Environmental Hearing Board

Adjudications
and
Opinions

1991

Volume IV

PAGES 1523-2028

COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1991

Chairman.....MAXINE WOELFLING

Member .....ROBERT D. MYERS

Member .....TERRANCE J. FITZPATRICK

Member .....RICHARD S. EHMANN

Member .....JOSEPH N. MACK

Secretary.....M. DIANE SMITH

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1991 EHB 1

ISBN No. 0-8182-0163-0

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

CASE NAME	PAGE
A.C.N., Inc.	1587
Allegro Oil and Gas Company	821
Gordon and Janet Back	1667
Board of Supervisors of Middle Paxton Township	546
Gerald E. Booher	987
Broad Top Township	214
C & L Enterprises, Inc. and Carol Rodgers	514
Chevron U.S.A. Inc.	1025
C. W. Brown Coal Co., Inc.	1063
Edward Davailus, et al.	1191
Ward I. Dran	1402
Fry Communications, Inc.	1734
Gabig's Service	1856
Robert K. Goetz, Jr.	1433
George W. Hatchard	1691
Hrivnak Motor Company	1811
T. C. Inman, Inc. and Theodore C. Inman	1512
Kennametal, Inc.	1847
Mr. and Mrs. John Korgeski	935
McDonald Land & Mining Co., Inc.	1956
Midway Sewerage Authority	1445
Mustang Coal & Contracting Corporation	1707
N & L Coal Company	1331

Newtown Township 150

Carl Oermann 1542

Pennsylvania Fish Commission 740

Pennsylvania State University 1374

P.N.B.P. Coal Company 412

Shipman Sanitary Service, Inc. 1122

Max L. Starr 494

Western Pennsylvania Water Company and
Armco Advanced Materials Corporation 287

OPINIONS AND ORDERS

CASE NAME	PAGE
A.C.N., Inc.	686
Adams Sanitation Company, Inc.	249
Al Hamilton Contracting Co.	1799
Allegro Oil and Gas Company, DER v.	34
Altoona City Authority	1381
Avery Coal Company and Thompson Brothers Coal Company (2/1/91)	146
Avery Coal Company, Inc. (4/19/91)	662
Ernest Barkman, Grace Barkman, Ern-Bark, Inc.	649
Bemco Recycling, Louis W. Belsito, III	734
Bethayres Reclamation Corporation	816
Bethenergy Mines, Inc.	847
City of Bethlehem	224
Bethlehem Steel Corporation	1218
Lawrence Blumenthal	357
Borough of Catasauqua	1537
Borough of Dunmore	1918
Borough of Ford City	169
George D. Bowling	1579
Bridgeview, Inc. & BVW Acquiring Corp.	1949
J. C. Brush	258
Carl E. Brunecke	1498
C & K Coal Company (8/26/91)	1484
C & K Coal Company (10/1/91)	1604
Cambria Coal Company	361
The Carbon/Graphite Group, Inc. (2/19/91)	234

The Carbon/Graphite Group, Inc. (3/22/91). 461

The Carbon/Graphite Group, Inc. (4/10/91). 620

The Carbon/Graphite Group, Inc. (4/19/91). 668

The Carbon/Graphite Group, Inc. (4/23/91). 690

The Carbon/Graphite Group, Inc. (4/24/91). 704

Borough of Catasauqua 1537

Centre Lime and Stone Company, Inc. 1144

Chevron U.S.A., Inc. 1635

City of Bethlehem 224

City of Harrisburg (1/30/91) (Joint Motion for Reconsideration). . . . 87

City of Harrisburg (1/30/91) (Pending Motions Regarding Discovery) . . 94

Clements Waste Services, Inc., et al. (4/29/91). 712

Clements Waste Services, Inc., Recycling Works, Inc. and Brian Clements (5/17/91) 806

George A. Clopper 1914

Coalition of Religious and Civic Organizations, Inc. (CORCO) 631

Frank Colombo, d/b/a Colombo Transportation Services and Northeast Truck Center, Inc. et al. and Northeast Rental Corporation d/b/a Colombo Transportation Lines . . 370

Concerned Citizens of Earl Township, et al. (1/7/91) 18

Concerned Citizens of Earl Township, et al. (7/12/91). 1167

Louis Costanza t/d/b/a Elephant Septic Tank Service (5/13/91). 780

Louis Costanza t/d/b/a Elephant Septic Tank Service (7/3/91) 1132

County of Schuylkill, et al. 1

Cratty, Gower & Hyduke, Inc. c/o Diamond Coal & Coke Co. 979

Croner, Inc. (11/20/91) 1828

Croner, Inc. (12/30/91) 2019

Darmac Coal, Inc. 1883
Davis Coal (2/21/91) 270
Davis Coal (12/12/91). 1908
DER v. Allegro Oil & Gas Co. 34
DER v. Monessen, Inc. 568
DER v. U.S. Wrecking, Inc. (4/17/91) 645
DER v. U.S. Wrecking, Inc. (10/23/91). 1704
Diamond Fuel Company 897
George Skip Dunlap 1562
Borough of Dunmore 1918
Eagle Crest Development, Ltd. 266
East Penn Manufacturing Company. 277
Edgewater Municipal Utilities Authority. 1600
Empire Sanitary Landfill, Inc. (1/24/91) 66
Empire Sanitary Landfill, Inc. (1/30/91) 102
Empire Sanitary Landfill, Inc. (9/17/91) (Motion to Exclude Evidence). 1567
Empire Sanitary Landfill, Inc. (9/17/91) (Motion for Summary Judgment) 1572
Environmental Neighbors' United Front, et al. 1891
E. P. Bender Coal Company (5/14/91) 790
E. P. Bender Coal Company (6/17/91) 969
Estate of Charles Peters, Jane P. Albrecht, & Linda P. Pipher (4/17/91) 653
Estate of Charles Peters, Jane P. Albrecht, & Linda P. Pipher (5/24/91) 837
Falcon Oil Company, Inc. 1503
F.A.W. Associates 601
William Fiore, d/b/a Municipal and Industrial Disposal Company 785
The Florence Mining Company 1301
Borough of Ford City 169

Franconia Township 1290
Robert F. Freeauf 1421
Fry Communications, Inc. 1895
Ganzer Sand & Gravel, Inc. (3/20/91) 430
Ganzer Sand & Gravel, Inc. (6/13/91) 957
Ganzer Sand & Gravel, Inc. (8/5/91) 1371
Glendon Energy Company 182
Grand Central Sanitary Landfill, Inc. 1160
Greenbriar Associates 1638
City of Harrisburg (1/30/91) (Joint Motion for Reconsideration). . . . 87
City of Harrisburg (1/30/91) Pending Motions Regarding Discovery). . . 94
Lawrence W. Hartpence and Imogene Knoll t/b/a Hydro-Clean, Inc. and Tri-Cycle, Inc. (4/17/91) 641
Lawrence W. Hartpence and Imogene Knoll t/b/a Hydro-Clean, Inc. and Tri-Cycle, Inc. (5/31/91) 876
Larry D. Heasley, et al. (3/25/91) 473
Larry D. Heasley, et al. (5/13/91) 772
Larry D. Heasley, et al. (11/7/91) 1758
Melvin J. Hoffer 682
Pauline Hughes 1597
J. C. Hayes, Inc.. 924
Joseph Kaczor 865
Kerry Coal Company 73
Keystone Coal Mining Corporation 1655
Kirila Contractors, Inc. 13
Morton Kise, et al. 1138
Lehigh Township, Wayne County (9/6/91) 1531

