon failure of the approving authority to act, the question becomes: is such specific language necessary to afford the remedy of deemed approval? The Commonwealth Court has so ruled. In D'Amico v. Board of Supervisors, Township of Alsace, 106 Pa. Commw. 411, 526 A.2d 479 (1987), the Court held that where a township sewage enforcement officer failed to act on an application for an individual sewage disposal system permit within the required time period, deemed approval of the application was not warranted in the absence of a specific deemed approval provision in the Sewage Facilities Act.[3] In considering that the MPC had made provisions for deemed approval of applications in certain instances, the court stated:

> We have previously recognized, however, that in order for a deemed approval to occur "there must

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[3] Section 7(b)(2) of the Sewage Facilities Act, 35 P.S. §750.7(b)(2), provides, with certain exceptions, that such permits shall be issued or denied within seven days of receipt of the application.

> be an express legislative declaration of deemed approval in the statutory ... provision in order to have such a substantive result produced by procedural tardiness." [Citations omitted.] Since the Act does not include a deemed approval provision, this Court cannot supply such a provision through statutory construction.

D'Amico, 526 A.2d at 480. Neither 25 Pa.Code §71.14 nor its enabling statute, 35 P.S. §750.5(b), expressly provide for deemed approval. Therefore, under D'Amico, DER's failure to act within the prescribed period of time does not lead to a conclusion that Kele's request is deemed approved.

Our conclusion that Kele's request is not deemed approved also requires us to find that we lack jurisdiction over this appeal. DER's failure to act upon Kele's request does not constitute a DER "action" which may be appealed to the Board. Westinghouse Electric Corp. v. DER, EHB Docket No. 89-058-F, Slip Op. (May 4, 1990); Marinari v. Commonwealth, DER, 129 Pa. Commw. 569, 566 A.2d 385 (1989). Therefore, we will grant DER's motion to dismiss.[4]

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[4] Our dismissal of this appeal should not be construed as condoning DER's inaction. However, the remedy for such inaction lies in the equity powers of Commonwealth Court. See, Marinari, supra.

ORDER

AND NOW, this 28th day of May, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of S. A. Kele Associates is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 28, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOA

NEW HANOVER CORPORATION	:	**EHB Docket No. 90-294-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** May 29, 1991

OPINION AND ORDER SUR
PETITION TO INTERVENE

By Maxine Woelfling, Chairman

Synopsis

A petition to intervene is denied where the prospective intervenor fails to demonstrate that it has a direct, substantial, and immediate interest in the subject matter of the appeal. Since the permit application which is the subject of the appeal was disapproved as a result of the denial of a related solid waste permit application, the issue before the Board is a narrow, legal issue. Petitioner's interest will be adequately protected by the Department of Environmental Resources (Department).

OPINION

This matter was initiated with the July 19, 1990, filing of a notice of appeal by New Hanover Corporation (Corporation) challenging the Department's June 29, 1990, denial of an application for a permit under the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.* (DSEA), to place and maintain fill in wetlands and to encroach upon wetlands through the construction of a leachate pipeline

and haul road. The Department denied the permit application because the Corporation's application for re-permitting its landfill in New Hanover Township, Montgomery County, under the municipal waste management regulations had been denied by the Bureau of Waste Management, and, therefore, the Corporation could not demonstrate a need to encroach upon the wetlands.[1] The Corporation alleges that the Department's action was arbitrary, capricious, and taken in bad faith; was a violation of its constitutional rights of due process and equal protection; and made it impossible to obtain the necessary approvals to construct the landfill. Finally, the Corporation maintains that its application demonstrated a need to encroach upon wetlands and complied with all relevant laws and regulations.

On February 25, 1991, New Hanover Township (Township) filed a petition for leave to intervene, contending that its involvement in other related appeals, specifically Docket No. 90-115-W, warrants its intervention here. The Township argues it has an interest in this matter, since the proposed landfill will affect the safety, health, and welfare of its citizens and that this interest is not adequately represented by the Department, since the Township has distinct knowledge of local conditions and because the Township is the Department's adversary in the related appeal at Docket No. 88-119-W. The Township proposes to present expert testimony from several named witnesses, but it gives no detail regarding the substance of this

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[1] The Department's denial letter also recited its permit coordination requirements, as well as its obligations under Article I, §27 of the Pennsylvania Constitution. However, the stated reason for denial was that because of the solid waste permit denial, the Corporation could not demonstrate a need to encroach on the wetlands.

testimony. Finally, the Township asserts that it may lose rights and be prejudiced in the related appeals in which it is involved if intervention is not granted here.

The Department filed no response to the Township's petition. The Corporation opposed the Township's petition in its March 7, 1991, answer, arguing that the Township has failed to establish a direct, immediate, and substantial interest or to establish that its interests are not adequately represented by the Department, concluding that the Township's involvement would only broaden and confuse this appeal.

On March 18, 1991, the Township filed its reply to what it considered new matter in the Corporation's answer, along with a memorandum of law in support of its petition to intervene.[2]

As we have stated on numerous occasions, intervention in a matter pending before the Board is within the discretion of the Board. The prospective intervenor has the burden of demonstrating that it has a relevant interest that cannot be adequately represented by the existing parties and that it will be able to present relevant evidence to the Board. Intervention will not be allowed by the Board where it will expand the scope of an appeal or impede the Board's deliberations. See 25 Pa.Code §21.62 and New Hanover Corporation v. DER, EHB Docket No. 90-558-W (Opinion issued May 14, 1991). For the reasons which follow, the Township's petition is denied.

The Township contends that its interest in this matter arises from the fact that the proposed landfill will affect the safety, health, welfare, and property of its citizens. It also argues that intervention is warranted because of its involvement in other appeals relating to the Corporation's

---

[2] These submissions were little more than a reiteration of the Township's earlier arguments.

landfill. A prospective intervenor's interest in a proceeding must be assessed in the context of the subject of the proceeding. New Hanover Corporation, *supra*. The issue before the Board in this appeal is a very narrow issue-whether the Department abused its discretion in denying the Corporation's DSEA permit application as a result of its denial of the Corporation's re-permitting application under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* This is a legal issue which can be decided by the Board without resort to any scientific or technical evidence.

The Township has also failed to establish how its interests will not be adequately represented by the Department. The Township asserts that the Department does not propose to introduce scientific or technical evidence regarding wetlands. But, as was explained earlier, such evidence is not germane, for this appeal involves purely legal questions of interpretation of the DSEA and the rules and regulations adopted thereunder.[3] To the extent that the Township has a distinct interest in the administration of the DSEA and the applicable regulations, the Department is best able to protect that interest.

The Township alleges that the outcome in this appeal may affect its interests in the other appeals concerning the Corporation's landfill which are pending before the Board. While the Township cited several of these other appeals, it did not explain the link between them and the instant appeal,

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[3] The Corporation asserted in its notice of appeal that the proposed obstructions otherwise satisfied the criterion of need to encroach upon wetlands. The Department's denial letter addressed this question only from the standpoint that the solid waste permit denial was conclusive that there was no need for the wetlands encroachment. If the Board were to rule in the Corporation's favor on the legal issue here, the matter would be remanded to the Department for consideration of whether need was established under 25 Pa.Code §105.14(b)(7).

except by asserting they overlap.[4] The Board is not responsible for making the Township's case here. And, as we have noted in New Hanover Corporation, *supra*, the fact that a prospective litigant is involved in multiple appeals relating to a facility, some of which place it in a position adversarial to the Department, does not, in and of itself, establish that its interest will not be adequately represented in one of those appeals where it is not adverse to the Department.

Finally, the Township's description of the relevant evidence it intends to produce consists of a list of expert and non-expert witnesses with no detail regarding the substance of their testimony. Without knowing the substance of this testimony, we are unable to determine its import and whether or not it would aid us in resolving this matter. Accordingly, the Township has failed to satisfy its burden on this criterion.

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[4] The Township's appeal at Docket No. 90-115-W, which challenged the Department's authorization to the Corporation to use general permits in an area the Township claimed contained important wetlands, was one of the related appeals cited by the Township as establishing its interest in this appeal. However, the Township withdrew that appeal on March 28, 1991.

O R D E R

AND NOW, this 29th day of May, 1991, it is ordered that New Hanover Township's petition to intervene is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: May 29, 1991

cc: **Bureau of Litigation**
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Southeastern Region
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M. DIANE SMITH
SECRETARY TO THE BOARD

JOSEPH KACZOR :
:
v. : EHB Docket No. 91-191-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: May 30, 1991

OPINION AND ORDER SUR JOSEPH KACZOR'S PETITION FOR SUPERSEDEAS

By: Richard S. Ehmann, Member

Synopsis

A petition for supersedeas of an administrative order of the Department of Environmental Resources ("DER"), revoking the mining foreman and assistant mine foreman certificates of Joseph Kaczor, is granted where DER failed to follow the statutorily prescribed decertification procedure for doing so.

OPINION

On May 7, 1991, Thomas J. Ward, Jr., in his capacity as Director of DER's Bureau of Deep Mine Safety, issued an administrative order to Joseph Kaczor ("Kaczor"), which purported to immediately revoke Mine Official Certificates of Qualification Nos. 1290 and 4427.

Certificate 1290 is Kaczor's certification as a Mine Foreman and Certificate 4427 is his certification as an Assistant Mine Foreman. DER's order directs Kaczor to return these certificates to DER and provides that it may be appealed to this Board.

On May 10, 1991, Kaczor appealed and simultaneously filed a Petition for Supersedeas of DER's Order. On May 20, 1991, DER filed its Objections To Petition For Supersedeas responding to Kaczor's Petition and we received Kaczor's Brief supporting his petition on May 22, 1991. A hearing on the issues raised by this Petition and DER's Objections was held on May 23, 1991, at which time the parties stipulated to certain facts and offered us additional evidence. At the close of the hearing counsel for each party agreed that no further briefs or memoranda of law were required to set forth their respective legal contentions. Later that day we issued our order granting supersedeas and indicating this Opinion would follow.

In ruling on a Petition For Supersedeas, 25 Pa. Code §21.78(a) mandates that we consider three factors which are:

> (1) Irreparable harm to the petitioner.
> (2) The likelihood petitioner will prevail on the merits;
> (3) The likelihood of injury to the public if the petition is granted.

Additionally, Section 21.78(b) requires us to deny supersedeas if pollution or injury to public health exists or is threatened during the supersedeas period. In ruling on such petitions, we also must keep in mind that Kaczor is the petitioner and bears the burden of proof. Globe Disposal Company et al. v. DER, 1986 EHB 891; Elmer R. Baumgardner et al. v. DER, 1988 EHB 786. While Kaczor has the burden of proof, there is a balancing test which must be conducted by this Board in regard to the three enumerated factors. Pennsylvania Fish Commission et al. v. DER, 1989 EHB 619.

In conducting the balancing test referenced above, we must remain aware that if DER lacked authority to issue this Order, supersedeas is appropriate. NY-TREX, Inc. v. DER, 1980 EHB 355. Irreparable harm or lack of injury to the public need not be shown by Kaczor when DER has no authority

to act as it did. WABO Coal Company v. DER, 1986 EHB 71; Lower Providence Township v. DER et al., 1986 EHB 395; Sysak v. DER, 1989 EHB 126.

Kaczor's Brief urges application of these cases here, contending there and in his Petition that DER lacks authority to act to take away Kaczor's certification in the manner utilized by DER, i.e., issuance of an Administrative Order. Kaczor contends that for DER to revoke these certifications, it must first proceed through a decertification hearing before this Board initiated by a written complaint filed by DER.

Certificates of Qualification of Mine Foreman and Assistant Foreman are issued pursuant to Sections 202 through 205 of the Act of November 10, 1965, P.L._____, No. 346, 52 P.S. §§70-202 through 70-205. The Act of June 3, 1943, P.L. 848, 52 P.S. §11 *et seq.* ("Decertification Act of 1943") provides the procedure through which such certificates may be revoked or suspended by DER. Specifically, Section 2 of the Act provides in relevant part:

> ... the Secretary of Mines... may, after written notice to such official, setting forth said complaint, a hearing thereon and appropriate findings as hereinafter provided, suspend for a period of not more than one year, or revoke absolutely, the certificate of such mine foreman, assistant mine foreman or fire boss. The Secretary of Mines, upon receiving any such complaint, shall have the power, if he deems such action advisable, forthwith to suspend the certificate of such official temporarily until such hearing and determination of the charges have been completed.

Section 3 of the Decertification Act of 1943 says that at the hearing, the certificate holder may be represented by counsel to present evidence and examine witnesses, and all testimony at such hearing shall be under oath and be reduced to writing by a competent person designated by the Secretary of Mines.

Passage of the Act of December 3, 1970, P.L. 834, No. 275 ("Act 275") by the legislature caused the creation of DER and this Board. Section 20 of this Act (71 P.S. §510-4) amended the Administrative Code of 1929 to set forth the power and duties of DER. Section 1901-A(2) of Act 275 (71 P.S. 510-1) directed that DER continue to exercise the powers and perform the duties formerly vested in the Department of Mines and Mineral Industries and the Secretary of Mines and Mineral Industries. As to mines, DER's powers are detailed in Section 1915-A of this act (71 P.S. §510-15), but this section does not empower DER to hold the decertification hearings specified in Section 2 of the Decertification Act of 1943, *supra*. Under Section 1915-A, DER is granted the power to see the mining laws are faithfully executed, but the power to hold hearings was transferred to the Environmental Hearing Board pursuant to Section 1921-A (71 P.S. §510-21) rather than to DER. Section 1921-A specifically provided that the Environmental Hearing Board was to:

> 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.

In turn, this power to hold hearings was passed to this Board in Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No.94, 35 P.S. §7514.[1]

It should be observed that as to this Board's ability to hold the hearings formerly held by the Secretary of Mines, DER does not disagree with Kaczor. DER's position concedes this point. DER argues that since the powers of Department of Mines and Mineral Industries were transferred to DER, it "has

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[1]Section 8 of the Environmental Hearing Board Act repealed Section 1921-A, 71 P.S. §510-21.

the authority and responsibility to ensure that only competent persons are employed in a mine as a foreman, assistant foreman, or fire boss" and it is essential in this role for DER to have the ability to revoke or suspend certificates of persons in these positions "who fail to carry out [their] duties." DER then argues it has "the authority to issue decertification orders un [sic] the Certification Act." Without citation to authority to where in the Decertification Act of 1943 or Act 275 this authority is found, DER turns to Section 4(c) of the Environmental Hearing Board Act and quotes that portion of the section which provides:

> The department may take action initially without regard to 2 Pa. C.S. Ch. 5 Subch. A, but no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board ... .

DER contends this language shows the General Assembly's intent to empower DER to issue decertification orders under the Decertification Act of 1943 as long as persons like Kaczor may appeal from DER's issuance of such orders to this Board.

DER's argument is seriously flawed. There is no language in the Decertification Act of 1943, Act 275 including Section 1915-A, or the Environmental Hearing Board Act, *supra*, empowering DER to issue such orders. To even try to read these acts to say such an authorization is present by implication is in error because this implication flies directly into the face of statutes containing a clear specific methodology for decertification other than that implied by DER. As quoted above, Section 2 of the Decertification Act of 1943 provides DER the right to revoke a certificate <u>after</u> hearing before this Board, and, in addition, in the appropriate circumstance, DER may

suspend the certificate of a foreman, assistant foreman, or fire boss prior to a hearing before this Board. For DER's argument to prevail thus requires not only our finding that a power to issue orders to decertify prior to hearing exists where none is explicitly stated by the Legislature, but, in addition, our finding either the General Assembly implicitly deleted the quoted language from Section 2 of the Decertification Act of 1943 or stacked this implied authority for DER decertification orders on top of the already existing powers to revoke or suspend certificates found in the Decertification Act of 1943. Such a statutory interpretation just makes no sense. Moreover, DER's construction of these statutes requires us to interpret them contrary to 1 Pa. C.S. §1921(a) in that in using this interpretation, we do not give effect to Section 2 of the Decertification Act of 1943 and 1 Pa. C.S. §1922(1) insofar as the result is unreasonable and absurd.

Kaczor's counsel also argues that 1 Pa. C.S. §1504 and various case law decisions by the appellate courts require us to find that DER is crafting a new remedy for itself when it is required to follow the exclusive statutory revocation and suspension remedy laid out in Section 2 of the Decertification Act of 1943. While DER's argument of a right to issue orders to revoke certifications is an attempt to create a new remedy where none existed before, the exclusive statutory remedy argument raised by Kaczor is not on point. 1 Pa. C.S. §1504 and the cases cited by Kaczor deal with actions in equity or assumpsit--common law actions attempted by a party instead of following the party's statutory remedy. For example, Interstate Traveller Services, Inc. v. Commonwealth, DER, 486 Pa. 536, 406 A.2d 1020 (1979), deals with a party's attack on a course of action taken by DER through an equity action, as opposed to filing an appeal to this Board. In that situation, the court held the suit

in equity did not lie because the statutory remedy must be exclusively pursued. Here, however, DER's theory directs Kaczor to us rather than to a new judicial forum, albeit DER is trying to create a new way to use this Board in these types of situations. Thus DER is arguing that under its interpretation of these statutes, there is another statutory remedy for it to use beyond that found in Sections 2 and 3 of the Decertification Act of 1943. Accordingly, Kaczor's exclusive statutory remedy argument is inapplicable here and this matter stands or falls on the interpretation of these statutes.

Returning to DER's Objections, which address neither the preceding argument raised by Kaczor nor the Ny-Trex, Inc. line of cases cited in Kaczor's brief, we must note the cases cited by DER do not address the issue before us, either. Pennsylvania Ind. Petrol. Producers v. Comm., DER, 106 Pa. Cmwlth. 72, 525 A.2d 829 (1987), deals with a petition for declaratory relief which sought, via a Motion for Summary Judgment, a finding that bond forfeiture proceedings authorized in that act were unconstitutional. In denying that motion, the Court held appeal to this Board after forfeiture adequately protected the movant's due process rights. Of course, the statutes at issue here were not before the court in that proceeding. There, Commonwealth Court was not faced with a statute explicitly requiring that a hearing precedes DER's action nor was it faced with an attempt to create authority to issue decertification orders. This case simply is not on point.

William V. Milesky v. DER, 1981 EHB 344, was a proceeding commenced before this Board by written Complaint filed by DER (1981 EHB at 352). It was a proceeding initiated by DER to secure the revocation of William V. Milesky's certificates. We sustained DER's action after a hearing and held it could revoke his certification. This case is on point, but not for the reason cited

by DER. DER is correct that in saying DER may revoke a certification since Kaczor does not contend DER lacks authority to decertify in appropriate circumstances. However, this case is important for a reason not cited by DER. The case shows DER knows and in the recent past followed the decertification procedure spelled out in Section 2 of the Decertification Act of 1943. Milesky shows DER may revoke certifications by complaint filed with this Board and after a hearing before this Board in which it produces the evidence demonstrating the appropriateness thereof. In accordance with this procedure's use for decertification, see DER v. Wilbur Guile et al., 1984 EHB 947; DER v. Wilbur Guile et al., 1988 EHB 1157; and DER v. Allen E. Hager, Jr., 1985 EHB 456. Importantly, these are not the only cases in which DER has used the procedure spelled out in the aforementioned Section 2 to decertify mine foreman and assistant foreman; rather these cases represent only those cases which reached the point where this Board was asked to render a written opinion thereon. As pointed out by Kaczor, there have been many other cases before this Board utilizing this procedure. Those cases were resolved without a written opinion from this Board. Collectively, the reported and unreported cases show that DER is historically well aware of the procedure set forth in Sections 2 and 3 of Decertification Act of 1943 and utilized same without exception, the instant appeal being the first case before this Board in which DER has asserted it may issue these administrative revocation orders.

DER also cites us to Cerjanec v. DER, 1973 EHB 283. There, DER again used the procedure in the Decertification Act of 1943, although it used the temporary suspension procedure outlined in the last sentence of Section 2, i.e., it temporarily suspended George Cerjanec's certification as a mine foreman. In the hearing on the suspension, this Board held a temporary

suspension of a certification in September was not justified under this Section where it occurred over two months after the date of the violation (in July), where the violation had been remedied, and where the mine inspector had in the interim authorized the reopening of the section of the mine previously closed because of the alleged violations. At no time were the issues raised in the instant proceeding raised or addressed by the Board in its Cerjanec adjudication.[2]

Lastly, DER cites us to an informal Attorney General's Opinion attached as Appendix A to its Objections. This opinion, dated April 23, 1980, from Attorney General Edward G. Biester, Jr., does not address the issues before us. After recognizing the decertification procedure in the Decertification Act of 1943 and its application to foremen, assistant foremen, and mine examiners, this opinion says DER has the implied power to decertify other persons it certifies to work in mines such as miners and mining machine operators. Attorney General Biester thus did not address the issue before us in this appeal.

In reaching the conclusions as to hearings outlined above, we have not passed on the merits of Kaczor's conduct and whether revocation after hearing is appropriate in regard thereto. We do not do so now because we need not reach this issue.

At the hearing on Kaczor's Petition for Supersedeas, the evidence established no hearing of the type envisioned in Sections 2 and 3 of the Decertification Act of 1943 had been held prior to issuance of DER's Order.

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[2]Of interest, however, is the discussion there suggesting that the Secretary of DER had to hold the hearings mentioned for a Section 2 temporary suspension and hold them within thirty days of the incident's occurrence with an appeal to this Board thereafter.

DER's employees and Kaczor all testified that there was an informal hearing at DER's Uniontown office. Kaczor had no prior written complaint from DER and DER denied his counsel's request at that informal hearing for a copy of its inspector's report because it was still in the midst of its investigation. No court reporter was at that informal hearing and there was no transcription of the testimony given as specified in Section 3 of the Decertification Act of 1943. Moreover, Kaczor's counsel was denied permission to tape record that hearing. Finally, none of the "testimony" at the informal hearing was given under oath. Clearly, if DER were to seriously argue that its informal hearing was the Section 2 hearing, DER failed to adhere to the mandates for those hearings set forth in Section 2 and Section 3, so such a hearing would violate Kaczor's due process rights if it was to form the basis for DER's subsequent Order.

Finally, turning back to the cases on supersedeas cited by Kaczor's counsel and applying them here, we are compelled to find DER's issuance of this Order revoking Kaczor's certificates prior to hearings before this Board to have been statutorily unauthorized and thus unlawful. As a Board, we are thus compelled to supersede DER's action without regard to fact and case specific issues such as irreparable harm to Kaczor or review of whether granting supersedeas would injure the public. Clearly, such issues do not arise for our review until after the threshold issue of DER's authority to act has been evaluated and authority is found to exist.[3]

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[3]Upon a hearing on the merits of this appeal, we will have to address this same issue again and also the question of whether DER's Order, coupled with that merits hearing, can meet the requirements of Sections 2 and 3 of the Decertification Act of 1943. We make no ruling on whether or not this is so in this Opinion and Order.

Accordingly, we enter the following Order.

ORDER

AND NOW, this 30th day of May, 1991, our order of May 23, 1991, granting the Petition For Supersedeas is affirmed for the reasons set forth in the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 30, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

LAWRENCE W. HARTPENCE AND IMOGENE KNOLL, t/b/a HYDRO-CLEAN, INC. AND TRI-CYCLE, INC.	:	
v.	:	**EHB Docket No. 90-028-MR**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 31, 1991**

OPINION AND ORDER SUR DEPARTMENT'S REQUEST FOR RECONSIDERATION OR, IN THE ALTERNATIVE, MOTION TO AMEND ORDER TO CERTIFY QUESTIONS FOR INTERLOCUTORY APPEAL

Robert D. Myers, Member

Synopsis

A request for reconsideration of an interlocutory order permitting discovery of documents alleged to be confidential communications from client to attorney is denied in the absence of exceptional circumstances. A motion to amend the order to certify the issue for interlocutory appeal also is denied because it does not present a controlling question and will not advance the ultimate outcome of the case.

OPINION

In an April 17, 1991 Opinion and Order sur Motion to Compel Production of Documents, we ruled that documents involved in making civil penalty assessments are not confidential communications from client to attorney since the legal counsel for the Department of Environmental Resources (DER) is part of the adjudicatory decision-making process. On April 29, 1991

DER filed a Request for Reconsideration or, in the alternative, Motion to Amend Order to Certify Questions for Interlocutory Appeal. By this filing, DER seeks either a reconsideration of our ruling or a certification of the question for interlocutory appeal to Commonwealth Court. Appellants have filed no response.