Lehigh Township, Wayne County (11/13/91) 1795

Alpert P. Leonardi & Hubert D. Taylor 699

George Matusavige 1555

McDonald Land & Mining Company, Inc. (1/31/91) 129

McDonald Land & Mining Company, Inc. (7/25/91) 1226

McDonald Land & Mining Company, Inc. and Sky Haven Coal, Inc. (7/29/91) 1230

McDonald Land & Mining Co., Inc. (10/1/91) 1610

McKees Rocks Forging, Inc. (3/15/91) 405

McKees Rocks Forging, Inc. (5/1/91) 730

McKees Rocks Forging, Inc. (8/1/91) 1313

Mil-Toon Development Group 209

Modern Trash Removal of York, Inc. (4/30/91) 726

Modern Trash Removal of York, Inc. (6/3/91) 879

DER v. Monessen, Inc. 568

Montgomery County (3/20/91). 435

Montgomery County (4/12/91). 625

Montgomery County (8/2/91) 1341

Montgomery County (12/3/91). 1874

Montgomery County (12/19/91) 2004

Montgomery County (12/23/91) 2013

Montgomery County, Clements Waste Service, Inc., Recycling Works, Inc. and Brian Clements (6/6/91). 906

Municipal Authority of the Borough of St. Marys (3/12/91). 391

Municipal Authority of the Borough of St. Marys (3/22/91). 450

Mustang Coal & Contracting Corporation 1999

Francis Nashotka, Sr., et al. (88-216-M); Lawrence Hartpence & Imogene Knoll (89-033-M); Lawrence Hartpence & Imogene Knoll t/b/a Hydro-Clean, Inc. & Tri-Cycle, Inc. (90-028-MR). 1900

Navy Ships Parts Control Center 198
New Hanover Corporation (3/21/91) (Montgomery County Intervention) . . 440
New Hanover Corporation (3/21/91) (New Hanover Township Intervention). 445
New Hanover Corporation (5/14/91) 800
New Hanover Corporation (5/29/91) 859
New Hanover Corporation (6/14/91) (Amending decision dated 5/29/91). . 963
New Hanover Corporation (6/19/91) 975
New Hanover Corporation (6/21/91) 1020
New Hanover Corporation (7/3/91) 1127
New Hanover Corporation (7/19/91) 1185
New Hanover Corporation (8/9/91) 1395
New Hanover Township & Paradise Watch Dogs 1234
Edgar Newman, Jr. 1508
North American Oil & Gas Drilling Company, Inc. (1/7/91) 22
North American Oil & Gas Drilling Company, Inc. (1/8/91) 46
Carl Oermann 1943
Paradise Township Citizens Committee, Inc., et al. 1647
Parker Oil Co. 1180
Parker Township Board of Supervisors 1724
Pennsylvania Public Interest Research Group, Inc. 1171
Pennsylvania Mines Corporation (8/2/91). 1348
Pennsylvania Mines Corporation (11/12/91). 1790
Estate of Charles Peters, Jane P. Albrecht, & Linda P. Pipher (4/17/91) 653
Estate of Charles Peters, Jane P. Albrecht, & Linda P. Pipher (5/24/91) 837
Phoenix Resources, Inc. 1681
P.O.E., Inc. 1492
Township of Potter 564

Power Operating Co., Inc. 1015
William Ramagosa, Sr., et al. (6/4/91) 889
William Ramagosa, Sr., et al. (8/23/91). 1427
William Ramagosa, Sr., et al. (9/9/91) 1535
William Ramagosa, Sr., et al. (10/28/91) 1720
William Ramagosa, Sr., et al. (12/12/91) 1904
Carol Rannels 1523
Raymark Industries, Inc., et al. 186
Cecelia and Tony Recklitis 365
S. A. Kele Associates 854
County of Schuylkill 1
Schuylkill Township Civic Assoiation 483
S. H. Bell Company 587
Shipman Sanitation Service, Inc. 61
Edward Simon 765
Fern E. Smith 1116
Richard Smith t/a Acme Drilling Company 1753
Harlan J. Snyder and Fred Eyrich 1558
Solomon Run Community Action Committee 1660
South Fayette Township 900
Clayton Stine 398
Hubert D. Taylor 1926
Township of Potter 564
University Area Joint Authority 893
U.S.P.C.I. of Pennsylvania, Inc. 1728
DER v. U.S. Wrecking, Inc. (4/17/91) 645

DER v. U.S. Wrecking, Inc. (10/23/91). 1704
Washington Township Concerned Citizens (2/8/91). 205
Washington Township Concerned Citizens (10/17/91). 1687
Westinghouse Electric Corp. (3/1/91) 353
Willowbrook Mining Company (1/8/91) 52
Willowbrook Mining Company (3/12/91) 376
Willowbrook Mining Company (3/27/91) 478
Willowbrook Mining Company (4/1/91) 507
Willowbrook Mining Company (5/7/91) 761
Willowbrook Mining Company (6/6/91) 917
James E. Wood 1156
Wood Processors, Inc., et al. 607
Wesley H. Young, Carole O. Young, and James Au 1323
Andrew J. and Georgia V. Zetts 1583

1991 DECISIONS

Administrative Code

§1921-(A)(b)--865

Air Pollution Control Act, 35 P.S. §4001 et. seq.

regulations

25 Pa. Code, Chapter 123 (Standards for Contaminants)

Odor emissions (123.31)--1572

Visible emissions (123.4-123.46)--1218

25 Pa. Code, Chapter 127 (Construction, Modification, Reactivation and Operation)

Subchapter A: Plan Approval and Permits--631

Subchapter B: Coke Oven Battery Abatement Plans--631, 1218

25 Pa. Code, Chapter 137 (Air Pollution Episode Standby Plans)--631

Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. §1406.1 et seq.--1348

Clean Streams Law, 35 P.S. §691.1 et seq.

civil penalties (691.605)--34, 821

Appeal bond/prepayment of penalty--897

definitions--1610

DER approval of plans, designs, and relevant data (691.308)--1234

DER enforcement orders (691.210, 691.610)--1063

discharge of industrial waste (691.301, 691.303-307)--514

operation of mines (691.315)--1226, 1610

bonds--1421

operator responsibility for pre-existing discharges--1063

other pollutants (691.401)--1063

powers and duties of DER (691.5)

inspection-open fields doctrine--1883

regulations

25 Pa. Code, Chapter 92-NPDES

Application for permits (92.21-92.25)--150

approval of applications (92.31)--1635

monitoring by permittee (92.41)--1635

NPDES permits (92.81-92.83)--1635

25 Pa. Code, Chapter 93-Water Quality Standards

application of water quality standards to discharge of pollutants (93.5)--1635

25 Pa. Code, Chapter 95-Wastewater Treatment Requirements

waste load allocations (95.3)--1635

responsibilities of landowners and occupiers (691.316)--234, 249, 514, 1063, 1313, 1381, 1610, 1667, 1811, 1856

unlawful conduct (691.611)--398

Cost Act (Award of fees/expenses for Administrative Agency Actions) 71 P.S. §2031-2035

prevailing party--357

Dam Safety and Encroachments Act, 32 P.S. §693.1 et seq.