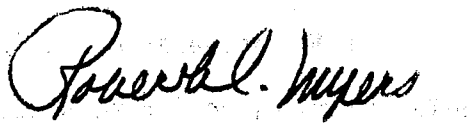
Reconsideration, which is governed by 25 Pa. Code §21.122, is granted only for two specific reasons, neither of which is applicable here. Moreover, it is granted with respect to interlocutory orders (such as the one involved here) only when "exceptional circumstances" are shown to exist: Elmer R. Baumgardner et al. v. DER, 1989 EHB 400. While DER clearly disagrees with our ruling and predicts dire consequences if it is allowed to stand, we find no exceptional circumstances to motivate us.

Nor are we willing to amend the order to certify the question for interlocutory appeal. As desirable as appellate review might be for DER on this aspect of the attorney-client privilege, we cannot truthfully state (as required by 42 Pa. C.S.A. §702(b)) that the issue represents a "controlling question" or that an appeal would "materially advance the ultimate termination" of the case.

ORDER

AND NOW, this 31st day of May, 1991, it is ordered that DER's Request and Motion both are denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: May 31, 1991

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M. DIANE SMITH
SECRETARY TO THE BO

MODERN TRASH REMOVAL OF YORK, INC.	:	**EHB Docket No. 90-250-W**
	:	**(Consolidated Docket)**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 3, 1991**

OPINION AND ORDER SUR
CROSS-MOTIONS FOR SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

A motion for summary judgment is denied, but a cross-motion for summary judgment is granted in part and denied in part. The fees imposed by §§701(a), 1180(c), and 1301(e) of the Municipal Waste Planning, Recycling, and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. §§4000.701(a), 1108(c), and 1301(e), commonly referred to as Act 101, apply to solid waste exhumed from one landfill and relocated to another; the fees are mandatory, not discretionary. Imposing the fees is not a retroactive application of the statute where no new legal burdens are placed on a past transaction or occurrence. A material issue of fact remains precluding summary judgment on the issue of whether the fees may be imposed on the soils exhumed and relocated where it is unclear whether the soils are separable from other waste or contaminated with other waste.

This matter was initiated by the June 22, 1990, filing of a notice of appeal by Modern Trash Removal of York, Inc. (Modern) challenging the Department of Environmental Resources' (Department) determination that Modern must, under Act 101, pay the host municipality benefit fee, 53 P.S. §4000.1301, the site-specific post-closure fee, 53 P.S. §4000.1108, and the recycling fee, 53 P.S. §4000.701 (Act 101 fees), for waste Modern exhumed from an affiliate's York County landfill and relocated to its own landfill in Lower Windsor Township, York County. Modern filed a second notice of appeal on January 8, 1991, challenging the Department's December 6, 1990, determination that Modern must also pay Act 101 fees for soil exhumed and relocated to Modern's landfill. Modern's second appeal was originally docketed at EHB Docket No. 91-013-W, and was subsequently consolidated with its first appeal at EHB Docket No. 90-250-W on January 18, 1991.

Both notices of appeal involve the same underlying set of facts. Sunny Farms Landfill was operated as a natural attenuation municipal waste landfill until the Department suspended and revoked the owner/operator's permit (Stipulated Facts, ¶ 8, 10). Thereafter, an affiliate of Modern acquired the landfill (Stipulated Facts, ¶ 11). Modern then exhumed waste and soil from the Sunny Farms Landfill, relocating it to its own (Modern's) landfill (Stipulated Facts, ¶ 11 and 12). The excavation and relocation commenced in November, 1988, and concluded in August, 1990 (Stipulated Facts, ¶ 18). During January and February, 1990, soil from the Sunny Farms Landfill was placed in the same cell at Modern as the relocated municipal waste (Stipulated Facts, ¶ 22). Modern paid the Act 101 fees under protest for the soil placed in the cell. Later, with Departmental approval, Modern used soil from Sunny Farms Landfill as daily cover (Stipulated Facts, ¶ 22).

On January 17, 1991, Modern filed a motion for summary judgment.[1] According to Modern, no material facts remain at issue and it is entitled to judgment as a matter of law because applying the Act 101 fees to the solid waste exhumed from the Sunny Farms Landfill would result in a retroactive application of the statute in the absence of a clear intent to do so by the General Assembly. Modern also contends that even if Act 101 fees are applicable to exhumed municipal waste, the Department has the discretion to waive the fees in this instance because the exhumation of waste from the Sunny Farms Landfill resulted in the protection of the Commonwealth's natural resources. Finally, Modern argues that because the exhumed soils are not solid waste, it is entitled to judgment as a matter of law with regard to paying Act 101 fees for the soils.

The Department filed an answer and cross-motion for summary judgment on February 25, 1991. The Department argues that there is no remaining material issue of fact and that it is entitled to judgment as a matter of law. According to the Department, requiring Act 101 fees for the relocation of the waste and soil does not amount to a retroactive application of Act 101; imposing Act 101 fees is not discretionary and the Department has no authority to waive the fees; and, the soils fall within the definition of solid waste because they are contaminated with leachate and industrial waste.

The Board may grant a motion for summary judgment 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. Robert L. Snyder, et al. v. Department of Environmental

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[1] The motion, which was filed prior to the Board's order of consolidation, was filed at both Docket No. 90-250-W and Docket No. 91-013-W.

Resources, No. 1095 C.D. 1990 (Pa.Cmwlth, Mar. 25, 1991). For the reasons set forth below, the Department is entitled to summary judgment on the issue of whether the solid waste exhumed from the Sunny Farms Landfill and relocated to the Modern Landfill is subject to the Act 101 fees. With respect to the issue of whether the exhumed and relocated soils are subject to the Act 101 fees, we must deny the cross-motions for summary judgment, for there remain material issues of fact.

Act 101 Fees are Mandatory

Modern and the Department take opposing views of whether the Act 101 fees are discretionary of mandatory. After examining the language of the three relevant provisions of Act 101, it is our conclusion that the fees imposed by §§701(a), 1108(c), and 1301(e) of Act 101 are mandatory, not discretionary. Section 701(a) of Act 101, which imposes the recycling fee, provides that

> There is imposed a recycling fee of $2 per ton... for all solid waste except process residue and nonprocessible waste from a resource recovery facility that is disposed of at municipal waste landfills. Such a fee shall be paid by the operator of each municipal waste landfill....

The provision imposing the site-specific fee, §1108(e), states that "Each operator of a municipal waste landfill shall pay into the trust on a quarterly basis an amount equal to $.25 per ton of weighed waste or $.25 per three cubic yards of volume measured waste for all solid waste received at the landfill." Finally, §1301(a) of Act 101 establishes a host municipality benefit fee which is imposed on the operator of every municipal waste landfill and is calculated on the basis of "...$1 per ton of weighed solid waste or $1 per three cubic

yards of volume-measured solid waste for all solid waste received at a landfill...." 53 P.S. §4000.1301. The language of all three provisions is mandatory.

Modern argues that the use of the terms "shall" or "may" is not determinative as to whether a particular statutory provision is mandatory or discretionary. It relies upon Commonwealth v. Ferguson, 381 Pa. Super. 23, 552 A.2d 1075, 1079 (1988), wherein the Superior Court held that the term "shall" in §481(a) of the Public Welfare Code,, the Act of June 13, 1967, P.L. 993, as amended, 62 P.S. §481(a), was sufficiently ambiguous to avoid the plain meaning rule of §1921(c) of the Statutory Construction Act, 1 Pa.C.S.A. §1921(c), and the common and approved usage rule of §1903 of the Statutory Construction Act, 1 Pa.C.S.A. §1903, Id., at 572 A.2d 1079.

Since the Superior Court's opinion in Commonwealth v. Ferguson, however, the Supreme Court held in Coretsky v. Board of Commissioners of Butler Township, 520 Pa. 513, 555 A.2d 72 (1989), that the language in §508 of the Pennsylvania Municipalities Planning Code, the Act of July 31, 1968, P.L. 508, as amended, 53 P.S. §10508, was mandatory. The Supreme Court wrote:

> Section 10508(2) is quite clear, "... the decision shall specify the defects and shall... cite the provisions of the statute or ordinance relied upon." ... Generally, words are construed to mean their common usage.... By definition "shall" is mandatory. Accordingly, there is no latitude for overlooking the plain meaning of 10508(2) to reach a more desired result.

As in Coretsky, the meaning of the provisions here is clear when the words are defined according to their common and everyday usage. The provisions at §§701, 1108(c), and 1301(e) require that landfill operators pay the recycling fee, the postclosure fee, and the host municipality benefit fee, respectively, for all solid waste received or disposed of at a landfill.

Modern also argues that the Department has the discretion under Article I, §27 of the Pennsylvania Constitution to decide whether to impose Act 101 fees, since the exhumation and relocation of the waste protects natural resources. The language of the provisions affords the Department no discretion to waive Act 101 fees where they would otherwise apply, and such discretion cannot be otherwise implied. Pennsylvania Drycleaners and Launderers Association v. Industrial Board, 110 Pa.Cmwlth 370, 332 A.2d 530 (1987). In addition, we know of no interpretation of Article I, §27 which would allow the Department to ignore mandatory statutory responsibilities. Although there may be some net environmental benefit from the exhumation of waste from a natural renovation landfill and relocation to a lined facility, there is still environmental disruption from the deposition of the waste. This environmental disruption was to be abated or addressed, in part, through the Act 101 fees.

Imposing the Act 101 Fees Here is Not a Retroactive Application of the Act

Modern contends that imposing the Act 101 fees constitutes a retroactive application of the act because the waste was buried in the Sunny Farms Landfill before Act 101 was enacted.[2] We disagree.

A law is given retroactive effect when it is used to impose new legal burdens on a past transaction or occurrence. R & P Services v. Commonwealth, Department of Revenue, 116 Pa.Cmwlth 230, 541 A.2d 432, 434 (1988). Disposal of the solid waste at Modern triggered the Act 101 fees; original disposal of the solid waste at Sunny Farms Landfill was an entirely separate transaction,

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[2] Section 1904 of Act 101 provides that Chapters 7 and 9 will be effective 90 days after signing, and the remainder will be effective 60 days after signing. 53 P.S. §4000.1904. Thus, the Host Municipality Benefit Fee and the Site-Specific Closure Fee became effective on September 26, 1988, and the Recycling Fee became effective October 26, 1988.

and no Act 101 fees would have been required if the waste was not transferred to Modern.

Material Issue of Fact Remains as to Whether Soil is Waste[3]

The Department and Modern disagree as to how to characterize the soils taken from Sunny Farms Landfill. The Department contends that the soils are waste; Modern argues they are not. There is, however, a material issue of fact which precludes summary judgment with regard to the soils. Whether soils taken from the Sunny Farms Landfill are waste depends on two factors: 1) whether the soils are contaminated with other wastes, and 2) whether the soils are separable from other waste. If the soils are either contaminated or inseparable, the soils are also waste. We cannot hold that the soils were either here based on the facts before the Board.

The parties' stipulation of facts refers to the soils. Paragraph 26 provides:

> Without waiving its position that the Act 101 fees are inapplicable to the relocated waste, Modern has paid or will pay Act 101 fees for all of the disputed Sunny Farms municipal waste and soil relocated to Modern Landfill. With respect to the soils, see Exhibits B and C.

Exhibit B is a December 6, 1991, letter from the Department to Modern. With regard to the soils, the letter provides:

> It is the Department's position that the tonnage deduction should not have occurred, as

---

[3] Modern asserts in its memorandum in opposition to the Department's cross-motion that the Department does not contend that Act 101 fees are required for soil removed from Sunny Farms Landfill and used as daily cover (Modern's memorandum in opposition to the cross-motion, pp. 3, 12). The Department, however, does, indeed, contend that fees are required for that soil (Department's memorandum in support of its cross-motion, p. 22-24; Department's reply memorandum to appellant's memorandum in opposition; and Exhibit B of the stipulated facts). Accordingly, our decision applies to all soil removed from Sunny Farms Landfill and taken to Modern.

> the mixture of solid waste was disposed, and included not only refuse, but soil contaminated with leachate and industrial wastes.

Exhibit C is the December 21, 1990, letter which Modern sent to the Department in response to the Department's letter of December 6, 1990. With regard to the soil, Modern's letter states: "[I]n the event that the Environmental Hearing Board determines that [Act 101] fees are applicable to solid waste exhumed from Sunny Farms Landfill, it is our position that the soil exhumed from Sunny Farms Landfill and relocated to [Modern] is not solid waste." In addition, Modern expressly denied that the soils were contaminated in its answer to the Department's cross-motion for summary judgment (Modern's answer to cross-motion for summary judgment, ¶ 2).

It is difficult to reconcile Exhibits B and C as stipulated facts. If Modern is deemed to admit the conclusions that Exhibit B contains, the soils are waste. But, if the Department is deemed to admit the conclusions Exhibit C contains, the soils are not waste. There is, however, another way to interpret the language in each exhibit. The parties did not stipulate to the conclusions the opposing party proffered; rather, as the language "It is the Department's position..." and "It is our (Modern's) position..." implies, the parties merely agreed that what was contained in the respective exhibits concerning the soil was the opposing party's position as to the facts. This interpretation avoids the conundrum outlined above and is consistent with the requirement that the Board must read a motion for summary judgment in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131. Because a material issue of fact remains, we cannot hold that either party is entitled to judgment as a matter of law on this issue.

O R D E R

AND NOW, this 3rd day of June, 1991, it is ordered that:

1) Modern's motion for summary judgment is denied;

2) The Department's cross-motion for summary judgment is granted with respect to the municipal waste exhumed from Sunny Farms Landfill and denied with respect to the soil exhumed from Sunny Farms Landfill;

3) Modern's appeals at Docket No. 90-250-W are unconsolidated; and

4) Modern's appeal at Docket No. 90-250-W is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

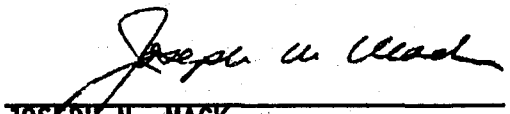
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 3, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOA

WILLIAM RAMAGOSA, SR., et al.	:	
	:	
v.	:	EHB Docket No. 89-097-M
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	: :	Issued: June 4, 1991

OPINION AND ORDER
SUR
FOUR DISCOVERY MOTIONS

Robert D. Myers, Member

Synopsis

The Board acts on discovery motions, granting some and denying others.

OPINION

Nothing is quite as tiresome as grown lawyers playing childish games. The latest vogue apparently is jockeying to see who can complete his own discovery while thwarting the discovery attempts of others. In the minds of the participants, it is entirely appropriate unilaterally to cancel scheduled depositions, ignore interrogatories and disregard document requests. When discovery becomes gridlocked, as it will inevitably if the participants are completely dedicated to their game, relief is sought through a flurry of motions and cross-motions. Untangling the mess is a time-consuming exercise that the lawyers thus gladly give over to the judge.

Such is the case here where four discovery motions have been presented. The first two, filed by the Department of Environmental Resources

(DER) on March 27, 1991, are a Motion for Protective Order Pertaining to Notice of Deposition Addressed to Records Custodian and a Motion to Compel. The third, filed by Appellants on April 3, 1991, is a Motion to Compel. The fourth, filed by DER on May 7, 1991, is a Motion to Compel Answers to Interrogatories. After considering the motions and responses, we enter the following.

ORDER

1. DER's Motion for Protective Order, filed on March 27, 1991, is granted with respect to paragraphs 4, 5, 6, 7, 68, 69, 70 and 71 of the Documents Requested in Appellants' Notice of Deposition, dated February 25, 1991, but is denied with respect to all other paragraphs.

2. DER's Motion to Compel, filed on March 27, 1991, is granted. Robert Ramagosa and William Ramagosa, Jr. each shall appear for deposition at a time and place, and on a date, designated by legal counsel for DER and set forth in a Notice of Deposition to be delivered personally to the office of legal counsel for Appellants at least fifteen (15) days before the scheduled date for the deposition. The depositions of both individuals shall take place within forty-five (45) days after the date of this Order. Failure on the part of either deponent to appear for deposition as scheduled will result in the imposition of sanctions upon Appellants which could include the dismissal of these consolidated appeals.

3. Appellants' Motion to Compel, filed on April 3, 1991, is granted in part and denied in part as follows:

(a) the Motion is granted with respect to the six (6) DER employees and the DER records custodian (all of whom are unnamed in the motions and answers filed with us) originally scheduled for deposition by Notices of Deposition served on February 15 and 25, 1991. Each of said DER

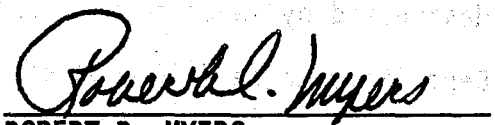
persons shall appear for deposition at a time and place, and on a date, designated by legal counsel for Appellants and set forth in a Notice of Deposition to be delivered personally to the office of legal counsel for DER at least fifteen (15) days before the scheduled date for the deposition. The depositions of all such individuals shall take place within forty-five (45) days after the date of this Order. Failure on the part of any deponent to appear for deposition as scheduled will result in the imposition of sanctions upon DER which could include the sustaining of these consolidated appeals;

(b) the Motion is granted and DER's objections are overruled with respect to all interrogatories in Appellants' First Set of Interrogatories except for interrogatories 64, 65, 66 and 89-107. As to all interrogatories other than the ones specifically mentioned, DER shall provide written answers in accordance with the Rules of Civil Procedure within fifteen (15) days after the date of this Order. Failure on the part of DER to comply with this portion of the Order will result in the imposition of sanctions which could include the sustaining of these consolidated appeals; and

(c) the Motion is denied with respect to Appellants' Second Set of Interrogatories.

4. DER's Motion to Compel Answers to Interrogatories, filed on May 7, 1991, is granted. Appellants shall provide written answers to DER's First Set of Interrogatories and produce documents in response to DER's Request for Production of Documents, in accordance with the Rules of Civil Procedure, within fifteen (15) days after the date of this Order. Failure on the part of Appellants to comply with this portion of the Order will result in the imposition of sanctions upon Appellants which could include the dismissal of these consolidated appeals.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: June 4, 1991

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M. DIANE SMITH
SECRETARY TO THE BC

UNIVERSITY AREA JOINT AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 91-121-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 4, 1991**

OPINION AND ORDER
SUR
MOTION FOR ENLARGEMENT OF TIME
AND FOR AMENDMENT OF PLEADINGS

Robert D. Myers, Member

Synopsis

A motion to amend a timely-filed Notice of Appeal after expiration of the thirty-day appeal period is denied where the only purpose to be served is the more specific delineation of legal contentions. That purpose does not amount to "good cause" under 25 Pa. Code §21.51(e) and is meaningless in light of the most recent decision on the subject by Commonwealth Court. Discovery is a better-suited process for accomplishing the purpose.

OPINION

This proceeding was begun on March 22, 1991 when University Area Joint Authority (UAJA) filed a Notice of Appeal seeking Board review of certain aspects of National Pollutant Discharge Elimination System (NPDES) Permit Amendment PA 0026239 issued by the Department of Environmental Resources (DER) on February 20, 1991. The Notice of Appeal set forth in 93 numbered paragraphs UAJA's objections to the Permit Amendment's requirements with respect to (1) chlorine residuals monitoring and reporting, (2) pH

monitoring and reporting, (3) fecal coliform monitoring and reporting, (4) NH_3-N effluent limitations, (5) temperature monitoring, (6) temperature effluent limitations, (7) free cyanide monitoring, (8) chloroform effluent limitations, (9) immediate application of effluent limitations, and (10) water quality-based effluent limitations.

On April 12, 1991 (after the thirty-day appeal period had expired) UAJA filed a Motion for Enlargement of Time and for Amendment of Pleadings, requesting additional time for discovery and permission to amend paragraphs 70, 89 and 93[1] of the Notice of Appeal. As originally drawn, these paragraphs stated objections to the NH_3-N effluent limitations (paragraph 54), the temperature effluent limitations (paragraph 70), the immediate application of effluent limitations (paragraph 89), and the water quality-based effluent limitations (paragraph 93) on the ground that they are illegal, unreasonable, arbitrary and capricious, contrary to DER regulations and an abuse of discretion. The amendments seek to replace these allegations with more specific objections set forth in 12 to 16 separate subparagraphs. DER filed an Answer to the Motion on May 2, 1991 joining in the request for extension of time[2] but opposing the request to amend the Notice of Appeal. UAJA filed a letter reply to DER's Answer on May 14, 1991.

25 Pa. Code §21.51(e) provides as follows:

> (e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department [DER]. Such objections may be factual or legal. Any objection not raised by the appeal shall be deemed waived, provided that, upon good cause

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[1] DER's Answer points out correctly that paragraph 54 is also revised in the Amended Notice of Appeal attached to UAJA's Motion. In its May 14, 1991 letter UAJA states that its omission of paragraph 54 was unintended and requests the Board to consider that amended paragraph also.

[2] This portion of the Motion was granted in an Order dated April 16, 1991.

> shown, the Board may agree to hear such objection or objections. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

In its construction of this provision in Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd. on other grounds 521 Pa. 121, 555 A.2d 812 (1989), Commonwealth Court held that "a decision to allow a party to amend an appeal to include new grounds, after the thirty-day period has run, is analogous to a decision to allow any agency appeal *nunc pro tunc*" (509 A.2d 877 at 885). Therefore, the Board "need not grant the petition absent a showing of good cause" (509 A.2d 877 at 886). The Court went on to observe that an appeal to the Board is not like a civil suit where leave to amend should be liberally granted. Specifying the grounds for an appeal to the Board is jurisdictional and amendments beyond the 30 day appeal period can be allowed only in limited circumstances. One of those circumstances is the necessity for engaging in discovery in order to elucidate the grounds for appeal, provided that a statement to that effect is included in the Notice of Appeal. The Board first applied the Game Commission holding in NGK Metals Corporation v. DER, 1990 EHB 376 and 473.

In Raymark Industries, Inc. et al. v. DER, 1990 EHB 1775, a petition for leave to amend a Notice of Appeal to "restate with more specificity" the grounds for appeal was denied for lack of good cause. That decision would seem to apply here since UAJA's purpose is "to set forth more specifically the grounds" for appeal. Moreover, the recent Commonwealth Court decision in Croner, Inc. v. Department of Environmental Resources, No. 1789 C.D. 1990, Opinion and Order issued April 9, 1991, would appear to render the proposed amendments unnecessary. The Court held in that case that language in the

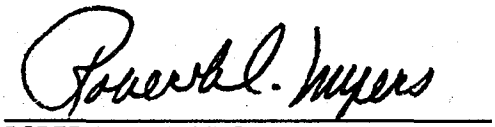
Notice of Appeal stating that DER's permit conditions were "otherwise contrary to law and in violation of [Croner's] rights" was adequate to raise the issue of whether a specific regulatory provision violated a specific statutory provision.

UAJA's desire to facilitate discovery by enunciating more clearly its legal position is commendable, but the narrow limits of the amendment process are ill-suited for the purpose. Written interrogatories often have been used as a means to determine the precise legal contentions of an opposing party; the discovery process still offers the best approach to doing that: Pa. R.C.P. 4003.1(c).

ORDER

AND NOW, this 4th day of June, 1991, it is ordered that UAJA's Motion is denied to the extent that it requested permission to amend the Notice of Appeal.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: June 4, 1991

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M. DIANE SMITH
SECRETARY TO THE BOA

DIAMOND FUEL COMPANY	:	**EHB Docket No. 91-098-W**
	:	**(Consolidated Docket)**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 5, 1991

OPINION AND ORDER SUR MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

A motion to dismiss is denied. Where the Department issues civil penalty assessments pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.22 (Surface Mining Act), and §605(b) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(b) (Clean Streams Law), and the appellant asserts that it is financially unable to obtain an appeal bond or prepay the assessment as required by statute, a motion to dismiss is premature before the Board determines whether the appellant did, in fact, have the resources to comply with the statutory appeals procedure.

OPINION

This matter was initiated by Diamond Fuel Company (Diamond) on March 11, 1990, with the filing of notices of appeal from three assessments of civil penalties issued by the Department of Environmental Resources (Department) on February 15, 1991. The Department issued the civil penalty assessments, each

for $22,500, because Diamond failed to comply with three Department orders directing Diamond to perform corrective work at a surface mine which Diamond operated in Elizabeth Township, Allegheny County. The Department issued the civil penalty assessments pursuant to §18.4 of the Surface Mining Act and §605(b) of the Clean Streams Law. The three appeals were assigned Docket Nos. 91-098-W, 91-099-W, and 91-100-W, and, on April 4, 1991, the Board consolidated them at Docket No. 91-098-W.

On April 8, 1991, the Department filed a motion to dismiss for lack of jurisdiction, arguing that the Board does not have jurisdiction because Diamond neither prepaid the civil penalty assessments nor forwarded appeal bonds for the amount of the assessments. Although Diamond did not file a response to the Department's motion, it asserted in its notices of appeal that it was unable to prepay the amount of the assessments.[1]

Generally, the Board will dismiss appeals of civil penalty assessments issued under the Surface Mining Act and the Clean Streams Law where the appellant fails to prepay the assessments or post appeal bonds within the 30 day appeal period. Roswel Coal Company, Inc. v. DER, 1989 EHB 224. Where, however, an appellant asserts that it is financially unable to file an appeal bond or prepay the amount of the assessment, the Board cannot dismiss the appeal before making a factual determination of the appellant's ability to comply with the appeal procedure. Otherwise, "a petitioner who, because of alleged impecunity [might] be denied access to [Commonwealth]

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[1] Diamond's notices of appeal also contained a request for a factual hearing regarding its ability to pre-pay the assessments. Diamond thereafter filed motions for summary judgment at Docket Nos. 91-099-W and 91-100-W, but those motions were withdrawn on April 29, 1991.

courts and due process of law." Twelve Vein Coal Company v. Commonwealth, DER, 127 Pa.Cmwlth 430, 561 A.2d 1317, 1319 (1989), allocatur denied, 578 A.2d 416 (1990). The Twelve Vein Coal decision is directly on point.

Since the Board must first determine whether Diamond can afford to obtain a bond or prepay the assessment, the motion to dismiss is premature and must be denied.

O R D E R

AND NOW, this 5th day of June, 1991, it is ordered that:

1) The Department's motion to dismiss is denied; and

2) A hearing on the issue of Diamond's ability to prepay the civil penalty assessment will be scheduled.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: June 5, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

SOUTH FAYETTE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 89-044-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 6, 1991
MOHAWK MINING COMPANY, Permittee	:	

OPINION AND ORDER SUR
MOTION FOR RECONSIDERATION, and
MOTION TO DISMISS OR LIMIT ISSUES

By Terrance J. Fitzpatrick, Member

Synopsis

A Permittee's motion for reconsideration is granted where the Board had denied the Permittee's motion to dismiss or limit issues because there was inadequate time to address the motion before the hearings, but the hearings were then postponed for several months.

The Permittee's motion to dismiss or limit issues is granted in part and denied in part. The Appellant's allegations of harm to its residents are sufficiently specific to establish its standing to bring this appeal. However, the Appellant's objections that the mine will violate the Appellant's zoning ordinance, that the mine will cause decreased property values, and that the intersection of the haul road and a state road poses a safety hazard due to inadequate sight distance, are all beyond the scope of the appeal. Therefore, the Board will preclude introduction of evidence on these issues at the upcoming hearing.

OPINION

This is an appeal by the Township of South Fayette (Township), Allegheny County, from an action of the Department of Environmental Resources (DER) granting a Mining Activity Permit to Mohawk Mining Co. (Mohawk).

The instant Opinion addresses two motions filed by Mohawk - a motion for reconsideration and a motion to dismiss or limit the issues. By way of background, Mohawk originally filed the motion to dismiss or limit issues on March 13, 1991. On March 15, 1991, the Board denied that motion as untimely, because, at that time, a hearing had been scheduled for April 4 and 5, 1991, and there was insufficient time to secure a response from the Township and draft an opinion on the motion prior to the hearing.[1] The hearings scheduled for April were cancelled, however, due to the illness of the undersigned, and on April 23, 1991 the Board rescheduled the hearings for June 24 and 25, 1991.

Mohawk filed its motion for reconsideration on April 25, 1991, arguing that the motion to dismiss or limit issues was no longer untimely in light of the rescheduling of the hearings. The Township filed an answer to the motion, contending that the motion to dismiss or limit issues was still untimely because it could have been filed much earlier in the proceedings.

We will grant Mohawk's motion for reconsideration. The Board's summary denial of Mohawk's motion to dismiss or limit issues was based upon the pragmatic consideration that there was insufficient time before the then scheduled hearings to solicit a response from the Township and then to prepare a written decision. This rationale is no longer valid in light of the rescheduling of the hearings. Therefore, we find that there are exceptional

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[1] The Board's order stated that it was without prejudice to Mohawk's right to raise objections to the scope of evidence at the hearing.

circumstances present here to warrant reconsideration of our previous order, and we will proceed to address Mohawk's motion to dismiss or limit issues.[2] See, Baumgardner v. DER, 1989 EHB 400.

In its motion to dismiss or limit issues, Mohawk argues, first, that the Township's entire appeal should be dismissed for lack of standing. Mohawk contends that the Township's allegations of harm are not specific enough to establish that the mine will have a substantial, direct, and immediate effect on the Township, citing William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). Mohawk also argues that, even if the entire appeal is not dismissed, the Township should be precluded at the hearing from introducing evidence regarding whether the mine will comply with Township zoning ordinances, whether the mine and the haul road from the mine will present a danger to the Township's citizens and the Township's road network, and whether the mine will lead to decreased property values in the Township.

The Township contends that Mohawk's motion to dismiss or limit issues should be denied. The Township argues that it has standing to represent the interests of its residents, citing Franklin Township v. Commonwealth, DER, 500 Pa. 1, 452 A.2d 718 (1982). The Township also argues that its objections regarding zoning, as well as its other objections, should be heard in order to have a full airing of the negative impacts of the mine.

Evaluating these arguments, we disagree with Mohawk that the Township lacks standing to bring this appeal. On its face, the Township's notice of appeal contains allegations which, if proven to be true, would constitute harm to the interests of the Township's citizens. For example, the notice of appeal alleges that the mine will eliminate residential water supplies

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[2] The Township filed an answer to this motion at the same time it answered Mohawk's motion for reconsideration.

(paragraph 3-2), and that the proposed haul road will create slides which will harm residences in the area (paragraph 3-3).[3] Whether the Township will introduce facts to support these allegations is an open question,[4] but the allegations themselves are certainly sufficient to establish the Township's standing.

Having decided that the Township has standing to appeal, we must next address Mohawk's argument that certain of the Township's objections are beyond the scope of this appeal. First, we agree with Mohawk that the Board lacks competence to decide whether the mine will comply with the Township's zoning ordinance. See, City of Scranton v. DER, et al., 1986 EHB 1223, Borough of Girardville, et al. v. DER, et al., 1990 EHB 86. If the Township believes Mohawk is violating its zoning ordinance, it may attempt to enforce that ordinance in the usual manner.

Second, we agree with Mohawk that it is beyond the Board's jurisdiction to decide whether the mine will adversely affect property values in the Township. See, Breckinridge v. DER, 1979 EHB 337. Therefore, any evidence regarding this issue will be excluded from the hearing.

Third, we agree, but only in part, with Mohawk's argument that the Township should be precluded from introducing evidence regarding the effect of the mine and the haul road from the mine on the Township's citizens and the Township's road network. This argument involves three separate objections raised by the Township in paragraph 3-3 of its notice of appeal:

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[3] This alleged harm to the Township's residents is sufficient to create standing in the Township. See, Franklin Township v. Commonwealth, DER, 500 Pa. 1, 452 A.2d 718 (1982).

[4] Apparently, Mohawk did not conduct discovery to learn what evidence the Township has to support its allegations.

1) The accessway to the mine poses a danger to people using the public road (State Route 978) because there is inadequate sight distance.

2) The proposed haul road will create dust and noise, to the detriment of residents.

3) The proposed haul road is over unstable land - a slate dump.

Examining the first of these objections, we agree with Mohawk that safety questions regarding the sight distance at the intersection of the proposed haul road and State Route 978 are within the jurisdiction of the Pennsylvania Department of Transportation, not the jurisdiction of this Board. See, Kwalwasser v. DER, 1986 EHB 24. We do not agree with Mohawk, however, that dust and noise from the haul road are beyond the scope of the appeal. The haul road is part of the mine site, and dust and noise from the haul road is no different from dust and noise from the actual mine itself.[5] Nor do we agree with Mohawk that the stability of the haul road is outside the scope of this appeal. The mining regulations specifically require that haul roads be constructed over stable areas. 25 Pa.Code §87.160(d). Since DER administers the mining regulations, it can hardly be said that this question is beyond the scope of this appeal.

In light of the above Opinion, we will enter the following Order.

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[5] Paragraph 3-4 of the notice of appeal objects to the dust and noise which the mine itself will allegedly cause. The Board has jurisdiction to consider these issues. Kwalwasser, 1986 EHB at 61-65.

ORDER

AND NOW, this 6th day of June, 1991, it is ordered that:

1) Mohawk's motion for reconsideration of the Board's March 15, 1991 Order is granted.

2) Mohawk's motion to dismiss or to limit issues is denied to the extent it seeks dismissal of the appeal; however, the motion is granted to the extent that it seeks to preclude the Appellant from introducing evidence regarding whether the mine complies with the Township's zoning ordinance, whether the mine will cause decreasing property values in the Township, and whether the sight distance at the intersection of the haul road and State Route 978 poses a safety hazard.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: June 6, 1991

cc: **Bureau of Litigation**
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SECRETARY TO THE BOARD

MONTGOMERY COUNTY,	:	
CLEMENTS WASTE SERVICE, INC.,	:	
RECYCLING WORKS, INC. and	:	
BRIAN CLEMENTS	:	
	:	
v.	:	**EHB Docket No. 91-053-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
WHEELABRATOR POTTSTOWN, INC.	:	
and	:	
BERKS COUNTY	:	**Issued: June 6, 1991**

OPINION AND ORDER SUR
WHEELABRATOR POTTSTOWN, INC.'S PETITION TO INTERVENE
IN *CLEMENTS WASTE SERVICE, INC. et al. v. DER,*
Docket No. 91-075-E

By: Richard S. Ehmann, Member

Synopsis

Before the Board is a petition to intervene in an appeal from the Department of Environmental Resources' ("DER") conditional approval of Berks County's ("Berks") Municipal Solid Waste Management Plan under Act 101 ("Plan"). Wheelabrator Pottstown, Inc. ("WPI") asserts it has an interest in this appeal pursuant to its pending application with DER for a permit for a recycling/resource recovery facility, its facility's designation under the plan as receiving 500 tons per day (WPI having been awarded a twenty year disposal contract by Berks' resolution), and its active participation both in this Plan's development and in litigation occurring in the Common Pleas Court of Berks County on the propriety of the Plan.

Intervention is denied because WPI lacks sufficient direct, immediate, and substantial interests in the outcome of this appeal, has not demonstrated that Berks County and DER will not adequately defend the Plan, and has not shown any evidence which it would produce which is not available from Berks or DER or how its intervention would assist the Board in resolving the appeal.

OPINION

On February 25, 1991, Clements Waste Service, Inc., Recycling Works, Inc., and Brian Clements (collectively "Clements") commenced an appeal with us from DER's conditional approval of the Berks County Municipal Solid Waste Management Plan ("the Plan") under the Municipal Waste Planning, Recycling, and Waste Reduction Act, Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.101 *et seq.* ("Act 101"). The appeal asserts that the Plan failed to meet the requirements of Act 101 for a variety of reasons and, thus, contends DER erroneously gave its conditional approval of the plan.

Subsequently, Browning Ferris, Inc. ("BFI"), Hays Run Associates ("HRA"), and Western Berks Refuse Authority ("WBRA") all separately petitioned to intervene in the Clements appeal which bore Docket No. 91-075-E. On April 29, 1991, we denied the Petitions to Intervene of BFI and HRA.[1] On that same date, Wheelabrator Pottstown, Inc. ("WPI") filed its Petition To Intervene in the Clements matter and a companion matter, Montgomery County v. DER and Berks County, EHB Docket No. 91-053-E.[2] By Order dated May 17, 1991, we denied WBRA's Petition To Intervene in the Clements appeal. By

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[1]BFI is currently pursuing review of that decision in the Commonwealth Court.

[2]WPI took no appeal from DER's approval of Berks' Plan and seeks to intervene on the side of DER and Berks.

separate Order also issued on that date, we consolidated the appeal by Clements at Docket No. 91-075-E with the appeal from DER's approval of the Plan by Montgomery County which was docketed at No. 91-053-E. On May 31, 1991, we granted WPI's unopposed Petition To Intervene in Montgomery County, et al., EHB Docket No. 91-053-E, but we limited WPI's participation in that matter to defense against the allegations of Montgomery County. This Opinion addresses only WPI's Petition To Intervene in the Clements appeal.

WPI's Petition

WPI's Petition alleges that it is the owner and operator of "the proposed West Pottsgrove Recycling/Resource Recovery Facility" located in Montgomery County. The Petition states this facility is designated to receive 500 tons per day of Berks' municipal waste under the Plan. Next, the Petition asserts the Plan was prepared, adopted, and approved under Act 101 and, as part of the Plan, Berks made a Request For Proposals from any interested party for resource recovery operations to handle 500 tons per day of Berks' municipal refuse. WPI submitted a proposal and, on August 31, 1990, Berks passed a resolution awarding WPI a twenty year waste disposal contract. WPI says that it has applied to DER for permits for the facility, which applications DER is reviewing, and that it has spent several million dollars on these permit applications. The Petition then asserts WPI is involved in a suit in the Common Pleas Court of Berks County defending this Plan (now on appeal to the Commonwealth Court). It concludes by saying Clements' appeal challenges the process under which WPI received this twenty year contract from Berks.

According to WPI's Petition, if WPI is allowed to intervene it will offer evidence as follows:

a. Evidence in support of Berks County's designation of Wheelabrator's West Pottsgrove facility in the Berks County Plan.

b. Evidence in support of Berks County's Act 101 planning process and its approval of the Plan.

c. Evidence in support of the fair, open and competitive process utilized by Berks County in its selection of the Wheelabrator West Pottsgrove facility as the resource recovery component of its plan.

d. Wheelabrator must be permitted to present its own unique perspective on the issues in question in this matter....

WPI's Petition next asserts its interests are not adequately represented because: (1) WPI has a unique perspective; (2) WPI has a financial stake in the outcome; (3) DER lacks the same degree of interest as WPI in defending the portion of the Plan dealing with WPI's facility, since all DER wants is an approved plan under Act 101; (d) Berks lacks the same degree of interest as WPI in WPI's facility because Berks' bottom line is an approved plan and Berks may not have the resources to fight Clements; and (e) WPI has argued in the Courts on the Plan and wants to see the same arguments raised here.[3]

DER has objected to intervention by WPI in its Response To Wheelabrator Pottstown, Inc.'s Petition To Intervene filed with us on May 9, 1991. Clements also opposed intervention in its Objections To Petition To Intervene of Wheelabrator Pottstown, Inc. which we also received on May 9, 1991. Berks County has taken no position on WPI's petition in this appeal.

As we have said before, intervention before the Board is governed by

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[3]WPI filed a Brief in support of its petition with us on May 17, 1991.

25 Pa.Code §21.62. We have consistently held that intervention is discretionary and that petitioners must demonstrate a direct, immediate, and substantial interest in the outcome of the litigation. Keystone Sanitation, Inc. v. DER, 1989 EHB 1287. In ruling on a petition to intervene, the Board considers five factors, including: 1) the nature of the prospective intervenor's interest; 2) the adequacy of representation of that interest by other parties; 3) the nature of the issues before the Board; 4) the ability of the prospective intervenor to present relevant evidence; 5) the effect of intervention on administering the statute under which the proceeding is brought. City of Harrisburg v. DER, 1988 EHB 946; Wallenpaupack Lake Estates Property Owners v. DER, 1989 EHB 446. Additionally, intervention is not permitted where it will overly broaden the scope of the original appeal or result in a multiplicity of arguments or confusion of issues. City of Harrisburg. The burden of showing that intervention should be granted rests with the prospective intervenor. Sunny Farms, Ltd. v. DER, 1982 EHB 442.

DER and Clements contend WPI's asserted interest arises from a contractual relationship with Berks County. Citing Skotedis, et al. v. DER, 1988 EHB 533, and Franklin Township Board of Supervisors v. DER, 1985 EHB 853,[4] Clements argue we have held third party contractors do not have the

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[4]In Skotedis, a contractor who conducted a fill operation authorized by an encroachment permit issued to a borough under the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.*, sought to intervene in a third party appeal of the issuance of the permit. We denied intervention, reasoning, in part, that the contractor's contractual relationship with the borough-permittee was not relevant to the issues before the Board. We also relied upon our decision in Franklin, which had involved a petition to intervene brought by trash haulers in an appeal of a landfill permit denial. The trash haulers in Franklin contended, *inter alia*, that the permit denial would have an adverse economic impact on them and (footnote continued)

type of interest which warrants the granting of intervention. Clements further adopts as their reasoning for their conclusion that used by the Board in denying the HRA and BFI Petitions To Intervene in Clements Waste Services v. DER, EHB Docket No. 91-075-E (Opinion issued April 29, 1991).

WPI's brief in support of its petition contends the cases cited by appellants are distinguishable and we should not "mechanically" apply a rule to deny intervention to parties like WPI. Moreover, WPI asserts it had direct and significant participation in the process producing the Plan, which process resulted in WPI's selection as contractor, so its interest is not like the contractor's interest in Franklin. It also distinguishes Skotedis because of its perception of the relationship in that case between the private interest and DER's action. WPI also says it is significantly different from BFI and HRA because they admitted they only wished to protect their contracts to dispose of Berk's municipal waste, whereas WPI's interests are larger because Berks selected WPI through a competitive bid process and WPI participated in developing Berks' Request for Proposals on resource recovery and WPI's facility may be "grandfathered" under Act 101. Moreover, WPI asserts that unlike BFI and HRA, it will not benefit from the self-correcting mechanism which favors BFI and HRA in the event Montgomery County prevails in its appeal, i.e., if Montgomery succeeds in challenging the WPI facility's selection by Berks, then the Plan provides the municipal wastes which were to go to WPI would go to BFI's landfill. WPI also argues its lack of a permit

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(continued footnote)
would impair contracts between them and the permit applicant. We denied the petition in Franklin, holding, *inter alia*, that the haulers' contractual interests vis-a-vis the permit applicant were not cognizable before the Board and that the economic impact of permit denial on the haulers was irrelevant to the issues before the Board.

does not make its interest remote because if DER rejected a permit for this facility, it would be an abuse of DER's discretion since it has issued permits for similar facilities elsewhere. WPI's brief also repeats that its interests are not adequately represented by DER and Berks acting jointly or severally.

Contrary to WPI's contention, even if it helped Berks prepare the Plan, has applied for permits from DER, and was awarded a contract, we do not view its posture in this appeal to be that of a permittee. It is Berks, not WPI, which submitted the Plan to DER and thus is like a permittee. WPI's relationship is more akin to that of a contractor. The Plan does call for resource recovery and indicates that an award of contract by Berks was made to WPI's facility after bids. The Clements' appeal challenges the Plan's adequacy on its face and, alternatively, DER's conditional approval of the Plan. It is the validity of the Plan and DER's approval thereof which are at issue in this appeal, not WPI's proposed facility or its assistance to Berks in plan preparation. Moreover, the economic impact on WPI, i.e., the expenses it has incurred, is irrelevant to this appeal. Skotedis; Franklin. This does not change WPI's status. Despite WPI's suggestions to the contrary, its interest is just like BFI's interest. It is narrow and relates solely to having its proposed resource recovery facility as a designated disposal facility under the Plan for this 500 tons of municipal waste. In turn, as it relates to this appeal, WPI's proposed facility will only be affected if DER issues WPI's permit, WPI constructs the facility, and the Plan is overturned through a successful challenge in this matter. Of course, DER might deny WPI's permit application for any number of valid reasons despite issuing permits for similar facilities in other locations.

Our reasoning in denying BFI's Petition To Intervene is thus equally applicable here, as suggested by Clements' Objections to WPI's Petition. WPI's interest in the Plan springs solely from its proposed facility, a proposed facility which may never come into existence for reasons unrelated to this Plan. Accordingly, WPI's interest in this matter is too remote and speculative at present.[5]

WPI has also failed to show that its interest in continuing to have recycling/resource recovery facility designated as one of the disposal sites through the Plan and its Plan authorized contract with Berks, i.e., in having the DER approved Plan sustained, will not adequately be represented by Berks County and DER in this appeal. WPI states that it and Berks have clearly separable and distinct interests in their opposition to the appellants' appeal, but WPI does not indicate how this is so other than to say Berks' bottom line is an approved Act 101 plan. WPI does not point to anything which would indicate that Berks intends to allow its Plan to be overturned in this appeal. Neither does the suggestion in WPI's Petition that Berks does not have the same financial resources to put into this proceeding as WPI. Even if WPI can call on every dime of the resources of its owners, the amount of Berks' resources and its choices of counsel do not create

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[5]WPI's brief advances an argument that had DER disapproved the Plan, WPI clearly would have had standing to directly appeal to us from that disapproval, therefore evidencing that WPI's interests in this matter are direct, immediate, and substantial. Since the Plan was not disapproved, but, rather, was approved, the argument which WPI asserts is mere speculation. It is, moreover, by no means clear that WPI would automatically have standing to appeal such a DER disapproval. It is possible that had such an event occurred and had WPI then appealed to us from DER's disapproval of the Plan, DER might have moved to dismiss the appeal and we might have dismissed the action depending on the basis for the Plan's disapproval. We thus refuse to engage in fruitless speculation on this point, however.

grounds for intervention in themselves. Unless there is a showing that a party, like Berks, is unable or unwilling to defend the Plan, these allegations are nothing more than "grasping at straws". The fact of WPI's participation in the Common Pleas Court proceedings mentioned in WPI's Petition also does not show Berks will permit the Plan and its efforts on the Plan to date to be for nought.

Additionally, WPI's petition asserts that it and DER have separable and distinct interests in their opposition to this appeal. WPI suggests that in many third party appeal situations, DER allows the permittee to defend DER's action and limits its own participation, we observe this is true in "routine" cases, but find DER's participation to date in this matter suggests this case rises above "routine". WPI also claims that DER's interest is an Act 101 plan, not this plan and WPI's twenty year contract. We agree DER has no institutional interest in WPI's contract but, as the regulatory agency administering Act 101, it should not. Rather, its interest is in defending its approval of this Plan and thus the Plan itself. We agree that if WPI is correct as to its own intimate and thorough going involvement in the plan formation process, DER may lack WPI's knowledge of that process but Berks has that knowledge and DER has the most intimate knowledge of DER's own review process. We do not judge the adequacy of representation of WPI's interest by looking solely at Berks, then closing our eyes to Berks, looking solely at DER. We look at the combined impact of their interests and ability to represent same versus Clements' challenge and WPI's claim. Looking at the totality of the DER-Berks interest in the Plan, we believe WPI's interest is

well-covered, particularly in light of the WPI/Berks twenty year contract described by WPI and potential claims which might spring from Berks' failure to defend the Plan.

According to its Petition, WPI proposes to offer evidence to support Berks designation of WPI's facility under the Plan, evidence of the Berks planning process that produced the Plan and evidence of "the fair, open, and competitive process" Berks utilized to select WPI's facility.[6] This is evidence that Berks has at least as available to it as it is available to WPI. Nothing set forth as to the groupings of evidence offered by WPI shows this evidence to be something uniquely available from WPI. Nor does WPI show why Berks or DER could not offer this evidence, unless WPI's reference to the withdrawal of Berks' outside counsel and substitution of its County Solicitor is intended to do so. Clearly, the mere choice of counsel is not such a showing. In short, the evidence proffered by WPI would merely duplicate that which we foresee being offered by Berks and DER.

As we have pointed out in prior opinions on intervention in this now consolidated proceeding, denial of WPI's Petition does not bar WPI from the issues in the proceedings in every way. WPI has been granted intervention as to Montgomery's issues. In addition, if, DER and Berks tried to settle this matter with Clements by amending the Plan in a fashion affecting WPI, WPI may appeal to this Board from the amendment. Moreover, this opinion does not bar WPI from working with Berks and DER to help them prepare their case, nor does it bar WPI from observing the hearings on the merits of Clements' issues.

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[6]WPI's suggestion in its Petition, under types of evidence it will offer, that it "must be permitted to present its unique perspective on the issues in question" does not constitute a quantifiable type of evidence offered by WPI similar to the first three identified above.

Finally, as pointed out in City of Harrisburg, WPI may file an *amicus curiae* brief at the end of this proceeding on any challenges raised by Clements.

However, at this stage in this appeal, even assuming all that WPI has asserted, DER and Berks appear capable of presenting rebuttal to the issues raised by Clements.

ORDER

AND NOW, this 6th day of June, 1991, it is ordered that WPI's Petition To Intervene is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: June 6, 1991

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M. DIANE SMITH
SECRETARY TO THE BOAR

WILLOWBROOK MINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 91-113-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 6, 1991

OPINION AND ORDER
SUR PETITION TO INTERVENE

By Joseph N. Mack, Member

Synopsis

In this appeal of a mining permit denial, a petition to intervene is denied where the prospective intervenor's interests are adequately represented by the Department of Environmental Resources ("DER"). Furthermore, according to the prospective intervenor, much of the evidence sought to be introduced was supplied to DER during the permit review process and was a basis for the denial of the permit. Therefore, intervention is likely to result in repetitive and cumulative evidence and would not assist the Board in resolving this matter. Finally, a challenge to DER's prosecutorial discretion is not a basis for intervention.