permits (693.6-693.9)

compliance with regulations of Pa. Fish Commission--1691

notice requirement--1234, 1562

regulations (25 Pa. Code, Chapter 105, 106)

wetlands

definition/determination--1191, 1691

permits--1191

restoration--1191

Decertification Act, 54 P.S. §11--865

Defenses

compliance coerced--287

corporate veil--607

estoppel--969, 1331, 1381

sovereign immunity--198

waiver--150

Department of Environmental Resources--Powers and Duties

abuse of discretion--1, 150, 287, 546, 935, 1542, 1587

actions taken pursuant to §1915 Administrative Code (71 P.S. §510-515)--865

actions taken pursuant to §1917-A of Administrative Code (71 P.S. §510-517)--1348

administrative compliance orders--1348

duty to consider economic effects--1381, 1758

duty to enforce regulations--169, 209

duty to consider traffic effects of permit grant--1758

duty to provide reasons for permit denial--1374

power to enforce a policy not enacted into regulation--2019

pre-emption--198

presumption of validity of regulation--2019

prosecutorial discretion--205, 370, 730, 765, 917, 969, 1116

supremacy over local law--1138, 1758

Environmental Hearing Board--Practice and Procedure

amendment of pleadings and notice of appeal--186, 601

amicus curiae--1891

appealable actions--169, 205, 587, 765, 790, 854, 1116, 1132, 1681

appeal nunc pro tunc--13, 365, 564, 1180, 1503, 1638

burden of proof

Coal Refuse Disposal Control Act--1691

Gas Operations Act--150, 740

Surface Mining Conservation and Reclamation Act--412, 1707

25 Pa. Code 21.101--494, 1191

civil penalties--987, 1433, 1542, 1999

in general, party asserting affirmative of issue--704, 1122, 1445, 1856, 1908

orders to abate pollution or nuisance (21.101(b)(3) and 21.101(d) and 21.101(e))--704, 1063, 1667, 1734, 1956

shifting burden of proof--704, 1908

third party appeals of license or permit issuance--214, 1926

certification of interlocutory appeal--461, 876, 1371, 1523, 1604, 1904

clarification of Board order--1635

collateral estoppel--935, 957

collateral attack on a DER order--483, 979, 1926

compulsory non-suit--1, 1926

consent adjudications, decrees, and agreements--1900

demurrer--22, 568, 1704

discovery-889

completion of discovery--73, 94, 353, 391, 847, 1167, 1498, 1535, 1558, 1567

depositions--376, 975, 1427

entry for inspection and other purposes-1883

experts--391, 620, 975, 1301, 1445

motion to compel answers--1167, 1537, 1655

interrogatories

agreements regarding discovery-653

motion to compel--18, 52, 376, 391, 450, 620, 653, 699, 837, 1144, 1537, 1790

privileges--649

attorney-client--376, 641, 1185, 1395

work product--376

production of documents and things--87

motion to compel--649, 1144

protective orders--975, 1395, 1883

relevancy--641, 653, 837

requests for admissions--73, 473, 1484, 1498

sanctions--94, 699, 847, 1427, 1883

scope of discovery--2013

stipulations--686

subpoenas--1395

dismissal of appeal--1914

dissenting opinion--987, 1943

evidence--494, 514

experts--353, 1799

relevancy--631

failure to comply with Board order--682, 1445

failure to prosecute appeal--1156

finality--662, 785, 790, 979, 1063, 1234, 1301, 1847, 1874

intervention--435, 440, 445, 625, 662, 712, 726, 761, 800, 806, 859, 906, 917, 1020, 1323

joinder--405, 1724

judgment on pleadings--22, 27, 169, 1015, 1381, 1908

judicial notice--1348

jurisdiction--214, 365, 405, 483, 662, 1132, 1138, 1508, 1531, 1555, 1724, 1728, 1874, 1900

mootness--146, 483, 631, 1127, 2004

factor in assessing future penalty--1512

no relief available--66, 370, 1579

motion to dismiss--730, 772, 897, 1015, 1492, 1555, 1949, 2004

motion to limit issues--61, 507, 668, 900, 1301, 1492, 1908

motion to strike--182, 1600, 1891, 2013

notice of appeal--186, 893

issue preclusion--61, 73, 234, 668, 690, 1191, 1313, 1402, 1600

perfection of appeal--186, 1949

parties--712, 1891

post-hearing brief--412, 514

powers of the Board--287, 478

adjudication of cold record--412, 1063

declaratory relief--780, 2004

pre-hearing memorandum--631, 1445, 1600

preliminary objections--568

pro se appellant--1116, 1660, 1926

reconsideration--258, 601, 900, 1720, 1895, 2019

exceptional circumstances--87, 1523, 1562, 1943

interlocutory order--186, 361, 690

new evidence--1999

remand--2019

reopening of record--1230, 1660

res judicata--287, 935, 957

ripeness--2004

sanctions--645, 1122, 1156, 1445, 1567

scope of review--1492, 1811, 1856

service--73

standard of review--87

standing--772, 900, 1758, 1828, 2004

stay of Board proceeding--1341

summary judgment--46, 73, 270, 430, 478, 483, 501, 785, 790, 969, 1116, 1171, 1226, 1290, 1301, 1313, 1421, 1484, 1572, 1758, 1828, 1918

affidavits--979, 1874

appeal sustained--1218

statute vs. policy--686

statutory construction--587

supersedeas--102, 129, 209, 224, 234, 249, 277, 398, 607, 734, 816, 865, 924, 1160, 1348, 1583, 1610, 1728, 1753

stay of judicial order--224

timeliness of filing of notice of appeal--246, 765, 1508, 1531, 1555, 1597, 1647

verification--806

waiver of issues--182, 412, 821, 1122, 1512, 1758, 1856

Federal Law

CERCLA (Superfund), 42 U.S.C. §9601 et seq.

interrelationship with state law

sovereign immunity, waiver of--198

Clean Water Act (33 U.S.C. §1281-1297)

costs--1234

sovereign immunity--198

regulations (40 CFR)--277

intake credits (122.45(g))--1025

Resource Conservation and Recovery Act (42 U.S.C. §6901 et seq.)
interrelationship with state law
sovereign immunity, waiver of--198
Hazardous Sites Cleanup Act, 35 P.S. §6020.101 et seq.--1381
Municipal Waste Planning, Recycling, and Waste Reduction Act, 53 P.S. §4000.101 et seq.--169, 734
Chapter 11: Assistance to municipality--102
fees--879
municipalities--1918
Non-Coal Surface Mining Conservation and Reclamation Act, 52 P.S. §3301 et seq.
civil penalties (3321)--1914
Oil and Gas Act, 58 P.S. §5601.101
civil penalties--34, 821
Pennsylvania Constitution
Article I, §27--287, 935, 1234, 1758
Pennsylvania Rules of Civil Procedure
default adjudication (Rule 1037)--34
Pennsylvania Safe Drinking Water Act, 35 P.S. 721.1 et seq.--209
penalties and remedies
amount of civil penalties--1542
regulations (25 Pa. Code §109)
definition "Bottled Water System" (109.1)--1523
general requirements (109.4)--1542
Sewage Facilities Act, 35 P.S. §750.1 et seq.
definitions--1402
official plans (750.3)--1402
permits (750.7)--546

powers/duties-DER (750.10)--546
regulations
25 Pa. Code, Chapter 71: Administration of
Sewage Facilities Program
Subchapter B: 71.11-71.26--854, 1138, 1290
Subchapter C: 71.31-71.63--1402
sewage enforcement officers--1402
SWMA 35 P.S. §6018.101 et seq.
bonds (6018.505)--1234, 1512
civil penalties (6018.605)--987, 1433, 1587
definitions--277, 734, 987
storage facility--494
transfer facility--587
enforcement orders--1734, 1847
Governor's 1989 Executive Order--102, 169, 1758
legislative findings and policy (6018.102)--102
permits--1758
grant denial--102
municipal waste--1758
required (6018.501(a))--494
residual waste--587, 1734
recommendations of a local governing body (6018.504)--1234
regulations
25 Pa. Code, Chapter 75: Solid Waste Management
Subchapter C: Permits and Standards (75.21-75.38)--935
Subchapter D: Hazardous Waste (75.259-75.267)--1847