OPINION

This appeal was filed on March 15, 1991 from DER's February 15, 1991 denial of Willowbrook Mining Company's ("Willowbrook") application for a

surface mining permit to open a surface mine in Cherry Township, Butler County. The reasons given by DER for the denial were as follows:

1. The application failed to demonstrate there was no presumptive evidence of potential pollution to waters of the Commonwealth, including, but not limited to, a manganese discharge.

2. The application failed to demonstrate that the proposed mining operation will not cause or contribute to the degradation of in-stream water quality criteria.

3. The applicant failed to demonstrate the availability of an adequate alternate water supply.

On May 7, 1991, a Petition for Intervention was filed by George F. Gerdenic (("Gerdenic").[1] The petition alleges that the water supply and water quality will be adversely affected if Willowbrook is permitted to mine the area in question. The problems alleged by the petition include the following: 1) the groundwater supply will be jeopardized, 2) the permit application did not identify an adequate alternate replacement water supply should the existing water supply be diminished by mining, 3) past mining in the immediate vicinity has created polluting discharges containing high concentrations of aluminum and manganese ions, 4) discharges from the proposed mining would drain into tributaries of the South Branch of Slippery Rock Creek and eventually into the Creek itself, and 5) the application failed to demonstrate there was no presumptive evidence of pollution. The petition further alleges that Gerdenic owns and occupies property within the

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[1]An earlier Petition to Intervene in this matter, filed by the Penns Woods West Chapter of Trout Unlimited, was denied in an Opinion and Order issued May 7, 1991.

permit application boundaries; that his sources of water are wells; that, as a resident of the area, he uses and enjoys the local environment and would be harmed by any degradation thereof; and, finally, that he has a substantial, immediate, and personal interest in the matter.

Willowbrook responded to the petition on May 13, 1991, arguing that Gerdenic should be denied intervention because his interest is adequately represented by DER and because his petition failed to offer any indication of the kind of evidence he would present at a hearing on the merits.

Gerdenic filed a reply on May 17, 1991, stating that, if permitted to intervene, he will present evidence of pollution by manganese and aluminum discharges, evidence provided to DER which led to the permit denial, as well as evidence which was not available or considered by DER in the application review process. The petition also states that Gerdenic will provide additional expert testimony from several named witnesses, but gives no description of the substance of this proposed testimony. Finally, as to Willowbrook's claim that DER adequately represents his interest, Gerdenic asserts that DER does not share his opinions about the evidence to be offered at hearing, and that he has a separate and distinct interest in resolution of the appeal.

Willowbrook again responded on May 22, 1991, arguing that Gerdenic's reply still failed to show why his interests would not be adequately represented by DER. Willowbrook also argues that the witnesses which Gerdenic intends to present were heard by DER during the permit review process and, furthermore, that Willowbrook's application file with DER is replete with the

very same evidence which Gerdenic plans to produce. Therefore, Willowbrook asserts, intervention would simply result in a duplication of evidence and testimony.

DER has not filed a response to the petition to intervene.

Intervention is discretionary with the Board and is governed by 25 Pa.Code §21.62. The burden is on the prospective intervenor to show that intervention is warranted, and he must demonstrate a direct, immediate, and substantial interest in the litigation. City of Harrisburg v. DER, 1988 EHB 946, 948. When ruling on a petition to intervene, the Board considers the following five factors: the nature of the interest of the petitioner, the nature of the issues before the Board, the petitioner's ability to present relevant evidence, the effect of intervention on administration of the statute involved, and, finally, whether the petitioner's interests are adequately represented by other parties to the litigation. Id. at 947.

Focusing primarily on Gerdenic's ability to present relevant evidence, his interest in the appeal, and whether that interest is adequately represented by DER, we conclude that the petition to intervene must be denied.

Gerdenic states that much of the evidence and testimony he seeks to introduce is that which he submitted to DER during the permit review process and which led to the permit's denial. The remaining evidence consists of "additional water quality data and computer modeling," and evidence of aluminum discharges to which Gerdenic alleges DER did not give sufficient weight. Gerdenic also asserts that the grounds given by DER for the permit denial are not exhaustive and that DER and Gerdenic do not share the same opinion about the evidence to be offered.

Gerdenic's primary concerns with respect to Willowbrook's permit application can be summarized as follows: 1) Willowbrook's application failed to meet the necessary requirements, in that it did not demonstrate that there was no presumptive evidence of pollution and did not provide for an alternate water supply should the current supply be diminished by mining, and 2) the proposed mining is likely to affect the supply of groundwater and the quality of a nearby creek and its tributaries. Likewise, the denial of the permit by DER was based principally on these same reasons. Moreover, it appears that much of the information reviewed by DER prior to denying the permit was supplied by Gerdenic and is the same evidence which Gerdenic now plans to introduce to the Board. To the extent that Gerdenic is asserting that the proposed mining will have an adverse effect on the water quality and supply of the area, this interest is shared by DER and we believe it will be adequately represented in DER's defense of the permit denial. Any information which Gerdenic seeks to introduce on this subject is likely to be repetitive and cumulative.

With regard to the expert witnesses which Gerdenic plans to produce, he simply states that these witnesses "support [Gerdenic's] position." Without knowing the substance of this testimony, we are unable to determine its importance and relevance and whether or not it would assist us in deciding this matter.

As to Gerdenic's argument that the reasons cited by DER for the permit denial are not exhaustive, this appears to be an attack on DER's prosecutorial discretion, which is not reviewable by the Board. McKees Rocks Forging, Inc. v. DER, EHB Docket No. 90-310-MJ (Opinion and Order issued May 1, 1991). Simply because Gerdenic feels that DER did not provide

an exhaustive list of reasons for the permit denial is not a sufficient reason to allow Gerdenic the right to intervene. Moreover, the issue on appeal is whether DER abused its discretion or acted arbitrarily in denying Willowbrook's permit based on the reasons stated in its denial letter. Granting intervention to Gerdenic is likely to unnecessarily broaden the scope of the appeal.

In addition, simply because DER does not share Gerdenic's strategy for determining which evidence is relevant and how it should be presented does not provide a basis for intervention.

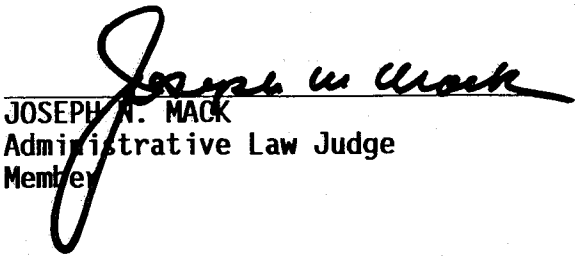
Finally, Gerdenic argues that simply because one successfully blocks the issuance of a mining permit because of evidence presented to DER during the review process, that does not automatically mean that that person's interests are the same as those of DER. That is true; however, in this case, Gerdenic has offered nothing else to show that his interests in this action are substantially different from those of DER.

In conclusion, Gerdenic has not presented a sufficient basis entitling him to intervene in this appeal and, accordingly, the following order is entered.

O R D E R

AND NOW, this 6th day of June, 1991, the Petition for Intervention filed by George F. Gerdenic is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 6, 1991

cc: See next page

EHB Docket No. 91-113-MJ
June 6, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

J. C. HAYES, INC.	:	
	:	
	:	
v.	:	**EHB Docket No. 91-164-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 11, 1991

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Robert D. Myers, Member

Synopsis

A petition for supersedeas is denied when the evidence establishes that the petitioner is unlikely to prevail on the merits. Petitioner qualifies as an "owner" of underground storage tanks under the Storage Tank and Spill Prevention Act and, as such, is presumed to be liable for all contamination occurring within 2500 feet of the tanks. Since the presumption was not rebutted by clear and convincing affirmative evidence, as required by the Act, petitioner can be required to take the corrective action outlined in DER's Order.

OPINION

J. C. Hayes, Inc. (Appellant) filed a Notice of Appeal on April 24, 1991, seeking review of an Order issued by the Department of Environmental Resources (DER) on March 27, 1991. The Order found Appellant responsible for the leakage of gasoline from underground storage tanks on the Helm's store property at 2840 Manor Road in West Brandywine Township, Chester County, and

directed Appellant to take remedial action. On April 29, 1991 Appellant filed a Petition for Supersedeas to which DER filed objections on May 20, 1991.

A hearing on the Petition was held in Harrisburg on May 24, 1991 before Administrative Law Judge Robert D. Myers, a Member of the Board, at which both parties were represented by legal counsel. The parties presented a 10-page Stipulation, 6 witnesses and 65 exhibits. Briefs were filed by Appellant on May 24, 1991 and by DER on May 31, 1991.

Based on the evidence, the following facts appear to be established. Appellant has been a wholesale and retail dealer of petroleum products since 1938. Paul L. and I. Phyllis Helm acquired the store property in 1974. At that time and for some unspecified earlier period, the property contained a general store and a gasoline station dispensing products of the Atlantic Refining Company (ARCO). Three steel underground storage tanks (USTs) existed on the property in 1974 - a 2,000-gallon tank used for high test gasoline and twin 550-gallon tanks used for regular gasoline.[1] These USTs, along with the gasoline pumps, the ARCO sign and other related equipment, were all owned by ARCO. Appellant had distributed ARCO products to the prior owner of the property and continued deliveries after the Helm's acquisition.

At or about 1975 Appellant acquired from ARCO the ARCO equipment installed at the Helm's store. Thereafter, Appellant continued to distribute ARCO products to the Helms. During the spring of 1977, one of the 550-gallon USTs lost a full load of product. When the tank was unearthed, Jay C. Hayes (then the owner and Chief Executive Officer of Appellant) observed a pinhole

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[1] There is some ambiguity in the stipulation and exhibits, caused by the occasional mention of a 1,000-gallon tank removed in 1977 because of leakage. It is likely that one of the 550-gallon tanks was mistaken for a 1,000-gallon tank. In the absence of any conclusive evidence establishing the presence of the larger tank, we will assume that it was a 550-gallon tank.

in the bottom. This tank was replaced in June 1977 with a steel 2,000-gallon UST. The other 550-gallon UST was filled with grout and left in place.

In 1978 domestic water wells at three residences within 300 feet south of the Helm's property (2830[2], 2820 and 2810 Manor Road, respectively) became contaminated with hydrocarbons.[3] As a remedial device, Appellant fitted these wells with charcoal filters. Owners of the three residences filed suit in 1980 against Appellant and the Helms in the Court of Common Pleas of Chester County (No. 49 Equity 1980), seeking relief for their contaminated wells. In October of that same year, Appellant discovered that the 2,000-gallon UST installed in 1977 was leaking. A month later both 2,000-gallon USTs were partially excavated, cut open, sandblasted and lined on the interior with fiberglass or resin.

A settlement was reached in 1982 with respect to the suit pending at No. 49 Equity 1980. Pursuant to the settlement, filtration systems were to be installed in the residences of the plaintiffs and maintained for three years. Cross claims filed against each other by the Helms and Appellant were not resolved until October 3, 1986 when the Helms executed a release in exchange for $3,500 and a bill of sale for the 2,000-gallon USTs, the gas pumps and the sign. Appellant ceased distributing gasoline to the Helms at or about that same time. Another supplier, Zeeks Full Oil, became Helm's distributor thereafter.

In June 1987 a new well was drilled at 2810 Manor Road. Water containing an odor of gasoline was encountered from depths of 100 feet to

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[2] The stipulation used 2840, but other exhibits establish that the correct address should be 2830. 2840 is the Helm's store address.

[3] The stipulation states that gasoline is made from a blend of hydrocarbon molecules, plus some non-hydrocarbon additives.

something less than 198 feet. The well was double cased to a depth of 198 feet and drilled to a depth of 526 feet. A water sample taken from the well on July 16, 1987 contained no hydrocarbons within the detection limit of 0.2 milligrams per liter (mg/l). Six months later, on January 28, 1988, a water sample taken from this same well contained 7.2 mg/l of gasoline.

A water sample taken from the new well at 2810 Manor Road on May 5, 1990 contained 47 mg/l of "mixed hydrocarbon in the gasoline range." A sample taken on the same date from the old well at this residence contained 24 mg/l of the substance. These water samples prompted a report to DER. Susan Dissinger, a water quality specialist for DER, visited the area on May 14, 1990. She detected an odor of gasoline in the wells at 2810 and 2820 Manor Road and obtained water samples at both locations. These samples, according to DER's laboratory analysis, revealed 16.5 parts per million (ppm)[4] of gasoline in the well at 2810 and 57 ppm of gasoline in the well at 2820.

Ms. Dissinger also went to the Stauffer Fuel Oil property at 2850 Manor Road, immediately north of the Helm's store property. She was told that there were no USTs on the property.[5] She took no water samples from the Stauffer Fuel Oil well, reported to be only 23 feet deep, because there was no detectable odor of gasoline when she opened a kitchen faucet.

On May 25, 1990 DER sent a letter to the Helms requesting precision testing of the USTs on their property. Testing, in fact, had been done on May 23, 1990. The results, forwarded to DER on June 25, 1990, revealed that both 2,000-gallon USTs were leaking - one at the rate of 2.145 gallons per hour and

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[4] The stipulation recites that ppm is the near-equivalent of mg/l and that the terms often are used interchangeably.

[5] There is evidence that Appellant supplied a 550-gallon tank to Stauffer Fuel Oil in 1974. There is no evidence whether the tank was underground and no evidence whether it is still on the Stauffer Fuel Oil property.

the other at the rate of 1.672 gallons per hour. Further testing that might have disclosed whether the leaks were in the tanks themselves or in the piping systems was not performed. On July 26, 1990 DER issued an Order to the Helms directing them *inter alia*, to unearth the USTs and take other remedial action.

Excavation was begun on July 31, 1990, in the presence of DER's Dissinger, and continued for several days thereafter. Ms. Dissinger observed a significant odor of gasoline in the excavation area and some staining of the soil surrounding the tanks. Patched areas were visible on the two 2,000-gallon USTs along with corrosion and deteriorated piping. The 550-gallon UST had been partially filled with cement or foam and had a hole in the top. A soil sample taken from the southeast corner of the excavation contained 7,255 ppm of gasoline. Excavation covered an area approximately 21 feet by 42 feet and extended to a depth of nearly 12 feet where bedrock was encountered. The 350 tons of contaminated soil were stockpiled on the site (where they still remain) and the excavation was backfilled with stone.

A shallow well (30 feet deep, more or less) on the Helm's store property became so contaminated with gasoline that it was grouted shut in 1984 when a new well was drilled. A sample obtained by Mr. Helm before this shallow well was closed had the odor and appearance of gasoline. Ms. Dissinger obtained samples on July 31, 1990 apparently from the new well on the Helm's store property and from the well on the unoccupied property adjacent to it (2830 Manor Rd). These samples contained 396.3 ppb (parts per billion) and 545 ppb of benzene,[6] respectively.

The Helms filed a Notice of Appeal with this Board on August 23, 1990 (docket number 90-360-MR) in order to contest DER's July 26, 1990 Order. On

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[6] The stipulation states that benzene is one of the components of gasoline, constituting from 2% to 10% of the total volume.

August 31, 1990 their legal counsel notified DER that they had exhausted their financial resources and could take no further action in compliance with the July 26, 1990 Order. On November 20, 1990 the Helms withdrew their appeal with this Board.

In the meantime, DER had learned that Appellant had owned the USTs at one time. On November 29, 1990 DER sent a letter asking whether Appellant would accept responsibility for remedial action. Having received no response, DER sent another letter to Appellant on January 29, 1991. On February 1, 1991 Appellant responded, declining to assume responsibility for the contamination. On March 27, 1991 DER issued the Order forming the basis of Appellant's appeal.

When the contamination in the wells at 2810 and 2820 Manor Road was discovered in May 1990, the residents obtained water on an interim basis from a 6,000-gallon tanker truck connected to the residences by garden hoses. The water was supplied by Friendship Water Company, a public utility serving the area in the general vicinity of the properties. After the Helms exhausted their financial resources, DER entered into an emergency services contract with the water company using moneys from the Federal Leaking Underground Storage Tank Trust Fund.

This fund consists of annual appropriations to Pennsylvania by the U.S. Environmental Protection Agency (EPA) to be used to perform investigations or cleanups or to provide impacted residents with an alternate potable water supply. Pennsylvania is required by terms of the appropriation to seek cost reimbursement from responsible parties. As of the time of the hearing, DER had spent over $10,000 for the emergency water supply and over $300,000 for the extension of Friendship Water Company's service lines to provide a permanent replacement water supply for these residences. Only about

$18,000 remains in the fund to cover statewide activities through September 30, 1991.

Lawsuits were filed in the Court of Common Pleas of Chester County in 1990 seeking property damages from Appellant for the contamination of the wells. Appellant has been unable to obtain insurance coverage for these potential liabilities. Mack Oil Company acquired the capital stock of Appellant on October 2, 1984. Appellant had been losing money for several years by that time and its liabilities exceeded its assets. Consequently, there was no purchase price paid to the shareholders. Appellant became (and remains) a wholly-owned subsidiary of Mack Oil Company.

According to a balance sheet compiled by Joseph P. McDevitt, a Certified Public Accountant, from information presented by management but neither audited nor reviewed by him, Appellant's net worth as of April 30, 1991 was $223,984. The bulk of the assets - accounts receivable, inventory and equipment - are pledged to secure bank loans totalling $337,000 payable within the next 12 months. Net profit before taxes estimated for the fiscal year that ends June 30, 1991 is $10,000. The average annual net profit from the 1984 acquisition to June 30, 1990 is $61,100. The list of about 1,500 fuel oil customers is a valuable asset not reflected on the balance sheet.

A preliminary investigation of the soils and groundwater to characterize the hydrogeologic environment and to determine the source and extent of contamination is estimated to cost about $80,000. Remediation could amount to another $600,000 to $800,000. According to McDevitt and Scott McCorry, Appellant's vice president, these costs are too steep for Appellant to bear.

According to a topographic map, the Helm's store property and adjacent residences are situated near the southern end of a ridge sloping

toward the south. If Appellant's hydrogeologist, Ann Dorsey, is correct that the affected residences are at a higher elevation than the store, it must be the result of a minor and very localized phenomenon for it does not show up at all on the topographic map with its 20 feet elevation increments. The generalized inclination of the land is clearly toward the south.

The bedrock under the area at an average depth of 5 feet is granodiorite/granodiorite gneiss, which are igneous and metamorphic. Groundwater propagation is through fractures in the bedrock. The overlying soils are permeable. In this type of regime, precipitation will generally infiltrate the permeable soil to the bedrock and then pass through interconnected fractures in the bedrock to the point of discharge. The pattern will basically mirror the topography.

No studies have been done by DER, Appellant, the Helms or anyone else to determine precisely the source of the gasoline contamination in the neighborhood wells or the extent of the contamination in the soils and groundwater.

To be entitled to a supersedeas, Appellant must show, by a preponderance of the evidence, (1) irreparable harm, (2) the likelihood of prevailing on the merits, and (3) the unlikelihood of injury to the public. If pollution or injury to the public health, safety or welfare exists or is threatened, a supersedeas may not be granted: Environmental Hearing Board Act, section 4(d), Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d); 25 Pa. Code §21.78.

We have held that significant economic or financial harm constitutes irreparable harm: Elmer R. Baumgardner et al. v. DER, 1988 EHB 786; Frank Colombo et al. v. DER, 1989 EHB 1319. Since DER apparently concedes that the cost of complying with its Order will be a significant financial burden to

Appellant, we will conclude that irreparable harm has been shown. Accordingly, we express no opinion whether Appellant's evidence is sufficient to prove the point.

Despite the financial impact upon Appellant, we are unable to conclude that it is likely to prevail on the merits. Section 1302 of the Storage Tank and Spill prevention Act (Storage Tank Act), Act of July 6, 1989, P.L. 169, 35 P.S. §6021.1302, empowers DER, upon learning of a release from a storage tank, to order the "owner, operator, landowner or occupier to take corrective action" and to pay any cost incurred by DER. "Storage tank" is defined in section 103 (35 P.S. §6021.103) to include an underground storage tank used for the storage of any regulated substance. The USTs at the Helm's store each met the definition of "underground storage tank" and each contained a "regulated substance" according to the definitions of these terms in section 103 of the Storage Tank Act.

Appellant is considered an "owner" under the Storage Tank Act because it falls within the third category of the definition in section 103: "the owner of an underground storage tank holding regulated substances on or after November 8, 1984, and the owner of an underground storage tank at the time all regulated substances were removed when removal occurred prior to November 8, 1984." The evidence is clear that Appellant owned the two 2,000-gallon tanks up to October 3, 1986 when they were transferred to the Helms. These USTs held gasoline during all of that time. It also is beyond question that Appellant owned the two 550-gallon USTs that held gasoline until June 1977 when one tank was removed and the other filled with grout. This latter tank remained in place until it was removed in August 1990. There is no evidence that it was ever transferred to the Helms.

With Appellant coming within the scope of the Storage Tank Act, DER was authorized to order corrective action and cost reimbursement. "Corrective action", as defined in section 103, covers a variety of measures from investigation to abatement and includes the replacement of water supplies. DER's Order falls within these parameters.

Appellant points out that DER has not established the precise time or source of the release that caused the 1990 contamination of the wells at 2810 and 2820 Manor Road. This is true, but provides no means of escape for Appellant. Apparently mindful of the difficulties of proof in this type of situation, the Legislature placed a rebuttable presumption in section 1311 of the Storage Tank Act, 35 P.S. §6021.1311, that an owner of a UST is liable, without proof of fault, negligence or causation, for all contamination occurring within 2,500 feet of the site where the UST is located. To overcome the presumption, the owner must "affirmatively prove, by clear and convincing evidence," one of four defenses: (1) the contamination existed prior to the use of any USTs, (2) an adjacent landowner refused access to conduct a survey, (3) the contamination was not within 2,500 feet, or (4) the owner did not contribute to the contamination.

Since the contamination involved here is well within 2,500 feet of the location of the USTs, the presumption comes into play and Appellant had the burden of rebutting it by clear and convincing affirmative evidence. This was not done and, accordingly, Appellant is presumed liable without proof of fault, negligence or causation.[7]

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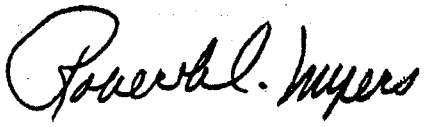
[7] The presumption is reinforced here by the documented releases from these USTs in 1977 and 1980 when Appellant owned them and Appellant's undertaking of remedial action at the same residences.

DER also based the Order on provisions of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §570-17. Since it is apparent that Appellant is unlikely to prevail under the Storage Tank Act, we offer no opinion on the applicability of these other statutory provisions.

ORDER

AND NOW, this 11th day of June, 1991, it is ordered that Appellant's Petition for Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: June 11, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

MR. AND MRS. JOHN KORGESKI	:	
	:	**EHB Docket No. 86-562-W**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	
and	:	
	:	**Issued:** June 13, 1991
BICHLER SANITARY LANDFILL, Permittee	:	

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

By Maxine Woelfling, Chairman

Synopsis:

Neither the Department of Environmental Resources (Department) nor a landfill permittee are barred by the doctrines of *res judicata* and collateral estoppel from asserting that a 1986 amendment to a solid waste permit designating approach and access routes to a landfill was not an abuse of discretion. Neither doctrine applies since there is no identity of issues; the facts relating to the approach and access routes changed since the Board's 1983 default adjudication sustaining an appeal from the issuance of the 1982 permit amendment.

Article I, §27 of the Pennsylvania Constitution and §§102(4) and (10) of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (Solid Waste Management Act), require the Department to evaluate traffic safety considerations when reviewing a solid

waste management permit application. The Department committed an abuse of discretion in approving a landfill approach route contingent upon the completion of a study regarding the feasibility of the approach route.

BACKGROUND

On October 6, 1986, Mr. and Mrs. John Korgeski appealed the Department's September 2, 1986, issuance of an amendment to Solid Waste Permit No. 100976 (the permit) which authorized the operation of a demolition waste landfill by Charles Bichler in the Borough of Taylor, Lackawanna County. The amendment, which was issued pursuant to the Solid Waste Management Act, designated approach and access routes to the Bichler Landfill, limited the days and hours of its operation, prescribed the amount and weight of vehicular traffic, and required street sweeping and dust control. The amendment also required that certain recommendations in a Department of Transportation (PennDOT) letter be addressed to the satisfaction of the Borough of Taylor (Taylor).[1] In their notice of appeal the Korgeskis contended that the Department's action was arbitrary, capricious, an abuse of discretion, and contrary to substantive and procedural laws; created a public nuisance;

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[1] In a related appeal filed at Docket No. 86-552-W, Charles Bichler challenged three of the conditions contained in the permit amendment. This appeal had been consolidated with the Korgeskis' appeal. In response to cross-motions for summary judgment filed by Bichler and the Department, the Board granted partial summary judgment to Bichler on two of the conditions, finding that the Department had abused its discretion in issuing a permit contingent upon a municipality's determination that the PennDOT concerns were satisfactorily addressed by the permittee. 1989 EHB 36. Bichler subsequently withdrew his appeal of the remaining permit condition on April 18, 1989.

Bichler also challenged the Department's December 4, 1989, decision refusing to process his application for re-permitting under the 1988 municipal waste management regulations. The Board granted the Department's motion for summary judgment, finding the Department did not abuse its discretion in refusing to process a preliminary application which failed to comply with the filing deadlines as set forth in the municipal waste management regulations. Charles Bichler, Bichler Landfill v. DER, EHB Docket No. 89-608-W (Opinion issued December 10, 1990). Bichler has petitioned the Commonwealth Court for review of that opinion at No. 13 C.D. 1991.

threatened their health, safety and welfare; and amounted to a *de facto* taking of their property.

The Board conducted a view of the premises on September 9, 1987.[2]

On May 1, 1989, there was a hearing on the merits of the appeal before Board Chairman Woelfling.

The Korgeskis filed their post-hearing brief on June 19, 1989, arguing that *res judicata* barred the reissuance of a permit amendment previously considered and revoked by the Board and that the Department acted arbitrarily and capriciously by permitting an approach route determined to be unsafe and dangerous by both PennDOT and Taylor without first conducting its own feasibility study.

Bichler filed his post-hearing brief on July 17, 1989, alleging that the principles of *res judicata* were not applicable and that the Department thoroughly and completely considered the approach route prior to approving it in the amendment.

The Department filed its post-hearing brief on August 9, 1989, also arguing that neither *res judicata* nor collateral estoppel were applicable.

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[2] This view was distinguished more by its carnival atmosphere than its providing the Board with a better understanding of the physical characteristics of the Bichler Landfill and the adjacent neighborhood. Local media apparently had been invited to attend the view by one or more of the parties without the Board's knowledge. Those same parties were so intent on conveying their positions to the media that they lost sight of the fact that they should have been making sure that they acquainted the Board with the Bichler Landfill and its surroundings. Such conduct does not reflect well on counsel or the parties represented by them. Furthermore, when a view is scheduled by the Board, the participants should dress appropriately and be prepared to walk around the site at issue.

The Department further contended that, consistent with its obligations under Article I, §27, of the Pennsylvania Constitution, it thoroughly reviewed all possible approach routes and chose the route with the least impact on the surrounding area.

Any issues not raised in the parties' post-hearing briefs are deemed to have been waived. J. C. Brush v. DER and Rampside Colleries, Inc., 1990 EHB 1521, and Lucky Strike Coal Co. and Louis J. Beltrami v. Dep't of Environmental Resources, 119 Pa.Cmwlth 440, 547 A.2d 447 (1988).

After a full and complete review of the record we make the following findings of fact.

FINDINGS OF FACT

1. Appellants are Mr. and Mrs. John Korgeski, who reside at 1100 Walnut Street, Taylor, Lackawanna County. (N.T. 13)

2. Appellee is the Department, the agency with the authority to administer and enforce the Solid Waste Management Act and the rules and regulations adopted thereunder.

3. Permittee is Bichler Sanitary Landfill, the recipient of the September 2, 1986, amendment to Solid Waste Permit No. 100976 that is the subject of this appeal. (N.T. 5)

4. The amendment to the permit designated Hickory Lane as the access road to the Bichler Landfill and Laurel Lane and Walnut Street as the approach route. The amendment also included, *inter alia*, the following conditions:

* * * * *

2. The Department is provided certification that the items mentioned in the PennDOT letter dated May 16, 1986 have been considered by a qualified engineer in determining the feasibility of Walnut Street and Laurel Lane as the approach route to the landfill.

3. Hours of operation are 7:00 A.M. to 6:00 P.M. Vehicles which arrive prior to 7:00 A.M. may wait between the first and second gate.

* * * * *

5. There will be no Sunday operation.

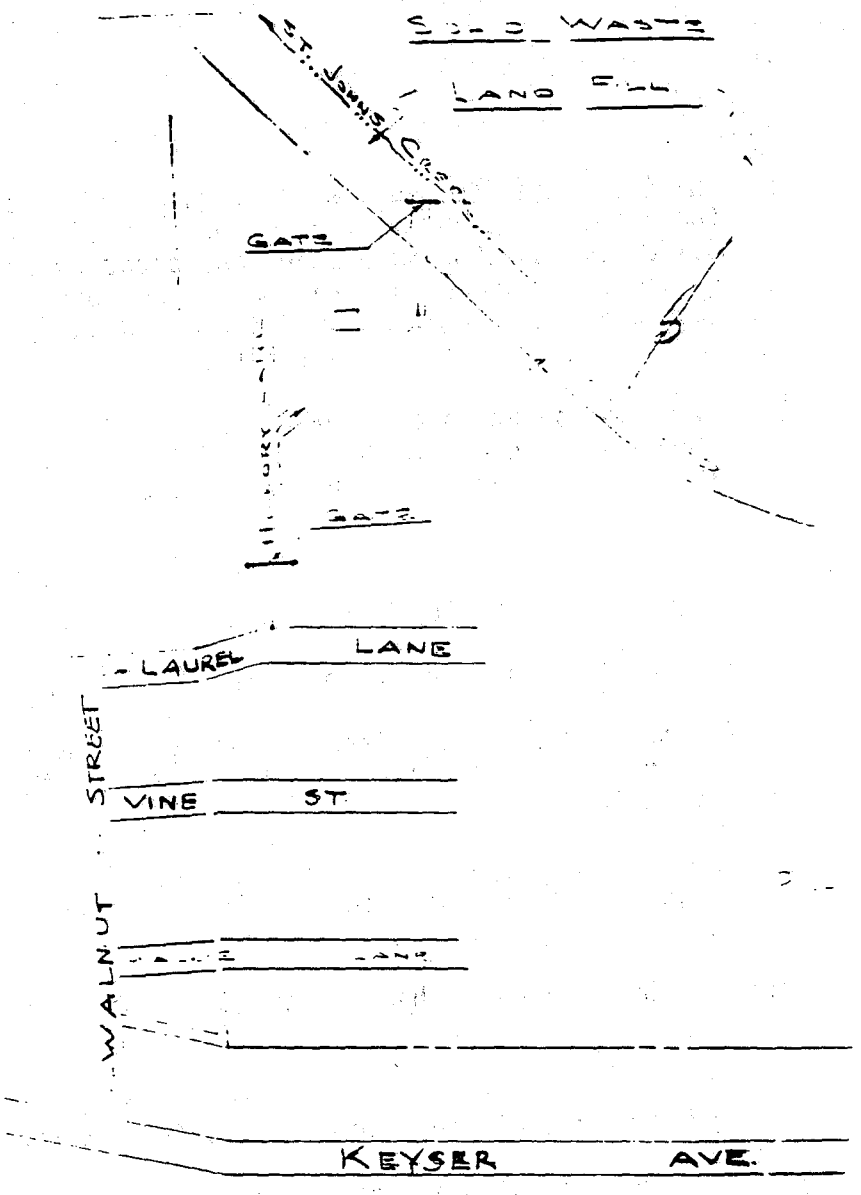
6. Hickory Lane must be paved to the first gate.

7. A regular program of street sweeping and dust control will be required as determined by the Department.

8. The traffic increase shall not exceed 10 vehicles per day and such vehicles shall not exceed 36 tons in capacity.

The PennDOT recommendations were attached to the amendment. (Notice of Appeal)

5. The configuration of the approach route/access route to the Bichler Landfill is as follows in this diagram, which is not to scale:



(Stipulation of Parties at N.T. 239-240).

6. The permit was originally issued to Bichler Sanitary Landfill on June 20, 1974, and authorized the construction and operation of a demolition waste landfill. (Stipulation of Parties at N.T. 239-240)

7. The permit allowed the landfill to be entered by an unnamed access road, the upper portion of which was later named Hickory Lane. (N.T. 3)

8. On June 28, 1982, the Department issued an amendment (1982 amendment) to the permit, which eliminated the unnamed lower portion of the road that was designated as the access road, and changed this portion of the access road to Laurel Lane, which, at that time, was a private road owned by Bichler. The upper portion of the access road, now named Hickory Lane, remained in the permit. (Stipulation of Parties at N.T. 239-240, 151-152)

9. Taylor appealed the 1982 permit amendment, and the Board sustained Taylor's appeal as a result of Bichler's failure to file a pre-hearing memorandum; accordingly, the 1982 amendment was revoked. 1983 EHB 343.

10. In 1985, the Court of Common Pleas of Lackawanna County ruled that Laurel Lane was a public roadway.

11. On May 31, 1985, Bichler filed an application for an amendment to the permit. This application requested that the Department eliminate the lower portion of the designated access road and indicated that Hickory Lane would be entered by Laurel Lane. N.T. 172; Exh. P-3)

12. Upon receipt of the application for the permit amendment, the Regional Waste Manager distributed it to his technical staff for review. (N.T. 173-174)

13. Due to concerns expressed by Taylor and the public regarding the approach route, the Department then requested Bichler to complete and submit a Module 9. (N.T. 174-175, 185-186)

14. Module 9 is a general environmental, social and economic information module, which the Department asked Bichler to submit because the Department was aware of concerns regarding the approach route. In particular,

the Department specifically requested Bichler to address Item 18, which concerns traffic impact. (N.T. 175; Exh. P-4)

15. Module 9 is not normally required for a permit amendment application. (N.T. 181)

16. In reviewing the application for the amendment, the Department decided to evaluate the approach routes, as well as the access routes. (N.T. 184)

17. The Department's engineer, Dale Williams, determined that the application met the requirements of the solid waste regulations, but he had concerns about traffic safety which prompted a request for the PennDOT review. (N.T. 176, 191-192)

18. The Department wanted more information on the approach route than was supplied by Harold Rist, the engineer retained by Bichler to complete the Module 9 questions on traffic impact. (N.T. 194-197)

19. PennDOT's District Traffic Engineer, Ronald F. Bonacci, P.E., responded to the Department's request on May 16, 1986, with a letter listing recommendations for further study. (Attachment to Notice of Appeal)

20. PennDOT's letter recommended that several issues be given more study: the structural integrity of Walnut Street and Laurel Lane; the adequacy of road widths; the necessity for parking restrictions and safe speed limits, considering cornering sight distances; the compatibility of truck traffic to the surroundings; a review of accident data in the immediate area; and a determination of which wheel base vehicles could be accommodated at the intersection of Walnut Street and Laurel Lane in light of the turning radii and pavement structure. (Attachment to permit amendment, Notice of Appeal)

21. The Department never conducted its own feasibility study to address these recommendations in further depth. (N.T. 186, 191)

22. The Department never consulted with the Taylor engineer regarding the feasibility of the approach and access routes proposed in the permit amendment application. (N.T. 192-193)

23. The Department met with Taylor Council several times. (N.T. 178)

24. Several possible approach routes to the Bichler Landfill were discussed with Taylor Council: Oak Street, Bichler Lane and Walnut Street. (N.T. 81)

25. Taylor was reluctant to choose one approach road over another. (N.T. 189)

26. At some point Taylor Council announced it did not want any street as the approach route. (N.T. 85)

27. Although the Department considered alternate approaches, which it did not detail, and conceded these other routes were in better condition, it ultimately decided the approach route chosen would have the least impact on the community because it would affect the fewest number of residences. (N.T. 185-186)

28. The speed limit at the intersection of Keyser Avenue and Walnut Street is 35 mph; the speed limit on Laurel Lane and Walnut Street is 25 mph. (N.T. 61)

29. As of the date of the hearing, there were no speed limit signs on Walnut Street. (N.T. 202)

30. As of the date of the hearing,there was no stop sign at the intersection of Walnut Street and Laurel Lane. (N.T. 205)

31. Walnut Street and Laurel Lane are 50 feet right-of-ways. (N.T. 125, 203)

32. Walnut Street becomes increasingly narrow before it intersects with Laurel Lane. (N.T. 66)

33. A May, 1986, survey map of portions of Walnut Street, Laurel Lane and Vine Street indicates that the width from the edge of pavement to the opposite edge of pavement of Walnut Street is 27.2 feet south of Vine Street; 18.0 feet north of Vine Street; and 18.1 feet in front of the Korgeski home. (N.T. 112, Exh. A-2)

34. The truck traffic that used the Bichler Landfill when it was operational consisted of Packmasters with three rear axles and tractor-trailers (18-wheelers). (N.T. 63)

35. A truck such as an 18-wheeler or a Packmaster with three rear axles, both of which require a turning radius of 50 feet, could not make the 90 degree turn at the intersection of Walnut Street and Laurel Lane. (N.T. 115)

36. With the current road intersection configuration, a truck would have to jockey back and forth several times in order to make a 90 degree turn. (N.T. 131)

37. It is unsafe for 18-wheelers or Packmasters to make the 90 degree turn at the intersection of Walnut Street and Laurel Lane. (N.T. 114)

38. Widening the pavement of Walnut Street or Laurel Lane would mitigate the hazard at this intersection. (N.T. 127)

39. Evergreens are planted in the sidewalk portion of the right-of-way of Laurel Lane; the evergreens interfere with the clear sight triangle for vehicles making this turn. (N.T. 125-126)

40. The presence of parked cars at the Walnut Street and Laurel Lane intersection exacerbates the safety hazard of executing a turn there. (N.T. 117, 119, 121-122, 210)

41. Making Walnut Street and Laurel Lane one way streets would decrease the safety hazards at the intersection of these two streets. (N.T. 121)

42. Taylor has no plans to make Walnut Street or Laurel Lane one-way streets (N.T. 168), to widen either of those streets, to create shoulders along them, to remove evergreens on the corner, or to restrict parking. (N.T. 168-169)

DISCUSSION

When a third party appeals actions of the Department, it bears the burden of proving by a preponderance of the evidence that the Department committed an abuse of discretion, 25 Pa.Code §21.101(c)(3) and Bobbi L. Fuller, *et al.* v. DER, 1990 EHB 1726. Thus, in order to prevail on their appeal, the Korgeskis must demonstrate that the Department's actions were arbitrary, capricious, in violation of the relevant law, or a manifest abuse of discretion, Anderson W. Donan, M.D. *et al.* v. DER, 1990 EHB 990.

***Res Judicata* and Collateral Estoppel**

The Korgeskis contend that the Department was barred by the doctrines of *res judicata* and collateral estoppel from issuing the amendment as a result of the Board's disposition of Taylor's appeal of the 1982 amendment. The 1982 amendment, *inter alia*, modified the approach and access routes to the landfill (N.T. 239-240). Taylor appealed the issuance of the 1982 amendment and the Board, in an opinion at 1983 EHB 343, sustained Taylor's appeal as a result of Bichler's failure to file a pre-hearing memorandum and his indication that he had no intention of defending the issuance of the permit amendment. On May 6, 1983, Bichler filed a petition to vacate the Board's order, which petition was dismissed for lack of jurisdiction due to its untimely filing, 1984 EHB 846.

The nature and purpose of the doctrine of *res judicata* was pointed out by the Superior Court in Day v. Volkswagenwerk Aktiengesellschaft, 318 Pa.Super. 225, 464 A.2d 1313, 1316 (1983):

> The doctrine of *res judicata* has been judicially created. It reflects the refusal of the law to tolerate a multiplicity of litigation. "It holds that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." 46 Am.Jur. 2d, Judgments §394 at 558-559 (footnotes omitted). "'The original cause is "barred" by a judgment for the defendant and "merged" in one for the plaintiff. [The doctrine] forbid[s] relitigation of matters actually decided, on the ground that there is no assurance the second decision will be more correct than the first. Moreover, a party is commonly forbidden to raise issues that could have been litigated in the first suit but were not, because of the desirability of settling the entire controversy in a single proceeding.'" *In re Estate of R.L.L.*, 487 Pa. 223, 228 n.7, 409 A.2d 321, 323 n.7 (1979), quoting Cramton, Currie and Kay, Cases on Conflicts of Laws 2d Ed. ABC, p.655 (1975). See also: *Haring v. Prosise*, ___ U.S. ___, ___ n.10, 103 S.Ct. 2368, 2375 n.10, 76 L.Ed.2d 595, 606 n.10 (1983)....
>
> (emphasis added)

The doctrine relates to causes of action. It does not bar the Department from issuing an amendment to a solid waste permit, although it may operate to preclude the raising of various issues in litigation relating to the permit amendment.[3] According to Day, *supra*, in order for *res judicata* to apply, four elements must be present: an identity of issues, an identity of causes of action, an identity of persons and parties to the action, and an identity of the quality or capacity of the parties suing or sued. *Res judicata* is

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[3] The same is true with respect to the related doctrine of collateral estoppel.

applicable to the actual parties to the litigation and those in privity to them.

In order for the doctrine of collateral estoppel to apply, the issue decided in the prior adjudication must be identical with the one presented in the later action, there must have been a final adjudication on the merits in the prior action, the party against which collateral estoppel is asserted must have been a party or in privity with a party to the prior action, and the party against which collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in question in the prior action, Donald W. Deitz v. DER, 1985 EHB 695.

To the extent that the Korgeskis are arguing that *res judicata* and collateral estoppel bar the Department and Bichler from asserting that the approval of the approach and access routes to the Bichler Landfill was not an abuse of discretion, we must conclude that the doctrines are inapplicable here, because there is no identity of issues between the 1982 appeal before the Board and this appeal.

While the Borough of Taylor's 1982 appeal and the Korgeskis' present appeal both concern the adequacy of the approach route, the nature of the approach route has changed since 1982. At the time of the 1982 appeal there was a dispute between the Korgeskis and Mr. Bichler as to whether Laurel Lane was a public road or a private road. That dispute was resolved in a 1985 decision by the Lackawanna County Court of Common Pleas, of which we take official notice pursuant to 25 Pa.Code §21.109. The Lackawanna County Court decision held that Laurel Lane was a public road. Thus, until this 1985 decision, Laurel Lane was regarded as a private road and, therefore, part of the access road. When the Department modified Bichler's permit in 1986, then, the approach and access routes had changed from the approach and access routes

considered by the Department in 1982.[4] Under these circumstances, it can hardly be said that the issue in the 1982 appeal was identical to the issue now before the Board. Schubach v. Silver, 461 Pa. 366, 336 A.2d 328 (1975)[5] and Diehl v. Com., Dept. of Public Welfare, ___ Pa.Cmwlth ___, 489 A.2d 988 (1985).

Propriety of the Access Route/Approach Route

The remaining issue before the Board is whether the Department abused its discretion in designating Walnut Street and Laurel Lane as the approach route to the Bichler Landfill. In reaching this determination, the Board must, of necessity, review the propriety of Condition No. 2 in the permit amendment, which designated this approach route contingent upon the following condition:

> The Department is provided certification that the items mentioned in the PennDOT letter dated May 16, 1986 have been considered by a qualified engineer in determining the feasibility of Walnut Street and Laurel Lane as the approach route to the landfill.

---

[4] The regulations which were in effect at the time of the Department's decision defined "access road" at 25 Pa.Code §75.1 as

> Any cartway or roadway (available to the public) which provides access between a public owned roadway and the entrance to a site or facility.

This definition was superseded by 25 Pa.Code §271.1 which became effective on April 9, 1988. As explained, *infra*, the Department had no specific regulations relating to approach routes, but did review access routes for compliance with 25 Pa.Code 75.21(i) (now repealed).

[5] The Department's brief cited this decision for the proposition that where a change in law occurs subsequent to a decision, collateral estoppel does not bar a subsequent attack on that decision. No change in law occurred here, as in the Schubach case, but, rather, the legal status of Laurel Lane changed. Schubach is more correctly cited for the proposition that a change in facts bars the application of the doctrine of collateral estoppel in subsequent litigation.

Under the circumstances, we find that the Department abused its discretion by designating Walnut Street and Laurel Lane as the approach route to the Bichler Landfill.

As was noted *supra* in footnote four, there is a distinction between the approach and access routes to a landfill. The access route, which was evaluated for conformance with 25 Pa.Code §75.21(i) (now superseded), is a private roadway, while the approach route is a public roadway. The Department correctly points out that it had no requirements relating to approach routes. Although it asserts that it went beyond its duties here by evaluating approach routes, the Department's actions in doing so, however, are no more than is required of it by prior Board and Commonwealth Court precedent.

Beginning with Pennsylvania Environmental Management Services v. DER *et al.*, 1984 EHB 94, rev'd on other grounds, 94 Pa.Cmwlth 182, 503 A.2d 477 (1986), and most recently with T.R.A.S.H. Ltd. and Plymouth Township v. DER *et al.*, 1989 EHB 487, aff'd, ___ Pa.Cmwlth ___, 574 A.2d 721 (1990), the Board has held that the Solid Waste Management Act and Article I, §27 of the Pennsylvania Constitution mandate an inquiry into traffic safety considerations when the Department evaluates a solid waste permit application. We have also recognized that because of the Department's realm of expertise, it may have to consult with and obtain the recommendations of PennDOT. T.R.A.S.H. Ltd., *supra*, at 551; Township of Indiana v. DER, 1984 EHB 1; Robert Kwalwasser v. DER, 1986 EHB 24; and Wisniewski v. DER, 1986 EHB 111.

The Department argues that its approval of the permit amendment is in compliance with the first prong of the test set forth in Payne v. Kassab, 11

Pa.Cmwlth 14, 312 A.2d 86 (1973), aff'd, 468 Pa. 226, 361 A.2d 263 (1976),[6] because Hickory Lane, the access road, complies with the requirements of 25 Pa.Code §75.21(i). With regard to the Walnut Street and Laurel Lane approach route, the Department appears to be arguing that because it required Bichler to prepare a Module 9 (Exh. P-4), it conducted a site visit, and it solicited PennDOT's comments on the traffic impacts of the approach route, it satisfied its obligations under Payne.

We disagree with the Department's assertion that it carried out its responsibilities, for although information was gathered, the Department never resolved any of the traffic safety problems which surfaced in this information-gathering process. In essence, the Department, in the face of objections from Taylor and residents along the approach route and concerns from PennDOT, designated an approach route in the permit and then required Bichler to retain a qualified traffic engineer to ascertain the feasibility of this approach route. It goes without saying that this issue should have been resolved before the permit amendment was issued. The Department, through its Regional Solid Waste Manager, David Lamereaux, admitted as much in this exchange with the Board:

> THE BOARD: Mr. Lamereaux, in reviewing the conditions of this permit, particularly Condition

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[6] Payne enunciates the well-known test for determining compliance with Article I, §27:

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

> **No. 2, it struck the Board as rather curious that the Department was requiring Mr. Bichler to perform a study of the feasibility of Walnut Street and Laurel Lane as the approach route to the landfill after the permit was issued. Isn't this something that would better have been done during the course of the permit application process?**
>
> LAMEREAUX: Absolutely.
>
> (N.T. 183-184)

The testimony adduced at the hearing confirms this.

The Department correctly sought PennDOT's assistance in evaluating the approach route, but completely ignored the import of PennDOT's comments. PennDOT recommended that a study of the approach route be performed and that the study include items such as core borings to assess structural integrity, compatibility of truck traffic to residential surroundings with children playing and no sidewalks, road widths, accident review data, lack of a posted speed limit, cornering sight distances, and the turning radius of the intersection (Attachment to Notice of Appeal). These are hardly minor concerns. Furthermore, they are substantiated by the testimony of Taylor Police Chief Robert Rist, Taylor Manager Daniel P. Zeleniak, and the expert engineers for both Bichler and the Korgeskis.

Mr. Zeleniak testified regarding Taylor's concerns about truck traffic in residential areas. Chief Rist testified that Packmasters and tractor trailers used the landfill when it was operational, and he described Walnut Street as becoming increasingly narrow as one approaches the intersection with Laurel Lane (N.T. 63, 66). He noted that these types of trucks would have a hard time safely making the turn at the intersection (N.T. 67).

Although the lay testimony was helpful, the expert opinion of Messrs. Bartholomew and Surace emphatically established that the Department had abused

its discretion in designating the approach route and then requiring the feasibility study.

Mr. Bartholomew described the turning radii of various garbage collection vehicles, and, applying this data to the actual road conditions at Walnut Street and Laurel Lane, opined that eighteen wheelers or garbage trucks with three axles could not negotiate the 90 degree turn at the intersection of Walnut Street and Laurel Lane (N.T. 114). Negotiating the turn is further complicated by narrow roadways, parked cars, trees and shrubs adjacent to the roads, and children playing in the streets (N.T. 116-120). These hazards could be mitigated by widening the streets, paving them, and clearing the trees and shrubs (N.T. 126-127).