25 Pa. Code, Chapter 271: Municipal Waste Management--987
continued operation under prior permit (271.112)--224
insurance (271.371)--1758
mandatory closure (271.113)--169
permit exclusion for clean fill (271.101(b))--398
transition scheme (271.111)--224, 816
25 Pa. Code, Chapter 273: Municipal Waste Landfills--1572, 1758
Subchapter A: Operating Requirements (§201 et seq.)--1160
Subchapter D: Special Handling Requirements (§401 et seq.)--1160
25 Pa. Code, Chapter 283: Resource Recovery/Processing Facilities)
storage, collection, transport--734
residual waste
disposal, processing, storage (6018.302)--1734
unlawful conduct--1433
Statutory Construction Act, 1 Pa. C.S.A. §1501 et seq.--494
legislative intent controls (§1921)--287, 1610
presumptions in ascertaining legislative intent (§1922)--287
Storage Tank and Spill Prevention Act, 35 P.S. 6021.101--1811
definitions (§103)--924
enforcement (Chapter 13)
responsibility of owners/operators (1302)--924
Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1, et seq.
bonds (1396.4(d)-(j))
forfeiture (1396.4(h))--979
per acre liability--412
violation of reclamation requirements--412
partial release (1396.4(g))--214, 1421

civil penalties (1396.22)--1331

prepayment requirement--897

DER right of entry (1396.4c)--1883

designation of areas unsuitable for mining (1396.4e)

notice/comment requirements--740

enforcement orders--1063

health and safety (1396.4b)

abatement of nuisances (1396.4b(a))--1828

blasting (1396.4b(b))--1828

mining within prohibited distance of certain structures (1396.4b(c))-1828

off-site discharges and operator's responsibility for cleanup--1753, 1956

permits (1396.4)--1191

content of permit application (1396.4(a))--1883

regulations

25 Pa. Code, Chapter 86: Surface and Underground Coal Mining-General--740

Subchapter F: Bonding and Insurance Requirements (86.141-185)--214, 1421

Subchapter G: Civil Penalties for Coal Mining (86.191-86.203)--1707

25 Pa. Code, Chapter 87: Surface Mining of Coal

Subchapter D: Minimum Requirements for Operation and Reclamation Plan--1063, 1908

Subchapter E: Minimum Environmental Standards--270, 412, 1610

U.S. Constitution

commerce clause--102

due process--102

Water Rights Act, 32 P.S. §631 et seq.

water allocation permits--287

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOA

CAROL RANNELS	:	
	:	
v.	:	**EHB Docket No. 90-110-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 6, 1991**

OPINION AND ORDER SUR
REQUEST FOR RECONSIDERATION *EN BANC*,
OR IN THE ALTERNATIVE,
MOTION TO CERTIFY QUESTION FOR INTERLOCUTORY APPEAL

By Terrance J. Fitzpatrick, Member

Synopsis

A request for reconsideration *en banc* filed by the Department of Environmental Resources (DER) is granted where the presiding Board Member's decision denying DER's motion for summary judgment addressed a question of first impression which is important to DER's regulation of bottled water suppliers. On the merits of the question, the Board affirms the presiding Member's decision that in order to constitute a "bottled water system," a supplier must regularly serve at least 25 year-round residents. In addition, the Board includes in its Order the necessary statement for an interlocutory appeal by permission pursuant to 42 Pa. C.S. §702(b).

OPINION

This is an appeal by Carol Rannels (Rannels) from a compliance order issued by DER on February 27, 1990. Rannels is the owner of Crystal Springs Water Co., (Crystal Springs) Brecknock Township, Berks County. Crystal

Springs provides water to the public through four vending machines. In the compliance order, DER directed Rannels to comply with 25 Pa. Code §109.301(6)(i), which requires bottled water systems to perform weekly microbiological monitoring.[1]

DER filed a motion for summary judgment, arguing that Crystal Springs is a "bottled water system" under the regulations, and that, as such, it must comply with the microbiological monitoring requirements of the regulations. Rannels opposed the motion. On December 11, 1990, the presiding Board Member issued an Opinion at 1990 EHB 1617 ruling that under the regulations a "bottled water system" is defined as one which, among other things, regularly serves at least 25 year-round residents. Since DER did not contend that Crystal Springs met this standard, DER's motion for summary judgment was denied.

This Opinion and Order addresses DER's "Request for Reconsideration, *En Banc*, or, in the Alternative, Motion for Amendment of Order to Certify Question for Interlocutory Appeal." In its request for reconsideration, DER argues that "exceptional circumstances" are present to justify reconsideration of the interlocutory decision denying its motion for summary judgment. DER asserts that the question raised here is one of first impression, and that the issue is important to its scheme of regulation of bottled water suppliers under the Pennsylvania Safe Drinking Water Act (SDWA), Act of May 1, 1984, P.L. 206, No. 43, 35 P.S. §721.1 *et seq.*, and the regulations implementing the SDWA at 25 Pa. Code Chapter 109. On the question itself - whether under the SDWA and the regulations a provider of bottled water constitutes a

---

[1] Pursuant to 25 Pa. Code §109.303(a)(4), Rannels was ordered to take samples at the point of delivery to the consumer and to include one representative sample for each source of supply (Compliance Order, para. 11).

"bottled water system" regardless of whether it regularly serves at least 25 year-round residents - DER contends that the prior Opinion incorrectly construes the regulations, fails to give proper weight to DER's interpretation of the regulations, and contravenes the purpose of the bottled water regulations.

With regard to whether reconsideration of the December 11, 1990 Opinion should be granted, we find that "exceptional circumstances" are present to justify reconsideration. The question raised here is one of first impression and is important to DER's scheme of regulation of bottled water suppliers. In addition, as we will explain below, it appears that the legal issue raised here is the controlling issue in the proceeding. Thus, it is appropriate to allow the entire Board to examine the question and then to include the statement for an interlocutory appeal to Commonwealth Court.

Having granted reconsideration, we turn to the substantive question raised by DER's motion for summary judgment: was DER justified as a matter of law in deeming Crystal Springs a "bottled water system" and, thus, imposing upon it the monitoring requirements set out in 25 Pa. Code §109.301(6)(i), DER contends that the Chapter 109 regulations deem a bottled water system to be a community water system. DER also argues that bottled water systems must comply with all regulations applicable to community water systems, citing 25 Pa. Code §109.4(b). Therefore, DER contends that the regulations recognize that bottled water systems perform the same function as community water systems, and present the same need for protection for users of the system.

The flaw in DER's argument is that it refers to Crystal Springs as a "bottled water system" without examining the following definitions in the regulations:

> Community water system - A public water system which serves at least 15 service connections used

> by year-round residents or regularly serves at least 25 year-round residents.
>
> (i) Bottled water system - A community water system which provides artificial or natural mineral, spring or other water for bottling as drinking water whether or not containers are provided by the water supplier ... .

25 Pa. Code §109.1. Under these definitions, a bottled water system is a form of community water system. In defining the term "community water system," the regulations impose a minimum size requirement - the system must serve at least 15 service connections used by year-round residents or regularly serve at least 25 year-round residents.[2] A supplier of bottled water which does not meet these size requirements cannot be a "community water system;" hence, it cannot be a "bottled water system."[3]

DER's arguments fail utterly to come to grips with, or even to recognize, these definitions. Instead, DER asserts, vaguely, that "Crystal Springs constitutes a bottled water system within the meaning of the regulations promulgated under the SDWA at 25 Pa. Code Chapter 109 ... ." (DER request for reconsideration, para. 7.) DER may be relying upon 25 Pa. Code §109.4(b), which provides that "[b]ottle water systems and bulk water hauling systems, unless specifically exempted, shall comply with regulations applicable to community water systems ... ." As the presiding Board Member stated in his Opinion (p. 5, note 4), this regulation is curiously worded; since a bottled water system is a form of community water system, it seems strange to say that it must comply with regulations applicable to community

---

[2] This definition of "community water system" is also contained in the SDWA itself. See 35 P.S. §721.3. The term "bottled water system" is not defined in the SDWA.

[3] Since a bottled water system does not have "service connections," it would have to meet the requirement of regularly serving at least 25 year-round residents.

water systems. However, nothing in this regulation alters the minimum size requirement which is incorporated into the definitions of "community water system" and "bottled water system."

We must emphasize that our conclusion arises from the language and policies of the SDWA and the regulations, and that our personal views regarding public policy have played no part in this decision. While it is true that both the SDWA and the regulations are designed to assure the safety of water supplies, it is also clear that by imposing the minimum size requirements referred to above, the General Assembly and the Environmental Quality Board (EQB) expressed a policy that very small water systems and suppliers should not be subjected to requirements as stringent as those imposed upon larger systems. Neither this Board nor DER may substitute its own notions of policy for those of the General Assembly and the EQB.

Accordingly, the Board affirms the Opinion of the presiding Board Member which denied DER's motion for summary judgment.

In the event that the Board refuses to reconsider, or refuses to reverse, the decision of the presiding Board Member, DER asks that we amend the Order to include a finding that the Order involves a controlling question of law as to which there is substantial ground for disagreement and that an immediate appeal will materially advance the ultimate disposition of this matter. The Judicial Code provides, in relevant part:

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

> thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

42 Pa. C.S. §702(b).

We find that the legal question addressed above meets the standards for an interlocutory appeal by permission. DER has not asserted that Crystal Springs regularly serves at least 25 year-round residents. Therefore, the question whether Crystal Springs must regularly serve at least 25 year-round residents to constitute a "bottled water system" appears to be a controlling question of law. In addition, there is "substantial ground for difference of opinion" on the question. Although we sincerely believe that DER's legal argument is weak, the fact that DER - the agency charged with implementing the regulations - would take this position is entitled to some consideration. Finally, an immediate appeal may materially advance the ultimate termination of the matter. Although the legal issue addressed here appears to be controlling, Rannels - a *pro se* appellant - may be forced to a hearing due to her inability to comply with the technical details involved in filing a motion for summary judgment. An immediate appeal to Commonwealth Court would very likely save everyone involved a great deal of needless effort.

Therefore, we will include in our Order the statement required by 42 Pa. C.S. §702(b) for an interlocutory appeal by permission.[4]

---

[4] DER requested that the December 11, 1990 Order be amended to include the statement required for an interlocutory appeal. We believe it is more appropriate to include the statement in the instant Order since we have reconsidered the earlier Opinion and Order, and since the instant Opinion and Order is a decision of the Board, *en banc*.

ORDER

AND NOW, this 6th day of September, 1991, it is ordered that:

1) DER's request for reconsideration *en banc* of the presiding Board Member's December 11, 1990 Opinion and Order is granted.

2) The presiding Board Member's December 11, 1990 Opinion and Order is affirmed.

3) Pursuant to 42 Pa. C.S. §702(b), it is the Board's opinion that its ruling that a supplier of bottled water must regularly serve at least 25 year-round residents in order to constitute a "bottled water system" under the SDWA and the regulations involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal may materially advance the ultimate termination of this matter.

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

DATED: September 6, 1991

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
Martha E. Blasberg, Esq.
Southeast Region
Appellant Pro Se:
Carol Rannels
Reinholds, PA

jm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

CAROL RANNELS :
:
v. : **EHB Docket No. 90-110-F**
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION CONCURRING IN PART AND DISSENTING IN PART
OF BOARD MEMBER RICHARD S. EHMANN

I specifically concur with the reasoning and conclusions reached in the foregoing opinion as it pertains to denial of DER's Motion For Summary Judgment. I take issue solely with the majority's decision to certify this issue to the Commonwealth Court. The majority finds DER's legal argument to be weak but agrees to certify anyway based on the fact that it is espoused by DER. I do not believe certification is appropriate on this basis. DER's argument is too weak to accede to DER's request for certification just because the argument was advanced by DER. I would deny DER's request and proceed to adjudicate the merits of this appeal.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATE: September 6, 1991

cc: **For the Commonwealth, DER:**
Martha E. Blasberg, Esq.
Southeast Region
Appellant Pro Se:
Carol Rannels
Reinholds, PA
jm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

LEHIGH TOWNSHIP, WAYNE COUNTY	:	**EHB Docket No. 91-090-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 6, 1991

OPINION AND ORDER
SUR MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

A motion to dismiss for lack of jurisdiction is granted in part where an appellant does not file its appeal within 30 days after receiving a Department of Environmental Resources' (Department) letter regarding reimbursement of expenses in enforcing the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.* (the Sewage Facilities Act).

OPINION

This matter was initiated with the March 7, 1991, filing of a notice of appeal by Lehigh Township, Wayne County (Township), seeking review of letters from the Department dated January 14, 1991, and February 8, 1991. The Department's letter of January 14, 1991, advised the Township that after consideration of additional information submitted by the Township solicitor, the Department was not altering its demand that the Township repay its 1987

and 1988 grants for expenses in administering and enforcing the Sewage Facilities Act because of the Township's failure to comply with the statute.[1] In this same letter, the Department also acted on the Township's 1989 reimbursement application and applied the approved amounts against the amounts to be repaid from the 1987 and 1988 grants to the Township. The Department's February 8, 1991, letter responded to a January 22, 1991, letter from the Township's solicitor, restating the position in the Department's January 14, 1991, letter, and demanding submission of the amount outstanding on repayment of the 1987 and 1988 reimbursement grants.

On May 13, 1991, the Department filed a motion to dismiss the Township's appeal for lack of jurisdiction, arguing that the appeal was filed more than 30 days after the Department's letter of April 24, 1990, notifying the Township of its denial of the Township's 1988 reimbursement application and demanding a refund of $12,518.57 from the Township's 1987 reimbursement grant. In the alternative, the Department argues that the Township's appeal of the January 14, 1991, letter is untimely. The Department cites Rostosky v. Department of Environmental Resources, 26 Pa. Cmwlth. 478, 364 A.2d 761, 763 (1976), and 25 Pa. Code §21.52 in support of its motion. The Township's May 28, 1991, response to the Department's motion denies that its appeal was untimely.

The Board's rules of practice and procedure at 25 Pa. Code §21.52 provide that an appeal of an action of the Department must be filed with the Board within 30 days after the party appellant has received written notice of such action. If an appeal is filed beyond this 30 day period, the Board has no jurisdiction to hear it. Rostosky, *supra*, and Lebanon County Sewage Council

---

[1] Such grants are authorized by §6(b) of the Sewage Facilities Act.

v. Com., Dept. of Environmental Resources, 34 Pa. Cmwlth. 244, 382 A.2d 1310 (1978). For the reasons which follow, the Township's appeal must be dismissed with respect to the Department's January 14, 1991, letter.

The Township specifies in its notice of appeal that it is seeking review of "DER letters of February 8, 1991, and January 14, 1991, denying sewage expenses reimbursement for the year 1988 as submitted, and the DER demand of repayment by the Township of 1987 sewage expenses reimbursement." While the Township states in its notice of appeal that it received notice of the Department's action through its solicitor on February 13, 1991, it is evident from a January 22, 1991, letter from the Township solicitor to the Department, which is attached to the Township's notice of appeal, that the Township received the Department's January 14, 1991, letter sometime prior to January 22, 1991, and forwarded the letter to its solicitor. Since the Township's appeal was not filed until March 7, 1991, it was untimely with regard to the January 14, 1991, letter. However, it was timely with regard to the Department's February 8, 1991, letter.[2]

O R D E R

AND NOW, this 6th day of September, 1991, it is ordered that:

1) The Department's motion to dismiss is granted in part and denied in part; and

---

[2] In so doing we do not address the issue of whether the Department's February 8, 1991, letter is an appealable action and, if so, what issues may be raised in the Township's appeal. Although the Department's motion contained allegations as to which Department letter was a "final appealable action," it sought dismissal of the Township's appeal on the basis of 25 Pa. Code §21.52 and the Rostosky decision, both of which deal with timeliness.

2) The Township's appeal of the Department's January 14, 1991, letter is dismissed as untimely.

3) The Township shall file its pre-hearing memorandum on or before September 23, 1991.