Bichler's expert, Dominick T. Surace, did not contradict Mr. Bartholomew's testimony and, in fact, confirmed it. Mr. Surace testified that dump and pick-up trucks could safely negotiate the turns on this approach route with certain modifications such as stop signs, speed limits, and parking restrictions (N.T. 204, 207). But, without these measures, there would continue to be a safety risk (N.T. 210). He would not recommend that trucks with a 50-foot wheel base (18-wheelers) (N.T. 204-205)) use this road as it presently exists (N.T. 213).

It is a mystery how the Department, in the face of these deficiencies, could have approved this approach route. Although Mr. Lamereaux testified that the Department approved the Walnut Street and Laurel Lane approach route because, with modifications, it would have the least impact on the community (N.T. 186), the Department had yet to even define those impacts.

In approving an approach route without ascertaining its impacts, the Department failed to assure in its approval of the amendment that its action was in conformance with the purposes of the Solid Waste Management Act

as articulated in §102.[7] Because it failed to ascertain the environmental harm which could result from its approval of the permit amendment, the Department did not comply with its obligation under the second prong of the Payne test to assure that there was a reasonable effort to reduce environmental incursion to a minimum. Similarly, in the absence of identification of environmental harm, we cannot conclude that the benefits of the approach route clearly outweighed the harm, as is required by the third prong of the Payne test.

CONCLUSIONS OF LAW

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

2. The Korgeskis, as a third party appealing actions of the Department, bear the burden of proving by a preponderance of the evidence that the Department committed an abuse of discretion. 25 Pa.Code §21.101(c)(3)

3. The Department and Bichler are not barred by the doctrines of *res judicata* and collateral estoppel from asserting that the 1986 amendment to the permit designating the approach route and access routes to the Bichler Landfill was not an abuse where the facts regarding the approach and access routes had changed since the appeal of the 1982 amendment designating the approach and access routes.

---

[7] Particularly to

* * * * *

(4) protect the public health, safety and welfare from the short and long term dangers of transportation...of all wastes;

* * * * *

(10) implement Article I, section 27 of the Pennsylvania Constitution...

* * * * *

4. In accordance with the Solid Waste Management Act and Article I, §27 of the Pennsylvania Constitution, the Department had the authority and duty to investigate traffic safety considerations and to include the approach route, as well as the access route, in its evaluation. Pennsylvania Environmental Management Systems v. DER, 1984 EHB 94; T.R.A.S.H., Ltd. and Plymouth Township et al. v. DER, et al., 1989 EHB 487.

5. The Department failed to carry out its obligations pursuant to the three-pronged test for determining compliance with Article I, §27 of the Pennsylvania Constitution articulated in Payne v. Kassab, 11 Pa.Cmwlth 14, 312 A.2d 86 (1973), where it failed to assure that the Walnut Street and Laurel Lane approach route protected the public health, safety, and welfare from dangers associated with the transportation of solid waste to the Bichler Landfill and failed to ascertain the environmental harms associated with the approach route.

6. The Korgeskis sustained their burden of proof under 25 Pa.Code §21.101.

7. The Department abused its discretion in approving the modification to Solid Waste Permit No. 100976 designating Walnut Street and Laurel Lane as the approach route to the Bichler Landfill.

O R D E R

AND NOW, this 13th day of June, 1991, it is ordered that the appeal of Mr. and Mrs. John Korgeski is sustained and the Department's September 2, 1986, amendment to Solid Waste Permit No. 100976 approving Walnut Street and Laurel Lane as the approach route to the Bichler Landfill is reversed.

ENVIRONMENTAL HEARING BOARD

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MAXINE WOELFLING
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Chairman

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ROBERT D. MYERS
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TERRANCE J. FITZPATRICK
Administrative Law Judge
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Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 13, 1991

cc: See following page.

cc: **DER, Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

GANZER SAND & GRAVEL, INC.	:	
	:	
v.	:	EHB Docket No. 89-585-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 13, 1991

OPINION AND ORDER
SUR APPELLANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

Where the cause of action and status of the parties in this case are not identical to that of a prior proceeding and where factual and legal issues have not remained static, *res judicata* and collateral estoppel do not act to bar relitigation of the adequacy of the proposed design of a landfill. Therefore, the appellant's motion for partial summary judgment based on these theories is denied.

OPINION

This matter arose on December 1, 1989 with the filing of an appeal by Ganzer Sand & Gravel, Inc. ("Ganzer") contesting the revocation of its solid waste permit by the Department of Environmental Resources ("DER") on November 2, 1989. The permit, which was issued in 1982, authorized construction of a residual waste landfill in Greene Township, Erie County. DER's letter of

revocation stated that the permit had been revoked due to Ganzer's alleged failure to provide collateral bonds as required by the permit. As of the date of revocation, construction of the landfill had not begun. (Affidavit of Anthony Talak, DER Brief in Opposition)

On February 21, 1991, Ganzer filed a motion for summary judgment, which was denied due to failure to meet the requirements of Pa.R.C.P. 1035(a) and because material questions of fact remained. See Ganzer Sand & Gravel, Inc. v. DER, EHB Docket No. 89-585-MJ (Opinion and Order Sur Appellant's Motion for Summary Judgment, issued March 20, 1991).

The matter now before the Board is a motion for partial summary judgment filed by Ganzer on April 26, 1991. This motion renews arguments made by Ganzer in its earlier motion and is accompanied by, *inter alia*, an affidavit signed by Ganzer's president. DER filed a brief in opposition to Ganzer's motion on or about May 29, 1991.

Ganzer contends that several arguments made by DER in its pre-hearing memorandum relating to the proposed design of the landfill are barred by the doctrines of *res judicata* and collateral estoppel because these issues were previously litigated and successfully defended by DER in a prior appeal. That appeal was brought by the Pennsylvania Game Commission ("the Game Commission") challenging DER's issuance of the solid waste permit to Ganzer in 1982. PA Game Commission v. DER and Ganzer Sand & Gravel, Inc., 1985 EHB 1. In that appeal, the Game Commission contended that DER had abused its discretion in issuing the permit to Ganzer because, *inter alia*, the landfill's design was inadequate to protect the environment. The Board held that the Game Commission did not meet its burden of showing that the design of the landfill was inadequate to prevent harm to the environment. On appeal, the Board's

decision was affirmed by the Commonwealth and Supreme Courts. See Commonwealth, PA Game Commission v. Commonwealth, DER, 97 Pa.Cmwlth. 78, 509 A.2d 877 (1986), and Commonwealth, PA Game Commission v. Commonwealth, DER, 521 Pa. 121, 555 A.2d 812 (1989). (The Board's decision and subsequent appeals shall be collectively referred to herein as "Ganzer I".) Ganzer argues that since the Board has ruled, and the courts affirmed, that the design of the proposed handfill is adequate and does not present a threat to the environment, DER is prevented by the doctrines of *res judicata* and collateral estoppel from again raising this challenge. DER, on the other hand, argues that the elements necessary for *res judicata* are not present and, therefore, summary judgment may not be granted on that basis. DER also asserts that the principle of collateral estoppel is not present with respect to this matter because the issues and facts have not remained static since the prior ruling.

Res judicata

Res judicata may come into play only when the following four elements are present: (1) identity of the thing sued for, (2) identity of the cause of action, (3) identity of persons or parties, and (4) identity in the quality of the parties for or against whom the claim is made. Bethlehem Steel Corp. v. DER, 37 Pa.Cmwlth. 479, 490, 390 A.2d 1383 (1978). Where these four elements are present, matters which have been litigated in a prior proceeding may not be relitigated. Id. at 490, 390 A.2d at 1389.

In the present case, the elements necessary for *res judicata* are lacking. As DER correctly notes, the causes of action involved in the two cases differ. Ganzer I involved a challenge to DER's issuance of the permit, whereas the present appeal concerns revocation of the permit. Secondly, the

relief requested in this action is reinstatement of the permit, whereas the relief sought by the Game Commission in Ganzer I was to overturn the issuance of the permit. Moreover, although both Ganzer and DER were parties to Ganzer I, DER was involved in Ganzer I in a much different capacity than what it now is. Whereas Ganzer I involved a third-party appeal where DER was aligned with Ganzer in defending issuance of the permit, it is now sided against Ganzer in this appeal of its revocation of the permit. Thus, because all the elements necessary for *res judicata* are not present, summary judgment may not be entered on that basis.

We also note that one of DER's contentions is that through experience and changing technology, it has gained more information leading it to conclude that the type of landfill design proposed for Ganzer's facility is less capable of protecting against groundwater pollution than other designs available. (Affidavit of Anthony Talak, DER Brief in Opposition). Where the action involved is subject to continuing regulation and developing technology, *res judicata* is to be applied sparingly. Bethlehem Steel, 37 Pa.Cmwlth. at 490-91, 390 A.2d at 1389.

Collateral estoppel

Whereas *res judicata* encompasses the effect of one judgment upon a subsequent trial or proceeding, collateral estoppel generally is invoked when the second action between the same parties is upon a different claim or demand. Fiore v. Commonwealth, DER, 96 Pa.Cmwlth. 477, 508 A.2d 371, 374 (1986). Under the theory of collateral estoppel, the judgment in the first action operates as an estoppel in the second action only as to those matters which are identical, were actually litigated, were essential to the judgment, and were material to the adjudication. Id. Collateral estoppel is designed

to prevent relitigation of issues which have been decided and have substantially remained static, both factually and legally. Keystone Water Co. v. Pennsylvania Public Utility Commission, 81 Pa.Cmwlth. 312, 474 A.2d 368, 373 (1984).

Although the issue of the adequacy of the landfill design was previously litigated in Ganzer I, we agree with DER that this issue has not remained static. The permit for construction of the landfill was issued in 1982. In its brief, DER states that the landfill design was approved in 1982 based on certain assumptions about the strength of the leachate that would be generated by the waste Ganzer proposed to dispose of at the landfill. DER asserts that those assumptions have now been determined to be incorrect and that the experience and information it has acquired since that time now demonstrate that the design of the facility is not adequate to prevent groundwater contamination. Since none of the information acquired since the 1982 permit approval was presented in Ganzer I, DER asserts, this issue has not remained static and collateral estoppel does not apply.

As stated above, this is an area subject to developing technology, where factual and legal issues have not remained static. Because these issues have not remained static since Ganzer I, collateral estoppel is not applicable to the relitigation of the issue of adequacy of the landfill's design.

In conclusion, because neither *res judicata* nor collateral estoppel is applicable in this case, Ganzer's motion for partial summary judgment, based on these theories, must be denied.

O R D E R

AND NOW, this 13th day of June, 1991, upon consideration of Ganzer's motion for partial summary judgment, the motion is denied.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 13, 1991

cc: **Bureau of Litigation**
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M. DIANE SMIT
SECRETARY TO THE B

NEW HANOVER CORPORATION	:	**EHB Docket No. 90-294-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	**Issued:** May 29, 1991
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	***Amended:** June 14, 1991

AMENDED
OPINION AND ORDER SUR
PETITION TO INTERVENE

By Maxine Woelfling, Chairman

Synopsis

A petition to intervene is denied where the prospective intervenor fails to demonstrate that it has a direct, substantial, and immediate interest in the subject matter of the appeal. Since the permit application which is the subject of the appeal was disapproved as a result of the denial of a related solid waste permit application, the issue before the Board is a narrow, legal issue. Petitioner's interest will be adequately protected by the Department of Environmental Resources (Department).

OPINION

This matter was initiated with the July 19, 1990, filing of a notice of appeal by New Hanover Corporation (Corporation) challenging the Department's June 29, 1990, denial of an application for a permit under the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.* (DSEA), to place and maintain fill in wetlands and to encroach upon wetlands through the construction of a leachate pipeline

* Only Footnote 4 on page 5 has been amended.

and haul road. The Department denied the permit application because the Corporation's application for re-permitting its landfill in New Hanover Township, Montgomery County, under the municipal waste management regulations had been denied by the Bureau of Waste Management, and, therefore, the Corporation could not demonstrate a need to encroach upon the wetlands.[1] The Corporation alleges that the Department's action was arbitrary, capricious, and taken in bad faith; was a violation of its constitutional rights of due process and equal protection; and made it impossible to obtain the necessary approvals to construct the landfill. Finally, the Corporation maintains that its application demonstrated a need to encroach upon wetlands and complied with all relevant laws and regulations.

On February 25, 1991, New Hanover Township (Township) filed a petition for leave to intervene, contending that its involvement in other related appeals, specifically Docket No. 90-115-W, warrants its intervention here. The Township argues it has an interest in this matter, since the proposed landfill will affect the safety, health, and welfare of its citizens and that this interest is not adequately represented by the Department, since the Township has distinct knowledge of local conditions and because the Township is the Department's adversary in the related appeal at Docket No. 88-119-W. The Township proposes to present expert testimony from several named witnesses, but it gives no detail regarding the substance of this

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[1] The Department's denial letter also recited its permit coordination requirements, as well as its obligations under Article I, §27 of the Pennsylvania Constitution. However, the stated reason for denial was that because of the solid waste permit denial, the Corporation could not demonstrate a need to encroach on the wetlands.

testimony. Finally, the Township asserts that it may lose rights and be prejudiced in the related appeals in which it is involved if intervention is not granted here.

The Department filed no response to the Township's petition. The Corporation opposed the Township's petition in its March 7, 1991, answer, arguing that the Township has failed to establish a direct, immediate, and substantial interest or to establish that its interests are not adequately represented by the Department, concluding that the Township's involvement would only broaden and confuse this appeal.

On March 18, 1991, the Township filed its reply to what it considered new matter in the Corporation's answer, along with a memorandum of law in support of its petition to intervene.[2]

As we have stated on numerous occasions, intervention in a matter pending before the Board is within the discretion of the Board. The prospective intervenor has the burden of demonstrating that it has a relevant interest that cannot be adequately represented by the existing parties and that it will be able to present relevant evidence to the Board. Intervention will not be allowed by the Board where it will expand the scope of an appeal or impede the Board's deliberations. See 25 Pa.Code §21.62 and New Hanover Corporation v. DER, EHB Docket No. 90-558-W (Opinion issued May 14, 1991). For the reasons which follow, the Township's petition is denied.

The Township contends that its interest in this matter arises from the fact that the proposed landfill will affect the safety, health, welfare, and property of its citizens. It also argues that intervention is warranted because of its involvement in other appeals relating to the Corporation's

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[2] These submissions were little more than a reiteration of the Township's earlier arguments.

landfill. A prospective intervenor's interest in a proceeding must be assessed in the context of the subject of the proceeding. New Hanover Corporation, *supra*. The issue before the Board in this appeal is a very narrow issue-whether the Department abused its discretion in denying the Corporation's DSEA permit application as a result of its denial of the Corporation's re-permitting application under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq*. This is a legal issue which can be decided by the Board without resort to any scientific or technical evidence.

The Township has also failed to establish how its interests will not be adequately represented by the Department. The Township asserts that the Department does not propose to introduce scientific or technical evidence regarding wetlands. But, as was explained earlier, such evidence is not germane, for this appeal involves purely legal questions of interpretation of the DSEA and the rules and regulations adopted thereunder.[3] To the extent that the Township has a distinct interest in the administration of the DSEA and the applicable regulations, the Department is best able to protect that interest.

The Township alleges that the outcome in this appeal may affect its interests in the other appeals concerning the Corporation's landfill which are pending before the Board. While the Township cited several of these other appeals, it did not explain the link between them and the instant appeal,

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[3] The Corporation asserted in its notice of appeal that the proposed obstructions otherwise satisfied the criterion of need to encroach upon wetlands. The Department's denial letter addressed this question only from the standpoint that the solid waste permit denial was conclusive that there was no need for the wetlands encroachment. If the Board were to rule in the Corporation's favor on the legal issue here, the matter would be remanded to the Department for consideration of whether need was established under 25 Pa.Code §105.14(b)(7).

except by asserting they overlap.[4] The Board is not responsible for making the Township's case here. And, as we have noted in New Hanover Corporation, *supra*, the fact that a prospective litigant is involved in multiple appeals relating to a facility, some of which place it in a position adversarial to the Department, does not, in and of itself, establish that its interest will not be adequately represented in one of those appeals where it is not adverse to the Department.

Finally, the Township's description of the relevant evidence it intends to produce consists of a list of expert and non-expert witnesses with no detail regarding the substance of their testimony. Without knowing the substance of this testimony, we are unable to determine its import and whether or not it would aid us in resolving this matter. Accordingly, the Township has failed to satisfy its burden on this criterion.

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[4] The Township's appeal at Docket No. 90-115-W, which challenged the Department's authorization to the Corporation to use general permits in an area the Township claimed contained important wetlands, was one of the related appeals cited by the Township as establishing its interest in this appeal. However, the Township's appeal was dismissed as moot on March 28, 1991, in accordance with the stipulation of the parties.

O R D E R

AND NOW, this 29th day of May, 1991, it is ordered that New Hanover Township's petition to intervene is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: May 29, 1991
AMENDED: June 14, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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Southeastern Region
For Appellant:
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SILVERMAN AND JONAS
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Albert J. Slap, Esq.
Mary Ann Rossi, Esq.
FOX, ROTHSCHILD, O'BRIEN & FRANKEL
Philadelphia, PA

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M. DIANE SMITH
SECRETARY TO THE BOA

E. P. BENDER COAL COMPANY	:	
	:	
v.	:	EHB Docket No. 90-487-MJ
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 17, 1991

OPINION AND ORDER
SUR APPELLANT'S MOTION
FOR SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

The appellant's motion for summary judgment is denied where material facts remain in dispute and the appellant has not shown that it is entitled to judgment as a matter of law. Moreover, DER may not be estopped from performing its statutory duties and responsibilities simply because it did not take enforcement action in the past.

OPINION

This matter was initiated with the filing of a notice of appeal on November 16, 1990 by E. P. Bender Coal Company ("Bender") from a compliance order issued by the Department of Environmental Resources ("DER") charging Bender with degradation of a public water supply as a result of its surface mining activities. Specifically, the order found that Bender had caused elevated sulfate levels in the Elder Township Water Authority's ("the

Township") water supply. The order required Bender to provide an alternate water supply of equal quantity and quality.[1] A more detailed description of the procedural history of this case is set forth in an Opinion and Order issued on May 14, 1991 denying DER's motion for summary judgment.

The matter now before the Board is a motion for summary judgment filed by Bender on April 29, 1991. In its motion, Bender argues that DER has no facts to establish that Bender caused the alleged degradation, that Bender has never been cited with any statute or regulation dealing with degradation of a water supply, and, finally, that since DER approved Bender's Stage I and II bond releases when it knew of the alleged degradation, it is now barred from charging Bender with any such degradation.

DER filed objections to Bender's motion on May 31, 1991. In its objections and supporting brief, DER argues that summary judgment may not be granted because genuine issues of material fact exist. DER also asserts that it may not be prevented from enforcing the environmental statutes and regulations under its authority simply because there may have been non-enforcement against a party in the past.

We shall address each ground for Bender's motion separately:

Estoppel

Bender argues that when DER approved the Stage I and II release of its bonds, it made a determination that Bender was not liable for the alleged degradation of the water supply, and it is now barred from charging Bender with any such degradation. Although Bender frames its argument as one of

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[1]An appeal from a subsequent compliance order issued to Bender, docketed at EHB Docket No. 90-565-MJ, was consolidated with this appeal on February 20, 1991.

"administrative finality," it is actually basing its argument on grounds of estoppel. In other words, Bender is suggesting that DER's decision to release the Stage I and II bonds necessarily involved a determination that Bender's mining activities had not resulted in any degradation of the water supply in question, and, therefore, DER should be estopped from now charging Bender with causing such degradation. However, it is well established that a governmental agency may not be estopped from performing its statutory duties and responsibilities. Commonwealth, DER v. Philadelphia Suburban Water Co., ___ Pa.Cmwlth. ___, 581 A.2d 984 (1990); Lackawanna Refuse Removal, Inc. v. Commonwealth, DER, 65 Pa.Cmwlth. 372, 442 A.2d 423 (1982); F.A.W. Associates v. DER, EHB Docket No. 90-228-B (Opinion and Order Sur Petition for Supersedeas issued December 31, 1990). DER is charged with the administration of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("SMCRA") and is authorized to take action necessary to enforce the provisions thereof. Where a mining company's activities have created a public nuisance, such as degradation of a public water supply, it is authorized to order that corrective action be taken. This is so even where DER may not have taken enforcement action in the past. F.A.W., supra, at p. 6. Thus, even if Bender is correct in asserting that DER knew of the alleged degradation at the time it released Bender's Stage I and II bonds and despite the fact that DER may have taken no enforcement action against Bender prior to this time, these factors cannot act to estop DER from carrying out its statutory duties and enforcing the law at this time.

Insufficient Evidence

In its motion for summary judgment, Bender also makes the argument that DER has no facts establishing that Bender caused the elevated sulfate level in the Township water supply. Specifically, Bender states that, other than three pit water samples, DER has no direct evidence linking Bender's mining to the sulfates in the Township's water supply, and that in deposition, two of DER's witnesses admitted that an abandoned or deep mine could be a possible source of sulfates. (Portions of depositions attached to Bender's motion.)

It is true, as Bender asserts in its motion, that DER has the burden of proof in this action to enforce its order. 25 Pa.Code §21.101(b)(3) However, whether or not DER has sufficient evidence to carry that burden cannot be determined at this point where we do not have all the evidence before us. Furthermore, if, as Bender asserts, there is uncertainty as to whether the elevated sulfates in the water supply resulted from Bender's mining or the abandoned deep mine, then summary judgment is not appropriate since summary judgment may not be granted where material facts remain in dispute. Pa.R.C.P. 1035(b); Summerhill Borough v. Commonwealth, DER, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978). Moreover, in passing on a motion for summary judgment, we are required to view the facts in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131, 133.

Failure to Cite Relevant Statute or Regulation

Finally, Bender states that DER's order did not cite any statutory provision or regulation dealing with degradation of a public water supply. A review of DER's order reveals that it charges Bender with violating,

inter alia, section 4.2 of SMCRA, 52 P.S. §1396.4b. Subsection (f) of that provision states that any surface mine operator who affects a public or private water supply by contamination or diminution shall restore or replace it with an alternate source of water adequate in quality and quantity. 52 P.S. §1396.4b(f).

Bender is not entirely wrong in its assertion; although the order properly referred to the relevant section of SMCRA, it provided an incorrect citation to that section as reprinted in Purdon's Pennsylvania Statutes Annotated ("Purdon's"). That is, the order should have referred to "52 P.S. §1396.4b" in Purdon's rather than "52 P.S. 1396.4(b)". (Emphasis added) However, the order did correctly refer to the appropriate section of SMCRA dealing with degradation of a public water supply, and there are no grounds for granting summary judgment on this basis.

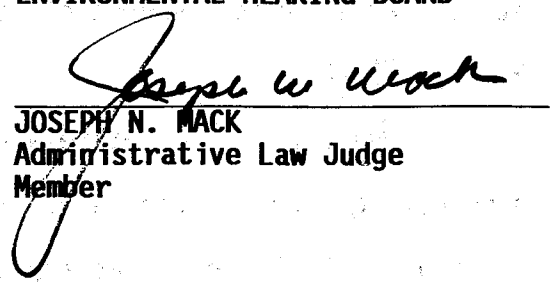
Conclusion

In conclusion, we find that Bender has not stated grounds sufficient for the grant of summary judgment and, therefore, its motion must be denied.

O R D E R

AND NOW, this 17th day of June, 1991, it is ordered that the Motion for Summary Judgment filed by E. P. Bender Coal Company is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 17, 1991

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M. DIANE SMITH
SECRETARY TO THE BOA

NEW HANOVER CORPORATION	:	
	:	
v.	:	**EHB Docket No. 90-225-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, NEW HANOVER TOWNSHIP and COUNTY OF MONTGOMERY, Intervenors	:	**Issued:** June 19, 1991

OPINION AND ORDER SUR
MOTION FOR A PROTECTIVE ORDER

By Maxine Woelfling, Chairman

Synopsis

Individuals who were identified as expert witnesses and who were consulted regarding an appeal of the denial of a solid waste permit application may be deposed as fact witnesses where they were also involved in the preparation and review of the permit application at issue.

OPINION

This matter was initiated with New Hanover Corporation's (Corporation) June 5, 1990, notice of appeal challenging the Department of Environmental Resources' (Department) May 7, 1990, denial of the Corporation's re-permitting application for a waste disposal facility in New Hanover Township, Montgomery County.

On May 21, 1991, Intervenor New Hanover Township (Township), served subpoenas on Elly R. Triegel, Seth C. Bacon, Richard M. Bodner, Gilbert

Marshall, Daniel Resslar, Scott Salvatore, W. Andrew Jenkins, Joseph Diamadi and Jeffrey Peffer for oral depositions and requested production of documents.