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

DATED: September 6, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Barbara L. Smith, Esq.
Northeastern Region
For Appellant:
Timothy B. Fisher, Esq.
Gouldsboro, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

WILLIAM RAMAGOSA, SR., et al.	:	
	:	
	:	
v.	:	**EHB Docket No. 89-097-M**
	:	**(consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 9, 1991**

OPINION AND ORDER
SUR
SUNDRY DISCOVERY MOTIONS

Robert D. Myers, Member

Synopsis

The discovery period will not be extended when the time allowed has been adequate, the number of issues has been significantly reduced, and the attorneys have turned the process into a contest of personalities.

OPINION

Discovery disputes have dominated these consolidated appeals for the past six months (see Opinions and Orders issued on June 4, 1991 and on August 23, 1991). The imminent closing of the discovery period on August 30, 1991 prompted the filing of a flurry of motions on August 28 and 29. Included were a Consolidated Motion for Protective Order filed by the Department of Environmental Resources (DER), a Motion for Protective Order filed by Appellants and a Motion for Extension of Time to Complete Discovery filed by Appellants. Responses have been filed to all of the Motions except the Appellants' Motion for Protective Order. Our disposition of these motions makes it unnecessary for us to wait for that response.

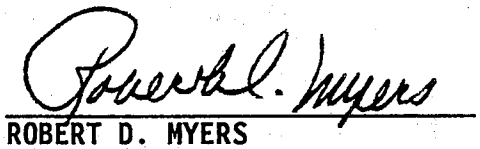
The attorneys, with conduct at least bordering on the censorious, have turned the discovery process into an ongoing contest of personalities. We will not lend our tacit approval to such conduct by granting additional time for them to continue it. The discovery period has been adequate and the issues have been significantly reduced by our Opinion and Order of August 23, 1991. The case should proceed to hearing.

ORDER

AND NOW, this 9th day of September, 1991, it is ordered as follows:

1. Appellants' Motion for Extension of Time to Complete Discovery is denied.
2. DER's and Appellants' Motions for Protective Orders are granted.
3. Appellants shall file their pre-hearing memorandum on or before September 24, 1991.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: September 9, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
M. Dukes Pepper, Jr., Esq.
Regulatory Counsel
Mary Martha Truschel, Esq.
Central Region
For the Appellant:
Richard B. Ashenfelter, Jr., Esq.
POWELL, TRACHTMAN, LOGAN & CARRLE
King of Prussia, PA
and
Joseph P. Green, Jr., Esq.
DUFFY & GREEN
West Chester, PA

sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

BOROUGH OF CATASAUQUA	:	
	:	
v.	:	**EHB Docket No. 90-461-B**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 9, 1991

OPINION AND ORDER SUR
MOTION TO COMPEL

By Thomas M. Ballaron, Hearing Examiner

Synopsis

A municipality's motion to compel more sufficient answers to interrogatories, served upon the Department of Environmental Resources (DER) during the course of discovery in the municipality's appeal from the issuance of a National Pollutant Discharge Elimination System (NPDES) permit, is granted. The interrogatories required DER, in relevant part, to set forth the subject matter of its experts' opinions, the substance of the facts and opinions to which they expected to testify, and the summary of the grounds for each opinion. DER's answers were vague and nonspecific, and, therefore, did not comply with Pa.R.C.P. No. 4003.5(a)(1).

OPINION

On October 26, 1990, the Borough of Catasauqua (Borough) filed a notice of appeal with the Board from DER's issuance to the Borough of an NPDES

sewage permit (permit) on September 27, 1990. In its notice of appeal, the Borough primarily contended that the effluent limitations set forth in the permit for copper, lead, silver, and zinc were unreasonable, arbitrary, and capricious because DER calculated the effluent limitations by using incomplete data in an unproven computer model.

The present discovery controversy stems from interrogatories served upon DER on March 20, 1991, by the Borough which requested, in pertinent part, the names of the experts DER intended to call as witnesses (No. 1), the subject matter of their testimony (No. 1a), the substance of the facts and opinions to which they expected to testify (No. 2a), and a summary of the grounds for each opinion (No. 2b). On May 20, 1991, DER provided its answers to the Borough. Dissatisfied with these responses, the Borough filed its motion to compel with the Board on July 5, 1991, contending that DER's answers did not provide the Borough with the substance of the facts or opinions to which each expert was expected to testify, or a summary of the grounds for their opinions. Arguing that DER's responses failed to comply with Pa.R.C.P. No. 4003.5(a)(1), the Borough requested that the Board order DER to supply more complete answers, or, upon DER's failure to comply, bar the agency from calling any experts to testify at trial.

In response to the motion to compel, DER stated that it had complied in good faith with all of the Borough's previous discovery demands, including the Borough's request to produce a copy of the software package for the DER computer model, and that its answers to the Borough's interrogatories were sufficient. DER asserted that the permitting process, through which the effluent limitations were established, was extremely complex and that it did

not know at the present stage of the appeal what aspects of the process the Borough intended to contest. As a result, DER argued that it could not specify how its experts would testify in defense of the permit.

In the Borough's reply brief filed on August 9, 1991, it asserted that it was attempting to discover, through the contested interrogatories, the specific data and calculations used by DER in determining the effluent limitations of the permit. The Borough contended that this basic information was essential in order for the Borough to properly frame the issues for its appeal.

A review of the contested interrogatories reveals that DER answered Interrogatory No. 1a by describing a range of subjects on which each of its three experts would testify, including the theoretical basis of the computer model, what data was used, and how the output from the model was interpreted. However, DER failed to provide the substance of the facts and opinions of its experts as called for in Interrogatory No. 2a. It merely provided a more detailed list of subjects on which each would testify. Similarly, DER failed to provide a summary of the factual grounds for its experts' opinions as required by Interrogatory No. 2b. Instead, the agency answered, that its experts' opinions were based upon their professional experience, various policy manuals, regulations, and technical references.

Discovery before the Board is governed generally by the Pennsylvania Rules of Civil Procedure. Kerry Coal Company v. DER, 1990 EHB 98; 25 Pa. Code §21.111. It is well established that the discovery rules are designed to provide generous access to all relevant information. CORCO v. DER, 1990 EHB 1376. This is equally true with regard to a party's expert opinions in order

to prevent surprise and unfairness and to allow for a trial on the merits. Sindler v. Goldman, 309 Pa. Super. 7, 454 A.2d 1054 (1982); Pa.R.C.P. No. 4003.5(a).

Applying these standards, DER's submissions do not constitute responsive answers to Interrogatories Nos. 2a and 2b, as required by Pa.R.C.P. No. 4003.5(a)(1). The proffered answers cannot substitute for the detailed information in DER's possession which is necessary for the Borough to develop its appeal. DER's contention that it had insufficient knowledge regarding the gist of the Borough's appeal to provide accurate responses is of no weight. It is evident from the notice of appeal that the Borough has challenged DER's use of the computer model, the validity of the field data, and DER's interpretation of the results.

As the information sought by the Borough is properly discoverable, CORCO v. DER, 1990 EHB 1376, and since DER's answers to the interrogatories were vague and nonspecific and did not adequately pinpoint the facts and opinions to which its experts were expected to testify in a case where technical evidence will be decisive, the Borough's motion to compel access to this information must be granted. Philadelphia Electric Company, *et al.* v. DER, 1990 EHB 1028.

ORDER

AND NOW this 9th day of September, 1991, the motion to compel more sufficient answers filed by the Borough of Catasauqua, is granted. DER will provide full and complete answers to Interrogatories Nos. 2a and 2b within 30 days of this order.

ENVIRONMENTAL HEARING BOARD

THOMAS M. BALLARON
Hearing Examiner

DATED: September 9, 1991

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
Barbara L. Smith, Esq.
Northeastern Region
For Appellant:
Jeffrey R. Dimmich, Esq.
Catasaqua, PA
jcp

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

CARL OERMANN	:	
	:	
v.	:	**EHB Docket No. 88-153-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 10, 1991**

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

By Robert D. Myers, Member

Syllabus

In an appeal by a water supplier from the assessment of a $5,000 civil penalty under the Safe Drinking Water Act, the Board sustains the assessment but reduces the amount to $3,000. In reaching this result, the Board concludes that DER carried its burden of proof only in showing that no one capable of acting on behalf of the water supplier was available to respond to the water emergency. This circumstance and the failure of the water supplier to have an emergency response plan, (as required by the regulations) was a violation of 25 Pa. Code §109.4(a)(4), for which a civil penalty is assessable. The Board holds that the absence of any legislatively mandated factors to be considered by DER in assessing civil penalties under the Safe Drinking Water Act is not a fatal flaw in the statute but simply requires DER to exercise sound discretion. This discretion may be exercised either by regulation or on a case-by-case basis, unless the Legislature dictates otherwise. Since the Legislature did not do so, DER was justified in proceeding on a case-by-case basis. The factors considered by DER are held by

the Board to be appropriate but the amount is considered too high since it was based, in part, on factual allegations that were not proved. The Board reduces the assessment to $3,000.

Procedural History

On April 19, 1988 Carl Oermann (Appellant) filed a Notice of Appeal from a Civil Penalty Assessment in the amount of $5,000 made against him on March 18, 1988 by the Department of Environmental Resources (DER). The appeal was twice scheduled for hearing and postponed at the request of the parties. A hearing eventually was held in Harrisburg on December 11, 1990 before Administrative Law Judge Robert D. Myers, a Member of the Board. Both parties, represented by legal counsel, filed a partial stipulation and presented evidence in support of their respective legal positions. Post-hearing briefs were filed on February 8, 1991 (DER) and on March 1, 1991 (Appellant). The record consists of the pleadings, the partial stipulation of facts, a transcript of 91 pages and 2 exhibits.

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

FINDINGS OF FACT

1. Appellant is an individual residing at 4621 South Salem Church Road, Dover (Dover Townsnip), York County, Pennsylvania 17315 (Notice of Appeal; N.T. 42).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is authorized to administer the provisions of the Pennsylvania Safe Drinking Water Act (SDWA), Act of May 1, 1984, P.L. 206, 35

P.S. §721.1 *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 (Stip. ¶ 1[1]).

3. Appellant is the developer, part-owner and manager of Del-Brook Estates, a mobile home park located in Dover Township. Appellant resides in the park (N.T. 43, 45-47, 49).

4. Until sometime in 1988, the domestic water supply for Del-Brook Estates consisted of a 210-feet deep well (drilled in 1978). Distribution facilities included a submersible pump (installed in 1983), a well house equipped with pressure tanks and electrical connections, a 2-inch water main, and individual service lines to each mobile home (N.T. 31, 44, 56, 58, 68 and 83).

5. As of May 1987 there were 30 mobile homes located in Del-Brook Manor (N.T. 44).

6. At or about 10:00 p.m. on Thursday, May 7, 1987 Leon B. Lankford, Township Manager of Dover Township, was notified by York County Control that Del-Brook Estates was without water (N.T. 73-75).

7. Lankford attempted to contact Appellant by telephone but was unable to do so (N.T. 75, 78).

8. Lankford went to Del-Brook Estates and, after verifying that the residents were without water, went to Appellant's mobile home but found no one there (N.T. 76, 80).

9. By midnight of May 7, 1987 a temporary water supply had been furnished to the residents by running a garden hose from a fire hydrant

---

[1] The partial stipulation is abbreviated "Stip." followed by the particular paragraph number. Most of the stipulations are legal rather than factual and will be referenced later in the Adjudication.

(connected to the Township's public water system) to a nearby mobile home (N.T. 11, 77-80).

10. Early on the morning of Friday, May 8, 1987 Lankford called Chester E. Young, DER's District Supervisor for the York-Adams-Franklin District, and informed him of the emergency water connection (N.T. 8, 10, 78).

11. After receiving this information, Young attempted to contact Appellant by calling the two telephone numbers that Appellant had previously given to DER, but the attempts were unsuccessful (N.T. 11, 12, 28).

12. Young went to Del-Brook Estates during the morning of May 8, 1987, observed the emergency water connection and a truck parked near the well casing but found no one to talk to (N.T. 10-12, 28-29).

13. Lankford contacted Appellant by car phone on May 8, 1987 and informed him of the emergency water connection (N.T. 46, 77).

14. After determining that the problem was not in the wiring, Appellant pulled the submersible pump from the well and replaced it. The permanent water supply was restored and the emergency connection was removed on Monday night, May 11, 1987 (N.T. 49-53, 79).

15. Young was notified by Township personnel on May 11, 1987 that the emergency connection had been discontinued (N.T. 17).

16. Neither Appellant nor anyone on his behalf notified DER of the water outage at Del-Brook Estates and the emergency water connection to the Township system (N.T. 17, 18, 20, 62).

17. Young had informed Appellant twice prior to May 1987 that he needed to prepare an emergency response plan but Appellant failed to do so because of his intention to connect Del-Brook Estates to the Township water system (N.T. 17, 21, 57, 65, 83; Exhibit AP-1).

18. Del-Brook Estates was connected to the Township water system in 1988 (N.T. 33, 83).

19. On March 18, 1988 DER assessed a civil penalty against Appellant in the amount of $5,000 (N.T. 19; Exhibit C-1).

20. Young calculated the civil penalty assessment by following DER guidelines that take into consideration the seriousness of the violation, the culpability of the violator and the duration of the violation (N.T. 19).

21. In evaluating these factors:

(a) Young considered the violation to fall within the most serious category, for which a range of $2,000 to $5,000 is suggested, and considered $3,500 to be an appropriate amount;

(b) Young considered Appellant's culpability to fall within the reckless category, with a range of $1,500 to $2,500, and determined that $2,000 was an appropriate amount;

(c) Young determined the duration of the violation to be 3 days but assessed for only 1 day at a rate of $5,000; and

(d) Young concluded that, despite the fact that the calculation totalled more than $5,000, the penalty should be $5,000.
(N.T. 19-23; Exhibit C-1).

DISCUSSION

As the party assessing the civil penalty, DER has the burden of proof: 25 Pa. Code §21.101(b). To carry the burden, DER has to show by a preponderance of the evidence that its assessment was lawful and an appropriate exercise of its discretion: *DER v. Lucky Strike Coal and Louis J. Beltrami*, 1987 EHB 234.

The parties have stipulated[2] that Appellant was a "person" and a "supplier of water" and that Del-Brook Estates was a "public water system" as those terms are defined in section 3 of the SDWA, 35 P.S. §721.3, as of May 7, 1987. As such, Appellant was obligated by section 4 of the SDWA, 35 P.S. §721.4, to comply with rules and regulations adopted pursuant to the SDWA. Those rules and regulations are set forth at 25 Pa. Code Chapter 109.

Appellant is charged with having violated 25 Pa. Code §109.4(a)(4) which mandates that public water suppliers "take whatever investigative or corrective action is necessary to assure that safe and potable water is continuously supplied to the users." According to DER's allegations, Appellant[3] "allowed the [water] system to malfunction in that a pump...failed." This pump failure, according to DER "resulted in no water being supplied, over at least a three day period, to the residents of [Del-Brook Estates]...." Neither Appellant "nor any authorized agent of his was available to respond to the emergency." Appellant's allowing the "system to malfunction" and his "inaction in response to the emergency" posed an "imminent and substantial" threat to the water users in Del-Brook Estates.

The evidence fails to support some of DER's allegations. There is no evidence, for instance, that shows why the pump failed. According to Appellant, it was only 4 years old. Unless we are to interpret 25 Pa. Code §109.4(a)(4) as imposing liability without fault, the mere fact that an essential piece of equipment stopped functioning raises no inference of operator neglect. The common experience of mankind is that the best

---

[2] Stip. ¶3 through ¶7.