On May 31, 1991, the Corporation filed a motion for a protective order precluding the depositions and production of documents. The Corporation argues that in accordance with Pennsylvania Rule of Civil Procedure No. 4003.5(a)(2), the Township, as the deposing party, should pay the fees and expenses of these experts as a precondition to their appearing for depositions. The Township has refused.

By order dated June 3, 1991, the Board stayed the depositions pending the disposition of the Corporation's motion for protective order.

That same day, June 3, 1991, the Township filed its response opposing the motion for protective order. The Township argues that each of the prospective deponents was a technical employee of the Corporation whose work was acquired or developed in furtherance of its application for Solid Waste Permit No. 101385 and its application to re-permit the facility under the 1988 municipal waste management regulations, and that, therefore, each is a fact witness regarding his/her role in the permit processes. The Township asserts that Rule 4003.5 does not apply to expertise or opinions that pre-dated the litigation and was not developed in anticipation of litigation, citing Neal by Neal v. Lu, 365 Pa. Super. 464, 530 A.2d 103 (1987).

On June 6, 1991, the Corporation filed a memorandum in support of its motion, contending that these named experts may not be deposed as fact witnesses because the permit application process and the appeals emanating therefrom are part of a single process in which the applicant or protestant seeks a final determination concerning the issuance or denial of a permit. Accordingly, the opinions of a proposed expert witness arrived at during the permitting process and the technical basis utilized to arrive at those

opinions are subject to the discovery limitations in Rule 4003.5. Further, the Corporation maintains that since the Township already has extensive knowledge concerning the application process, its only conceivable purpose in deposing these individuals is to discover the expert testimony the Corporation will present at the hearing on the merits.

The Rule of Civil Procedure cited here by the Corporation, No. 4003.5, provides that a party may, through interrogatories, discover the facts known and the opinions held by an expert retained in anticipation of litigation. Discovery of this information may also be obtained by deposition where the requesting party has shown good cause. However, the rule does not operate to bar the discovery sought by the Township, for although the individuals sought to be deposed here have been identified by the Corporation in its responses to the Department's interrogatories as experts consulted regarding the appeal (Response to Interrogatory No. 3), they have also been identified as fact witnesses regarding the permit application (Response to Interrogatory No. 11). While it may be difficult as a practical matter to distinguish in some circumstances between facts developed during a permit application process and opinions later developed to challenge the Department's rejection of that permit application in an appeal to the Board, it cannot be held here that the Township is not entitled to depose these individuals regarding the permit application process. Accordingly, the Corporation's motion for a protective order is denied and the depositions of these individuals by the Township may proceed.[1]

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[1] Since the depositions of these individuals as fact witnesses is being allowed, it is unnecessary to address the Corporation's claims that the Township has failed to show good cause for deposition, as required by Pa.R.C.P. No. 4003.5(a)(2) or that the Township is liable for the fees and expenses of the deponents.

O R D E R

AND NOW, this 19th day of June, 1991, it is ordered that New Hanover Corporation's motion for a protective order relating to the depositions of Elly K. Triegel, Seth C. Bacon, Richard M. Bodner, Gilbert Marshall, David Resslar, Scott Salvatore, W. Andrew Jenkins, Joseph Diamadi, and Jeffrey Peffer is denied in accordance with the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: June 19, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOAF

CRATTY, GOWER & HYDUKE, INC. c/o DIAMOND COAL & COKE CO.	:	
v.	:	EHB Docket No. 91-029-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 19, 1991

OPINION AND ORDER
SUR DER'S MOTION FOR
SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

A Motion For Partial Summary Judgment which fails to address an issue of fact and law raised by an appellant fails to show clearly that movant is entitled to judgment as a matter of law and thus must be denied. As to a second issue raised in the Motion For Partial Summary Judgment, DER's contentions are factually uncontroverted by the appellant. Since DER's interpretation of the applicable law is correct, the Motion is granted.

OPINION

On January 16, 1991, Cratty, Gower and Hyduke, Inc. ("CGH") filed an appeal with this Board from the Department of Environmental Resources' ("DER") letter dated December 17, 1990, notifying CGH that DER was forfeiting surface mining bonds CGH posted in connection with Surface Mining Permit No. 65763061

and a mine site located in Sewickley Township, Westmoreland County. DER had notified CGH of its forfeiture of three collateral bonds involving six certificates of deposit with a total face value of $49,028.

Paragraph Nos. 1 and 2 of CGH's Notice Of Appeal challenge the amount to be forfeited because of a prior release of bond (with the monies not returned by DER) and CGH's posting of $359 more in collateral bond than actually required for a particular bonding increment. In Paragraph No. 3 of its Notice Of Appeal, CGH raises a claim that it was coerced by DER into agreeing not to seek partial bond release on reclaimed areas, which bonds apparently are now the subject of bond forfeiture. Paragraph No. 4 thereof challenges DER's refusal to grant CGH more time to complete reclamation, while Paragraph No. 5 charges DER's refusal to agree to a proposal for bond release as site reclamation occurred caused a financially strapped CGH's site reclamation agreement with a third party to fall through.

In CGH's Pre-Hearing Memorandum, it raises three issues for consideration by this Board. First, it raises whether DER violated its own regulations by allowing CGH extensions of time to complete reclamation and thus acted unreasonably, where some reclamation had occurred, in refusing to grant further time extensions to CGH to complete reclamation. Secondly, CGH questions whether, where collateral bonds are posted, DER may forfeit not only the amount initially posted but also the interest accrued thereon. CGH contends that DER is limited to the face amount of the bond and must return the accrued interest. CGH's final issue concerns whether DER may, by coercion or duress, compel a miner to give up interim bond release rights as to bonds later forfeited in full by DER without violating that miner's rights "under the 14th Amendment to the Constitution of the United States".

On May 20, 1991, DER filed a Motion For Partial Summary Judgment with this Board. The motion asserts that DER issued an administrative order to CGH in August of 1989. The Order directed the restoration of the affected areas of the mine site to approximate original contour by October of 1989 and site revegetation by May of 1990. It then says CGH neither challenged this order by appeal nor complied with these deadlines (as thrice extended). It also says CGH never appealed from nor complied with a second order issued to CGH because of both CGH's failure to comply with DER's first order and its removal of backfilling equipment from the mine site. From this, DER argues the violations cited in the orders are final, may not be challenged in this proceeding and constitute an adequate basis for DER's forfeiture of these bonds. DER also contends the bond's language allows it to forfeit the total amount of the bond for any violations by CGH on this mine site. From these arguments, DER asks for summary judgment on each of these two issues.

On June 3, 1991, we received CGH's *pro se* Memorandum In Opposition To Motion For Partial Summary Judgment. In it, CGH does not attack the merits of DER's contentions directly. Instead, CGH argues, correctly, that it would be improper for us to grant summary judgment where there are material facts in dispute or DER's right to judgment is unclear. CGH then argues that under the language in these bonds, all that DER is entitled to is the face amount specified therein, so, if there has been an appreciation in the collateral, DER is not entitled to it, but must either accept only the face amount of the bond (returning the excess to CGH) or permit CGH to substitute collateral in the exact face amount of the bond. CGH next argues that under the terms of the bonds, it has a right to substitute other securities for those pledged and now forfeited. Finally, CGH says granting summary judgment in DER's favor at

this time would leave unresolved its assertion that its Fourteenth Amendment rights were violated by DER's alleged insistence on waiver of CGH's right to partial bond release. CGH asserts that this unresolved issue leaves open a genuine dispute of material fact precluding summary judgment.

It is obvious from the stance adopted by CGH that it fails to understand that DER is seeking partial summary judgment, i.e., judgment in its favor as to only certain issues, rather than entry of a judgment on the merits on all issues such as would authorize DER to turn over the matter of collection of these collateral bonds to the Attorney General. As a Board, we can order a partial summary judgment without foreclosing CGH from a hearing on the merits of any remaining issues and we have done so repeatedly in the past. Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978); Charles Bichler et al. v. DER, 1989 EHB 36; Kerry Coal Company v. DER, EHB Docket No. 90-333-E (Opinion issued January 29, 1991).

This being true, we turn to the issues raised by DER's Motion and CGH's response, mindful, as pointed out by CGH and agreed to by DER, that where there are material facts in dispute or DER is not clearly entitled to judgment as a matter of law, this motion must be denied. Summerhill Borough, *supra*. DER asks for a judgment on the issue of whether the total amount of the bonds is due for any violation at the mine site. The sole factual support for this portion of the Motion is an affidavit of DER's Robert J. Slatick. Until recently, this would have been an inadequate factual foundation. Nanty-Glo v. American Surety Co., 309 Pa. 236, 163 A. 523 (1932). However, in Robert L. Snyder, et al. v. Commonwealth, DER, __ Pa. Cmwlth. __, 588 A.2d 1001 (1991), Commonwealth Court interpreted Nanty-Glo, *supra*, to find this foundation to be adequate where the allegations in an affidavit are uncontroverted. Here, the

allegations are uncontroverted by CGH. CGH does say one factual dispute remains and raises certain legal issues, but the factual dispute does not go to this narrow issue raised by DER; rather, it goes to the question of the propriety of forfeiture in light of the alleged infringement on CGH's constitutional rights.

CGH's issues, as recited in its response to the Motion, also do not bar granting this portion of DER's Motion. CGH does argue that DER is only entitled to the face amount of this bond, but DER's motion does not seek a judgment precluding our hearing this CGH argument. DER seeks a ruling that the bonds in question, though posted in increments for various phases of the mining of this site, nevertheless apply to the entire site. It is clear that two of the bonds say:

> "[l]iability upon this bond shall be for the amount specified herein, and that amount shall become a part of the total bond for the acreage specified herein for the permit for which the total bond applies; such liability shall apply to that acreage for the permit, including any and all prior or subsequent authorizations to mine or otherwise operate under that permit...."

This language clearly reads as DER interprets it. The third bond dated April 2, 1985 states:

> "the condition of this obligation is such that if the said surface mine operator shall faithfully perform all of the requirements of ...[all applicable laws]...then this obligation shall be null and void, otherwise to be and remain in full force and effect. Liability upon this bond shall be for the amount specified herein...."

It makes this statement after reciting that CGH proposes to affect 74.9 acres in conducting mining at this site and before authorizing liquidation of the

bond upon any CGH default. The bond contains no language indicating DER's interpretation of this language is in error. Finally, we have previously held that unless the bond is written for liability to accrue proportionally to the acreage affected, a deficiency anywhere on the bonded area caused by mining is a ground for the bond's forfeiture. James E. Martin and American Insurance Company v. DER, 1988 EHB 1256, aff'd, 131 Pa. Cmwlth. 297, 570 A.2d 122 (1990). Accordingly, if such violations at the mine site are proven by DER and no other legal defense to forfeiture exists, DER may forfeit this bond even where the violations are not on the specific mining increment for which the bond was initially posted.

Next, we turn to DER's Motion insofar as it seeks a judgment that the violations cited in the unappealed compliance orders are final and are adequate justification for bond forfeiture. Here, we deny DER's Motion. The factual admissions by CGH show DER has issued compliance orders to CGH requiring site reclamation by a certain date and the orders have not been complied with by CGH. The affidavit of this Board's Secretary establishes no appeals therefrom and is uncontroverted by CGH. Under these circumstances, DER is clearly correct that the compliance orders cannot be collaterally challenged in a proceeding to enforce same, Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 473 Pa. 432, 375 A.2d 320 (1977), but this appeal is not such a direct enforcement proceeding. We note further that CGH is not contesting the fact that the site was not fully reclaimed at the time of forfeiture and our opinions do support forfeiture on the basis of unappealed compliance orders. Fidelity & Deposit Co. v. DER, 1989 EHB 751.

Here, however, CGH says DER unconstitutionally forced it to waive the right to seek partial bond release by DER when a quantifiable portion of the

site reclamation was completed. An example of this might be CGH seeking a return of a portion of the collateral bond when a section of the site was returned to approximate original contour.

Though CGH raised this issue in its Pre-Hearing Memorandum filed prior to DER's Motion, the Motion and DER's supporting brief fail to address the impact of this argument (reraised in CGH's response) in any fashion. Thus we have no facts before us in DER's Motion which address CGH's contention in any fashion. As a result, we cannot be sure there are no material factual disputes between CGH and DER, nor is it clear that CGH's allegations provide no defense for CGH if CGH proves them. Accordingly, granting a judgment to DER on this issue would be premature, at best, and we must deny this portion of the Motion. Palisades Residents In Defense Of The Environment (PRIDE) v. DER, et al., 1990 EHB 680. In so doing, it must be stated that the Board is not ruling in any fashion on the validity of various arguments raised by CGH nor are we finding that CGH's factual admissions do not bind it.

O R D E R

AND NOW, this 19th day of June, 1991, DER's Motion For Partial Summary Judgment is granted as to the issue of whether these bonds may be forfeited for violations occurring off the mining increment for which the bond was initially posted as long as they are within the mine site. The motion is denied as to its second issue.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 19, 1991

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M. DIANE SMITH
SECRETARY TO THE BOA

GERALD E. BOOHER	:	
	:	
v.	:	EHB Docket No. 89-204-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 20, 1991

ADJUDICATION

By Joseph N. Mack, Member

Synopsis

The unpermitted disposal or prolonged storage of waste tires on one's property constitutes a violation of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. ("SWMA"), and the regulations promulgated thereunder. Prior written approval must be obtained from the Department of Environmental Resources ("Department") before "beneficial use" may be made of waste tires pursuant to the SWMA and the regulations. In this appeal of a civil penalty assessed in connection with the unlawful storage and disposal of waste tires, the Department met its burden of proof with respect to $14,000 of the $20,000 assessment.

Background

This matter arose on July 18, 1989 with the filing of a Notice of Appeal by Gerald E. Booher ("Mr. Booher") contesting a July 6, 1989 Assessment of Civil Penalty by the Department of Environmental Resources ("the Department").

The civil penalty assessment was based on the following: 1) a Notice of Violation issued to Mr. Booher in March 1988 in connection with used tires maintained on Mr. Booher's property, and 2) Mr. Booher's failure to comply with a January 10, 1989 administrative order of the Department directing him to cease storing, processing, or disposing of waste tires at his site in violation of the SWMA. The penalty was assessed in the amount of $20,000.

In his appeal, Mr. Booher stated that, in building a fence, he was conforming to a plan submitted to the Department for use of the tires in question and that said use was not in violation of any Department rules or regulations. In the alternative, Mr. Booher argued that the penalty of $20,000 was excessive, in that no willful violations had occurred and no harm was occurring to the environment.

On October 24, 1989, the Department filed a Motion to Limit Issues, asserting that since Mr. Booher had not filed a timely appeal from the Department's January 10, 1989 Order, he was barred under the doctrine of administrative finality from contesting the findings of the Order. The Department therefore argued that the only issue remaining was whether the $20,000 civil penalty assessment was reasonable.

Mr. Booher responded to the Motion on November 6, 1989, asserting that a letter he had written to Michael Steiner of the Department following his receipt of the January 1989 Order constituted sufficient notice of appeal or, in the alternative, that Mr. Steiner had a duty to inform him that his letter did not serve as a proper appeal. The Department replied on November 15, 1989, arguing that the letter to Mr. Steiner was not sufficient to act as a notice of appeal since the last paragraph of the January 1989 Order explicitly stated that appeals were to be filed with the Environmental Hearing Board.

On March 21, 1990, the Board denied the Department's Motion to Limit Issues based on the Commonwealth Court's ruling in Kent Coal Mining Co. v. Commonwealth, DER, 121 Pa.Cmwlth. 149, 550 A.2d 279 (1988).[1] See Gerald E. Booher v. DER, EHB Docket No. 89-204-MJ (Opinion and Order Sur Motion to Limit Issues, issued March 21, 1990). Therefore, in the instant case, Mr. Booher is challenging not only the amount of the civil penalty but also the alleged violations for which the penalty was assessed.

On July 18, 1990, the Department submitted a Stipulation of Facts in this matter. On July 30, 1990, Mr. Booher concurred with the Department's Stipulation of Facts, subject to certain limitations.

A hearing on this matter was held on August 17, 1990 before Board Member Joseph N. Mack.

Post-hearing briefs were filed by the Department on October 24, 1990 and by Mr. Booher on October 29, 1990. In its brief, the Department asserts that Mr. Booher has disposed of solid waste on his property without a permit or beneficial use approval, in violation of the SWMA and the regulations promulgated thereunder. The Department also asserts that the $20,000 civil penalty assessment is reasonable and fully supported by the facts of the case. In his brief, Mr. Booher argues that there is nothing in the SWMA or the regulations specifically dealing with tires. He further contends that, based on the regulations and his conversations with Department personnel, there is no requirement of a permit to build a fence.

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[1] Kent Coal held that a party appealing a civil penalty assessment may also challenge the underlying violations on which the civil penalty was based.

The Department filed a reply brief on November 8, 1990, asserting that waste tires fall within the definition of "solid waste" and "municipal waste" and are, therefore, subject to the provisions of the SWMA and the regulations.

Any matters not raised by the parties in their post-hearing briefs are deemed to have been waived. Laurel Ridge Coal, Inc. v. DER, EHB Docket No. 86-349-E (Adjudication issued May 11, 1990). After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. The Appellant is Gerald E. Booher who resides at R.D. #1, Box 36, Shirleysburg, Cromwell Township, Huntingdon County, Pennsylvania. (T. 86-87)[2]

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, the state agency authorized to administer and enforce the SWMA and the rules and regulations promulgated thereunder, and Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17.

3. Mr. Booher owns a 130 acre farm in Hill Valley along Pennsylvania Route 747 ("the Booher property") where the tires at issue in this case are located. (T. 87)

4. On or about October 1987, Mr. Booher was approached by Roger Pesco concerning the possible placement of used tires on Mr. Booher's property. Mr. Booher at first declined, but later, after reviewing materials showing tires

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[2]A reference to "T. ___" is a reference to a page in the transcript. A reference to "S.F. ___" is a reference to a paragraph in the parties' Stipulation of Facts. A reference to "F.F. ___" in the discussion is a reference to a Finding of Fact.

as a possible fuel source and not wanting to see used tires simply discarded, he consented. (T. 102-104, 143-144)

5. At that time, Willie Webb, at the direction of Roger Pesco, began bringing tires onto Mr. Booher's property, under Mr. Booher's supervision. (T. 105-106, 143-146) Mr. Webb retained ownership of the tires. (T. 147; Booher Ex. 7, 10, 11) Mr. Pesco acted as coordinator. (T. 145) The tires were to remain on Mr. Booher's property for approximately two years until Mr. Webb could find a market for them. (T. 148)

6. As Mr. Webb brought tires onto Mr. Booher's property, he would segregate them and take any that were retreadable or resaleable, leaving behind those which were neither retreadable nor resaleable. (T. 132)

7. Mr. Webb paid Mr. Pesco $65 per truckload of tires placed on Mr. Booher's property. Mr. Pesco paid Mr. Booher $100 per month for managing the property. (T. 69, 105, 145, 148; S.F. 7 and 8) An access road was constructed on Mr. Booher's property at the direction of Mr. Pesco. (T. 102)

8. In January 1988, in response to a call from the Shirleysburg Township secretary, Jeffrey Stout, an Operations Supervisor with the Department's Bureau of Waste Management, visited the Booher property. He was accompanied by Township Supervisors. Mr. Stout saw approximately 500 to 1,000 tires in piles on the Booher property. (T. 9, 10, 29)

9. During the January 1988 site visit, Mr. Stout spoke to Willie Webb's son, Curtis Webb, who was bringing the tires onto the Booher property. (T. 30, 105)

10. On February 9, 1988, Mr. Stout telephoned Mr. Booher to explain that he could not bring tires onto his property unless he met Department guidelines. (T. 11, 12, 30)

11. Mr. Stout met with Mr. Booher on February 11, 1988 at Mr. Booher's place of business in order to further explain the Department's guidelines to him. During that visit, Mr. Stout told Mr. Booher that it was against the law to dispose of waste tires on his property. (T. 13, 14) Mr. Stout also informed Mr. Booher that he could not bring in more waste tires. (T. 15)

12. During the February 11, 1988 visit, Mr. Booher asked Mr. Stout whether a fence could be built out of the tires. Mr. Stout informed Mr. Booher that if he wanted to do that, he would need to submit plans to the Department for review and approval. (T. 14, 15)

13. Near the end of the February 11, 1988 visit as Mr. Stout was starting to leave, Mr. Booher grabbed him by the shirt and told him to get off his property. (T. 15, 16, 35, 164)

14. After that incident, the Department mailed a Notice of Violation to Mr. Booher by certified mail, but it was not accepted and was returned to the Department. (T. 17)

15. On March 17, 1988, Mr. Stout hand-carried the Notice of Violation to Mr. Booher's place of business accompanied by a state police officer. (T. 17; DER Ex. 1) The Notice of Violation was left with Mrs. Booher, and Mr. Booher subsequently read it. (T. 18, 133)

16. The Notice of Violation stated that Mr. Booher had deposited or permitted the depositing of tires on his property without a permit from the Department, that he had constructed a solid waste storage or disposal facility without a permit, and that he had threatened an employee of the Department during the course of performance of his duty. The Notice of Violation

recommended that Mr. Booher cease depositing waste tires on his property and that he remove and properly dispose of the existing tires. It was recommended that this action be taken by March 31, 1988. (DER Ex. 1; T. 19)

17. Tires continued to be brought onto Mr. Booher's property after he received the Notice of Violation. (T. 134)

18. Mr. Stout visited the site again on August 4, 1988. Mr. Booher had not removed any tires and had, in fact, brought in additional tires. The tires were laced together and stacked into a "wall". Mr. Stout again informed Mr. Booher that he could not dispose of waste tires on the property. (T. 20, 21; DER Ex. 7)

19. The Department issued an Order to Mr. Booher on January 10, 1989, requiring him to cease storing and disposing of waste tires on his property and to submit a plan for removal of the tires. (DER Ex. 2; T. 55, 56, 122; S.F. 2)

20. Mr. Booher did not submit a plan for removal in the time period required by the Order. (T. 56) Tires were brought in after the January 10, 1989 Order was issued. (T. 134)

21. The Department sent a follow-up letter to Mr. Booher on March 1, 1989, from Edward Liggett, a Solid Waste Specialist in the Department's Altoona District office. (DER Ex. 5; T. 57) The letter requested Mr. Booher to comply with the Order and submit a plan to the Department. (DER Ex. 5; T. 57) Mr. Booher received and read the letter. (T. 133)

22. Mr. Booher did not submit a plan in response to Mr. Liggett's letter. (T. 57)

23. On April 26, 1989, Richard J. Morgan, at that time a Compliance Specialist with the Department, sent another letter to Mr. Booher requesting

information about his plans for removal of the tires and questioning him as to why a plan still had not been submitted in response to the January 10, 1989 Order. (T. 58, Exhibit 6) Mr. Booher received and read the letter. (T. 133)

24. Mr. Booher did not submit a plan in response to Mr. Morgan's letter. (T. 58)

25. Mr. Stout visited the site again in July 1989. No tires had been removed from the property. Rather, additional tires had been brought in since his last visit in August 1988. (T. 22, 23; DER Ex. 7)

26. On July 6, 1989, the Department assessed Mr. Booher a civil penalty of $20,000. (T. 65, 66)

27. Mr. Morgan was involved in drafting the civil penalty assessment against Mr. Booher. In assessing a civil penalty, Mr. Morgan considers the conduct of the violator, the effect of the violations on the environment, any past history of violations and other relevant factors. (T. 65 and 66) In the case of Mr. Booher, Mr. Morgan primarily considered Mr. Booher's conduct and the effect on the environment. (T. 66)

28. Of the $20,000 civil penalty assessment, $8,000 was based on the violations noted in the Notice of Violation. That $8,000 was comprised of $3,000 for unpermitted disposal of municipal waste and $5,000 for threatening and assaulting a Department inspector. (T. 67)

29. The $3,000 penalty for unpermitted disposal was developed based upon the Department's civil penalty assessment guidelines. In assessing the penalty, Mr. Morgan determined that Mr. Booher's initial disposal of waste tires should be considered negligent behavior, rather than willful or reckless behavior, because it was his first formal notification of a violation. Within the Department's guidelines, a civil penalty assessment for negligent behavior

falls within a range from $1,500 to $10,000. Mr. Morgan chose an amount in the lower end of the range because this was Mr. Booher's first notification. (T. 67-68)

30. Also within the $1500 to $10,000 range, Mr. Morgan assessed $5,000 for threats to Mr. Stout. Mr. Morgan selected an amount in the middle of the range as a statement that a field inspector should not be subjected to threats and physical abuse. (T. 68)

31. The remaining $12,000 of the civil penalty was assessed for Mr. Booher's failure to comply with the Department's January 10, 1989 Order. (T. 68)

32. Since Mr. Booher had already been given notice through the March 1988 Notice of Violation that his conduct was unlawful, his failure to comply with the January 10, 1989 Order constituted reckless behavior rather than negligent behavior. The Department's guidelines provide that reckless disregard of the Department's regulations normally results in an assessment ranging from $6,000 to $17,500. The $12,000 was based upon what Mr. Morgan considered to be two underlying violations which he assessed at $6,000 apiece: (1) violations of the SWMA, and (2) violations of the rules and regulations promulgated thereunder. Mr. Morgan's selection of $6,000 for each of the violations was at the lowest end of the range of possible penalties under the Department's penalty guidelines. (T. 69)

33. Mr. Booher ceased having tires brought onto his property in July 1989 when he received the civil penalty assessment. (T. 135)

34. At the time of the civil penalty assessment, there were approximately 200,000 tires on the property. (T. 135) The tires were in several large piles and strewn about. The piles were approximately 20 to 25 feet wide and

extended for several hundred yards. Some tires were interwoven and some were dumped on the ground. (T. 81)

35. After Mr. Booher received the $20,000 civil penalty assessment in July 1989, he contacted the Department's Williamsport Regional Office and spoke with Douglas Overdorff. (T. 138)

36. Mr. Overdorff, a Solid Waste Specialist, recalled receiving a telephone call from an individual who would not identify himself but who turned out to be Mr. Booher. (T. 138, 157) Mr. Overdorff asked Mr. Booher where he lived, but Mr. Booher would only say that he had a farm in Central Pennsylvania. (T. 158)

37. Mr. Booher did not tell Mr. Overdorff that he had 200,000 tires on his property. Nor did he tell Mr. Overdorff that he had received a Notice of Violation, an Order, or an Assessment of Civil Penalty in relation to the tires on his property. (T. 158, 159)

38. Mr. Booher told Mr. Overdorff that he had some tires on his property which he wanted to use to construct a fence in order to keep deer off his farm. (T. 159)

39. Mr. Overdorff informed Mr. Booher that he would need to contact the regional office for his location in order to discuss submitting a plan for building a fence out of waste tires. (T. 159)

40. On September 5, 1989, Mr. Booher wrote to Michael R. Steiner at the Department's Bureau of Waste Management in Harrisburg, advising Mr. Steiner of Mr. Booher's idea of building a fence with the tires on his property. (Booher Ex. 5)

41. The Department has a review process to determine if a proposed use of waste tires would constitute a legitimate use. The Department has an engineer that reviews such legitimate use proposals. (T. 52)

42. Francis P. Fair, Acting Regional Solid Waste Manager of the Harrisburg Regional Office, responded to Mr. Booher's letter on October 11, 1989. In his letter, Mr. Fair stated that Mr. Booher's proposal to build a tire fence was simply a reaction to the Notice of Violation and a proposal for inexpensive disposal of the tires on-site, which Mr. Fair determined to be unacceptable to the Department. He again advised Mr. Booher that he was to remove the tires from his property. (Booher Ex. 6)

43. In October 1989, a "wall" or "fence" of tires was constructed by Mr. Webb on Mr. Booher's property extending for more than a quarter mile and standing approximately five to ten feet high and ten to twenty-five feet thick. (T. 49, 123, 124, 137; Booher Ex. 15B-E)

44. The tires piled on Mr. Booher's property were intended to be hauled away in the future for some other purpose. The project was not designed to be a permanent fence. (T. 150)

45. On June 21, 1989, the Department had filed a Petition to Enforce the January 10, 1989 Order in Commonwealth Court. (S.F. 10)

46. On November 21, 1989, the Commonwealth Court issued an Order to Mr. Booher in response to the Department's Petition to Enforce. (S.F. 11) The Commonwealth Court ordered Mr. Booher to immediately comply with the Department's January 10, 1989 Order by submitting within 30 days of the Court's Order a plan for removal of the waste tires. (T. 58 and 59; DER Ex. 3)

47. Mr. Booher did not submit a plan in response to the Court Order. (T. 59)

48. On February 16, 1990 the Department filed in Commonwealth Court a Petition for Contempt against Mr. Booher for failure to comply with the Court's Order of November 21, 1989. (T. 65; S.F. 12) The Commonwealth Court issued an order on May 1, 1990 finding Mr. Booher in contempt. (T. 65; S.F. 13; DER Ex. 4)

49. Mr. Booher does not have, and has never had, a permit from the Department to operate a solid waste disposal facility. (S.F. 3)

50. Mr. Booher consented to the placement of the tires on his property. (S.F. 5)

51. The cost to Mr. Booher to dispose of the tires on his property would be approximately $1.10 per tire. (Booher Ex. 8)

52. Waste tire piles pose several environmental concerns. First, if the tires catch fire, leachate from the melting tires can cause groundwater pollution and soil contamination. Second, tires can accumulate water and serve as a breeding ground for disease-bearing mosquitoes and other insects or animals carrying disease. (T. 25, 77, 78, 104)

53. The Department has policy guidelines with respect to storage of waste tires. It allows storage of tires, provided that accurate inventory records are kept and, further, that the tires are not simply being disposed of but are being stored for a future use. A plan for such storage must be submitted to the Department. (T. 12-13)

54. As of the date of hearing, approximately 200,000 tires were on Mr. Booher's property. (T. 135)

55. As of the date of hearing, Mr. Booher had not removed any tires from his property. (S.F. 14)

DISCUSSION

In this appeal of a civil penalty assessment, the Department bears the burden of proving that the amount of the assessment was reasonable and not an abuse of discretion. 25 Pa.Code §21.101(b)(1); Beltrami Enterprises, Inc. v. DER, 1988 EHB 348. In addition, it has been previously ruled that, in this appeal of the civil penalty, Mr. Booher may also contest the fact of the underlying violations on which the penalty was based. (See Board's Order of March 21, 1990). Therefore, the Department also bears the burden of proving the underlying violations which served as the basis for the penalty assessment. 25 Pa.Code §21.101(b)(3).

We first address the fact of the violations. Richard Morgan, the Department's Compliance Specialist who assisted in drafting the civil penalty assessment, testified that the penalty was based on the Notice of Violation and on Mr. Booher's failure to comply with the January 10, 1989 Order of the Department.

Violations Cited in Notice of Violation and Compliance Order

Mr. Booher was charged with unlawfully storing or disposing of municipal waste, in the form of waste tires, on his property without a permit. It is undisputed that Mr. Booher has approximately 200,000 waste tires on his property. (F.F. 54 and 55). Rather, Mr. Booher challenges the Department's finding that the tires constitute municipal or solid waste and that a permit or Department approval is required in order to store them or build a fence with them on his property. In the event Mr. Booher is found to be in violation of the SWMA and/or the regulations, he challenges the reasonableness

of the civil penalty assessed. The first issue is whether tires constitute waste, as defined in the SWMA and the regulations.

"Solid waste" is defined in Section 103 of the SWMA, 35 P.S. §6018.103, as follows:

> Any waste, including but not limited to, municipal, residual or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials...

"Municipal waste" is defined in the same section as follows:

> Any garbage, refuse, industrial lunchroom or office waste and other material including solid, liquid, semisolid or contained gaseous material resulting from operation of residential, municipal, commercial or institutional establishments and from community activities...
>
> 35 P.S. §6018.103

The municipal waste regulations, at 25 Pa.Code §271.1, define "waste" as follows:

> A material whose original purpose has been completed and which is directed to a disposal or processing facility or is otherwise disposed. The term does not include source separated recyclable materials or material approved by the Department for beneficial use under §271.232 (relating to beneficial use).

This Board has previously held that discarded tires clearly constitute "waste" within the meaning of the SWMA. Max L. Starr v. DER, EHB Docket No. 87-203-W (Adjudication issued April 1, 1991), ("Max Starr"), at p. 6. The tires on Mr. Booher's property are used tires which are neither retreadable nor resaleable. (F.F. 6). They clearly fall within the definition of "waste" set forth in the regulations and the SWMA. Their original purpose has been completed and they are not resaleable as tires. Although Mr. Booher believed

the tires could be recycled for use as a fuel source, at present there is no immediate market for them. Furthermore, even if there were such a market for waste tires, that does not change their status as waste. As waste, the tires are subject to the terms and conditions of the SWMA and the regulations.

The second issue is whether the placement of the tires on Mr. Booher's property constitutes unlawful disposal or storage of waste under the SWMA and the regulations.

Section 103 of the SWMA, 35 P.S. §6018.103, defines "disposal" as the following:

> The incineration, deposition, interjection, dumping, spilling, leaking, or placing of solid waste into or on the land or water in a manner that the solid waste or a constituent of the solid waste enters the environment...

"Storage" is defined in the same section as follows:

> The containment of any waste on a temporary basis in such a manner as not to constitute disposal of such waste. It shall be presumed that the containment of any waste in excess of one year constitutes disposal. The presumption can be overcome by clear and convincing evidence to the contrary.
>
> 35 P.S. §6018.103

In further explaining the above definitions, the Board in Max Starr, supra, held that one disposes of waste when he does any of the following:

> (1) places solid waste on land in a manner that a constituent of the solid waste enters the environment; or
>
> (2) places solid waste on land in a manner that the solid waste enters the environment; or
>
> (3) stores waste on his property in excess of one year without clear and convincing evidence showing that the waste was not disposed.
>
> Max Starr, p. 8.

Mr. Booher argues that at the time the Notice of Violation was issued, the tires had been on his property for less than one year and, therefore, he was not in violation of the SWMA. However, Mr. Booher is misconstruing this provision of the statute. Storage of waste for more than one year creates a presumption of waste disposal, which can be overcome only by clear and convincing evidence to the contrary. This does not mean that anything stored for less than a year cannot constitute disposal or unlawful storage. Rather, it simply means that where waste has been stored for less than a year, no presumption of disposal arises; rather, there must be actual evidence that the storage constitutes disposal.

We find that all of the tires were stored on Mr. Booher's property and at least some of the tires fell under the statutory presumption of disposal since they had been stored on the property for over one year at the time the January 1989 Order and the civil penalty assessment were issued. Furthermore, the evidence indicates that even those tires which may have been on Mr. Booher's property for less than one year at the time of the Order or penalty assessment, nevertheless, were disposed of, since Mr. Booher intended to keep them on his property for longer than one year, and possibly indefinitely, if and until a market developed for them. (F.F. 5)

Section 501 of the SWMA, 35 P.S. §6018.501, provides that it is unlawful for any person or municipality to use its land as a solid waste processing, storage, treatment, or disposal area without first obtaining a permit as required under the provisions of that act. Section 201 of the SWMA, 35 P.S. §6018.201, and section 271.101 of the regulations, 25 Pa.Code §271.101, prohibit the ownership or operation of a municipal waste or solid waste disposal facility without a permit. Section 285.113 of the regulations, 25

Pa.Code §285.113, further provides that no person may store municipal waste for more than one year unless the Department has approved a longer period in writing.

It is not contested that Mr. Booher did not have a permit for the disposal of the tires on his property. Since we have already determined that the tires constitute waste under the terms of the SWMA and the regulations, Mr. Booher was clearly in violation of the aforesaid provisions which prohibit the disposal of waste on one's property without a permit.

Mr. Booher argues that he was not simply allowing the disposal of tires on his property but, rather, that he was making beneficial use of them, as defined in 25 Pa.Code §271.232, by building a fence out of the tires. However, as pointed out by the Department, under 25 Pa.Code §271.232, in order to make a beneficial use of processed municipal waste, one must first request and receive written approval from the Department. 25 Pa.Code §§ 271.101(b)(2) and 271.232(b). Mr. Booher asserts that there is nothing in the regulations requiring a permit or special approval to erect a fence. (Post-Hearing Brief, pp. 8, 11) However, it has already been determined that the tires on Mr. Booher's property constitute municipal waste. Therefore, in order to make a beneficial use of them by building a fence on his property, Mr. Booher was required to first obtain written approval from the Department. Simply stacking waste tires or any other form of municipal waste and calling it a "fence" does not change its status as "waste."

Mr. Booher argues that even if prior approval from the Department was needed for him to construct the tire fence, he obtained that approval. Mr. Booher contends that both Jeff Stout and Douglas Overdorff of the Department advised him that a permit was not needed to build a tire fence and that they

thought such a fence would be a good idea. However, even if Mr. Stout and/or Mr. Overdorff may have thought it a good idea, both testified at hearing that they did, in fact, advise Mr. Booher that approval from the Department would be needed before he could build such a fence. (F.F. 12, 39) Furthermore, when Mr. Booher contacted Mr. Overdorff about his idea of building a fence, Mr. Booher did not provide him with relevant background information nor did he inform him of the outstanding compliance order or civil penalty assessment. (F.F. 36, 37) When Mr. Booher wrote to the Department's Bureau of Waste Management about his proposal, he was advised in writing by Francis Fair, Acting Regional Solid Waste Manager of the Harrisburg Regional Office, that the proposal was unacceptable. (F.F. 42) Yet, despite the fact that the Department rejected his proposal and that he was still under an administrative order to remove the tires from his property, Mr. Booher proceeded to allow construction of the tire fence on his property. (F.F. 43)

It is the position of the Department that the collection of tires on Mr. Booher's property does not come close to legitimately being a fence but is merely a pile of disposed tires. The evidence indicates that Mr. Booher developed the idea of building a fence out of the tires only after he realized that simply allowing disposal of the tires on his property without a permit was unlawful. However, regardless of whether Mr. Booher intended to build a legitimate fence or whether he was simply seeking a means by which he could allow the tires to remain on his property, in either case he is in violation of the SWMA and the regulations requiring a permit for the disposal of municipal waste or written approval for beneficial use of municipal waste on one's property.

In summary, we find that the Department has met its burden of proof with respect to the violations cited in the Notice of Violation and its Order of January 10, 1989. We now address whether the civil penalty assessed in connection with the aforesaid violations was reasonable and a proper exercise of the Department's discretion.

Civil Penalty Assessment

Under section 605 of the SWMA, 35 P.S. §6018.605, the Department is authorized to issue a civil penalty up to a maximum of $25,000 per day for each violation. In determining the amount of the civil penalty, the Department is to consider the willfulness of the violation, damage to air, water, land or other natural resources, cost of restoration and abatement, savings resulting to the person as a consequence of the violation, and any other relevant factors. 35 P.S. §6018.605.

Our task in this review is not to determine what penalty we would impose, but to determine whether the Department abused its discretion in setting the amount of the assessment. Chrin Brothers v. DER, 1989 EHB 875. However, where we find that the Department has abused its discretion, we may substitute our discretion for that of the Department and modify a civil penalty assessment. Id.

In this case, the Department presented very extensive and detailed testimony on how the civil penalty was calculated at $20,000. Richard Morgan, who was involved in the calculation of the penalty, testified that the primary factors he considered were (1) Mr. Booher's willfulness in violating the Department's Order by continuing to bring more tires onto his property after being advised it was unlawful and (2) the potential harm to the environment. (F.F. 27, 52)

Mr. Booher challenges the reasonableness of the amount of the penalty, asserting that he agreed to the placement of the tires on his property only after considering the importance of recycling tires, and that he was simply storing them for Mr. Webb for use as a potential fuel source. However, as noted in Max Starr, supra, although Mr. Booher may have had a beneficial purpose in mind in storing the tires, it does not excuse him from complying with the requirements of the law. Max Starr, p. 10. Secondly, although Mr. Booher acknowledges receiving $100 per month for storage of the tires, or a total sum of approximately $2200 over the course of 22 months, he argues that while Mr. Webb and Mr. Pesco have profited significantly from this arrangement, he is now faced with a cost of approximately $200,000 to remove the tires. (F.F. 7, 34, 51) However, simply because others may have profited from this venture more than Mr. Booher does not excuse his noncompliance. Finally, Mr. Booher also disputes the Department's concern over potential harm to the environment. He points out that vector control has been placed on the premises, that there has been no increase in mosquitoes, and that the possibility of the tires burning and thereby causing leachate contamination is unlikely. However, simply because no environmental harm may have resulted thus far does not dispute the Department's finding that there is a potential for such harm.

The Department assessed $5000 of the $20,000 civil penalty for assaulting and threatening a Department employee. Although Mr. Booher denies grabbing Mr. Stout by the shirt, he acknowledges grabbing his wrist in what he claims was a defensive measure. (N.T. 110-111) We find Mr. Stout's version of the incident to be the more credible of the two, particularly in light of the fact that he requested the assistance of a state police trooper when serving the

Notice of Violation on Mr. Booher. It is a violation of the SWMA to hinder, obstruct, or threaten a Department employee in the course of his duties. 35 P.S. §6018.610(7). In assessing the $5000 penalty, the Department considered this to be a serious violation. The Department reasoned that its inspectors are in the field day after day meeting with the public, and their ability to perform their job rests on the belief that they will not be subject to attack. Therefore, the Department urges, the Board must be strict in penalizing persons who threaten inspectors. We agree with the Department and find the $5000 portion of the penalty assessed against Mr. Booher for threatening a Department inspector to be reasonable and not an abuse of discretion.

Three thousand dollars of the total penalty was assessed for Mr. Booher's initial unpermitted disposal of waste tires which was noted in the Notice of Violation. Mr. Morgan determined this action to be negligent, as opposed to willful, behavior. Department guidelines set the range for negligent behavior at $1500 to $10,000. (F.F. 29) Mr. Morgan selected a figure at the lower end of the range since this was Mr. Booher's first notification of the violation. We find that an amount in the lower end of the penalty range was proper based on the following two mitigating factors: (1) this was Mr. Booher's first notification of a violation, and (2) Mr. Booher's stated intention in storing the tires was beneficial, i.e. to recycle the tires. We find that the $3000 penalty assessed for this violation was not an abuse of the Department's discretion and, therefore, sustain this amount.

Finally, $12,000 was assessed for the violations cited in the January 1989 Order. Mr. Morgan determined these violations to constitute reckless, rather than negligent, behavior since Mr. Booher continued to collect the tires on his property after being notified that it was unlawful to do so by the Notice

of Violation. Department guidelines set the penalty range for reckless behavior at $6000 to $17,500. (F.F. 32) Mr. Morgan testified that he arrived at the sum of $12,000 by assessing $6000 each for what he considered to be two underlying violations: (1) violating the SWMA and (2) violating the regulations. (F.F. 32) Mr. Morgan did not explain how he determined these to be two separate and distinct violations. On the contrary, we find that the action of Mr. Booher which violated the SWMA, i.e. improper storage/disposal of waste tires, also constituted violation of the regulations. Therefore, this should have been properly assessed as one violation, which Mr. Morgan determined to be $6000. Although this could have been separately assessed for each day of violation, there is no indication in the record that this was done. Therefore, we find that the total amount which should have been properly assessed under this portion of the calculation is $6000, rather than $12,000. Subtracting $6000 from the Department's figure of $20,000 leaves a total penalty assessment in the amount of $14,000.

In summary, we find that the Department met its burden with respect to proving the underlying violations. We further find that the department met its burden with respect to proving the reasonableness of $14,000 of the civil penalty assessment.

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proving that it did not abuse its discretion in assessing the July 1989 civil penalty. 25 Pa.Code

§21.101(b)(1); Beltrami Enterprises, supra. The Department also bears the burden of proving the underlying violations on which the penalty was assessed. 25 Pa.Code §21.101(b)(3).

3. Mr. Booher bears the burden of proof with respect to any affirmative defenses. 25 Pa.Code §21.101(a).

4. Section 201(a) of the SWMA and section 271.101 of the regulations prohibit the disposal of municipal waste without a permit from the Department. 35 P.S. §6018.201(a); 25 Pa.Code §271.101

5. It is unlawful to store, collect, or dispose of any solid waste contrary to the rules and regulations of the Department. 35 P.S. §6018.610

6. Discarded, used tires constitute waste under the SWMA and the regulations. Max Starr, supra.

7. The disposal of waste tires on one's property without a permit constitutes a violation of the SWMA. Max Starr, supra; Samuel B. King v. DER, EHB Docket No. 87-111-M (Adjudication issued September 25, 1990).

8. A permit is not required for the beneficial use of municipal waste where the person has received prior written approval from the Department. 25 Pa.Code §271.101(b)(2); §271.232(b).

9. The storage of municipal waste for more than one year creates a presumption that the person storing the waste is operating a municipal waste disposal facility. 35 P.S. §6018.103; 25 Pa.Code §285.113(b).

10. It is unlawful to use one's land as a solid waste disposal area without a permit. 35 P.S. §6018.501.

11. The Department may assess a civil penalty of up to $25,000 per day per violation of any provision of the SWMA or the rules and regulations promulgated thereunder. In assessing the penalty, the Department may consider

the willfulness of the violation, damage to the environment, cost of restoration and abatement, savings resulting to the person as a result of the violation, and any other relevant factors. 35 P.S. §6018.605.

12. It is unlawful to obstruct or threaten any agent or employee of the Department in the course of the performance of his or her duty, including, but not limited to, entry and inspection. 35 P.S. §6018.610(7).

13. Mr. Booher violated 35 P.S. §6018.610(7) by threatening and assaulting Mr. Stout.

14. Mr. Booher violated sections 201 and 501 of the SWMA, 35 P.S. §§6018.201 and 6018.501, and section 271.101 of the regulations, 25 Pa.Code §271.101, by allowing the disposal of solid waste on his land without a permit.

15. The Department met its burden of proving that its Order of January 10, 1989 was authorized by law and was not an abuse of discretion.

16. In reviewing the Department's civil penalty assessment, the Board's role is to determine whether the Department abused its discretion or acted arbitrarily. Chrin Brother, supra.

17. The Board may substitute its discretion for that of the Department and modify a civil penalty assessment when it finds that the Department has abused its discretion. Chrin Brothers, supra.

18. The $5000 penalty assessed for threatening a Department inspector did not constitute an abuse of discretion.

19. The $3000 penalty assessed for the unpermitted disposal of waste, as stated in the Notice of Violation, did not constitute an abuse of discretion.

20. The Department did not carry its burden of proof as to the $12,000 assessed for violations of the SWMA and the regulations stated in the January

1989 Order. Therefore, this constituted an abuse of discretion, and we modify the amount of the penalty to $6000.

ORDER

AND NOW, this 20th day of June, 1991, it is ordered that Gerald Booher's appeal from the Department's Civil Penalty Assessment of $20,000 is sustained in part and denied in part, and the penalty is modified to $14,000. The entire civil penalty is due and payable immediately to the Solid Waste Abatement Fund.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
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Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Richard S. Ehmann concurs in part and dissents in part. A separate Opinion is attached.

DATED: June 20, 1991

cc: See next page

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
David Wersan, Esq.
Central Region
For Appellant:
Harvey B. Reeder, Esq.
Huntingdon, PA

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M. DIANE SMITH
SECRETARY TO THE BO

GERALD E. BOOHER	:	
v.	:	EHB Docket No. 89-204-MJ
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 20, 1991

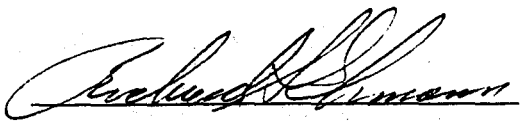
OPINION CONCURRING IN PART AND DISSENTING IN PART OF BOARD MEMBER RICHARD S. EHMANN

I concur in full with my colleagues on this Board as to this Adjudication in all respects save one.

The other members of this Board would affirm DER's assessment of a $5,000 penalty against Mr. Booher in regard to his conduct involving assaulting and threatening DER's Mr. Stout. I would find that DER's assessment should have been for a higher amount.

As a nation, we are a society built on laws. Members of our society must adhere to them until they are modified if society is to survive and flourish. While the governed must insist that representatives of the government act reasonably in dealing with all citizens, those charged with administering the statutes which glue our society together have the right to expect, when performing their jobs, that they will be responded to reasonably by the citizenry. When the law's administrators fail to deal responsibly and respectfully with their citizen employers, we have a tragedy like that recently video taped in Los Angeles and replayed nightly thereafter on the

nation's television news. When we have conduct like Booher's toward Mr. Stout, we have the reverse of that ugly coin. Just as what was video taped in Los Angeles cannot be condoned and must be condemned, so, too, must we condemn Mr. Booher's conduct. If DER found Booher's conduct to be serious, as the majority opinion says, then a $5,000 penalty is unreasonably small. Such an assessment suggests room to assess a $12,000 penalty for a serious maiming and a $25,000 penalty for a killing. I do not subscribe to such a theory nor do I find it reasonable. Booher's conduct was no mere obstinacy or even a verbal exchange; it was assault and battery. I would find DER's discretion was abused in only assessing $5,000 and assess a $15,000 penalty against Mr. Booher.



RICHARD S. EHMANN

Administrative Law Judge

Member

DATED: June 20, 1991

cc: **Bureau of Litigation**
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