[3] All of the quoted language that follows in this paragraph is derived from paragraphs 12 to 15 of the Civil Penalty Assessment issued by DER on March 18, 1988.

manufactured and carefully maintained mechanical devices can malfunction. The standard of service imposed by the Legislature on persons and entities furnishing water to the public is set forth in section 1501 of the Public Utility Code, Act of July 1, 1978, P.L. 598, 66 Pa. C.S.A. §1501. That section reads, in part as follows:

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. *Such service also shall be reasonably continuous and without unreasonable interruptions or delay....* (emphasis supplied)

The emphasized words, injecting the concept of reasonableness into the duty to furnish water without interruption, conflict with any suggestion of liability without fault. It has been held that a cause of action for strict liability does not exist against a water supplier for an interruption of service caused by a defect in the system: *Kitzmiller v. Riverton Consolidated Water Company*, 38 Cumb. L.J. 33, 46 D&C 3d. 72 (1987).

There also is a lack of evidence to support DER's allegations that no water was supplied to Del-Brook Estates residents for a 3-day period. The precise time when the water pump failed has not been shown. It is clear, however, that water service was restored, through an emergency connection to the Township's system, by midnight on May 7, 1987. The connection was not severed until May 11, 1987 when the Del-Brook Estates system went back into operation. There is hearsay testimony that the mobile home park had been out of water for a 24-hour period before the emergency connection was made on May 7, 1987. Even if we accept such testimony, it falls short of the 3-day period alleged by DER.

DER argues, however, that the allegation is correct because the water supplied to the mobile home park during the May 7 - May 11 period was from the Township's system and not the Del-Brook Estates system. We are frankly puzzled by this argument. If a water supplier is to do whatever is necessary to assure that potable water is supplied to his users (as required by 25 Pa. Code §109.4(a)(4)), by what reasoning can he be penalized for acquiring that water from another system when his own supply is interrupted?

In addition, as Appellant points out in his post-hearing brief, DER's factual premise underlying this argument is incorrect. While the water itself came from the Township's system, it was furnished to users through the facilities of the Del-Brook Estates system. Thus, Appellant's system continued to furnish water while the pump was being replaced.

It is true, as DER alleges, that neither Appellant nor any authorized agent was available to respond to the emergency. As noted above, the precise time when the pump failed has not been shown. The first solid evidence of a water emergency is 10:00 p.m. on Thursday, May 7, 1987. Appellant was unaware of it until the afternoon of May 8. Attempts to contact him on the night of May 7 (by the Township Manager) and on the morning of May 8 (by DER) were unsuccessful. Once informed of the problem, Appellant took steps to find the source of the difficulty and to correct it. There is no evidence that these actions were dilatory.

The delay in getting corrective action begun was caused by the lack of an effective emergency response plan. As events transpired, the lack of such a plan caused no harm to the residents of Del-Brook Estates. That does not shield Appellant from censure, however, because it was the intervention of other agencies that produced that result. The unavailability of any responsible person associated with the Del-Brook Estates water system and the

absence of any established procedures for responding to an emergency posed an "imminent and substantial" threat to the health and safety of the residents of the mobile home park. This constituted a violation of Appellant's duty under 25 Pa. Code §109.4(a)(4) to take action necessary to assure a continuous supply of safe and potable water.

DER has the power to assess a civil penalty up to a maximum of $5,000 per day for a violation of the SDWA regulations: section 13(g) of the SDWA, 35 P.S. §721.13(g). The penalty assessed against Appellant was calculated by Young pursuant to DER guidelines that consider the seriousness, willfulness and duration of the violation. Appellant argues that, since the SDWA contains no guidance whatever on the factors that should be weighed by DER in assessing civil penalties and since this vacuum has not been filled by the adoption of regulations, the assessment should be stricken.

Unlike many regulatory statutes administered by DER, the SDWA does not mandate the consideration of any specific factor in determining the amount of a civil penalty. Section 605(a) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(a), which is typical of the more common civil penalty provisions, specifies the consideration of willfulness, injury to the environment, costs of restoration "and other relevant factors." Included in the last category is deterrence: *DER v. Lawrence Coal Company*, 1988 EHB 561 at 595.

The reason why the Legislature chose not to detail specific considerations in the SDWA is not known. While the absence of the directives may appear unusual, it does not constitute a fatal flaw in the statute. DER, and indeed, other administrative agencies have traditionally been endowed with

far-reaching powers, attended only by the most general guidance from the legislature. In such circumstances, DER is held to a standard requiring the exercise of sound discretion.

Appellant argues that, where civil penalties are concerned, DER is obligated to exercise its discretion through regulations. Ordinarily, an administrative agency may act either by regulation or on a case-by-case basis; the choice of method lies within the sound discretion of the agency: *Administrative Law and Practice*, Charles H. Koch, Jr. (1985), volume 1, §2.14 and cases therein cited; see also *Newport Homes, Inc. v. Kassab*, 17 Pa. Cmwlth. 317, 332 A.2d 568 (1975). The agency's discretion in this regard can be limited, of course, by legislative mandate. Appellant submits that such a mandate appears in section 5(a) of the SDWA, 35 P.S. §721.5(a), which directs DER to adopt and implement a public water supply program including, *inter alia*, "compliance and enforcement procedures." Appellant ignores the fact that the word "regulation" is absent from this provision. Where it does appear (in section 4, 35 P.S. §721.4, dealing with the powers and duties of the Environmental Quality Board), there is no corresponding mandate concerning "compliance and enforcement procedures." Clearly, then, DER has discretion to establish such procedures either by regulation or on a case-by-case basis; and has chosen to do the latter. We have not been presented with any reason why that choice should be declared an abuse of discretion.

The factors that DER considered in assessing the civil penalty against Appellant - seriousness, willfulness and duration - are manifestly appropriate. No abuse of discretion exists with respect to that choice. Nonetheless, we are not persuaded that $5,000 is an appropriate amount in this case. As noted above, some of the allegations contained in the Civil Penalty Assessment have not been established. Other allegations presented at the

hearing relate to violations for which Appellant has not been cited. On the basis of our factual findings and legal discussion, we conclude that DER abused its discretion in assessing a civil penalty of $5,000. Having reached that conclusion, we can substitute our own discretion: *Chrin Brothers v. DER et al.*, 1989 EHB 875. In our judgment, a civil penalty in the amount of $3,000 is appropriate.

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 its assessment of a civil penalty was lawful and an appropriate exercise of its discretion.

3. Appellant was a "person" and a "supplier of water" and Del-Brook Estates was a "public water system", as those terms are defined in the SDWA, as of May 7, 1987.

4. Appellant was required by the SDWA to comply with rules and regulations adopted pursuant to that statute.

5. Appellant was required by 25 Pa. Code §109.4(a)(4) to take necessary action to assure that safe and potable water was continuously supplied to the users.

6. Appellant, as a supplier of water, is not liable for civil penalties, without fault, because of an interruption of service caused by the failure of a piece of equipment.

7. Appellant, as a supplier of water, is not liable for civil penalties because of utilizing the water of the Dover Township system during the emergency caused by the pump failure.

8. The lack of an emergency response plan was a material factor in causing the delay in getting corrective action begun.

9. The unavailability of any responsible person associated with the Del-Brook Estates water system and the absence of any established procedures for responding to an emergency posed an imminent and substantial threat to the health and safety of the residents of the mobile home park and constituted a violation of Appellant's obligations under 25 Pa. Code §109.4(a)(4).

10. DER has the authority under the SDWA to assess a civil penalty up to a maximum of $5,000 per day for a violation of the regulations.

11. In the absence of any specification in the SDWA of the factors to be considered by DER in assessing civil penalties, DER is required to exercise sound discretion.

12. DER may exercise this discretion either through regulations or on a case-by-case basis, unless specifically commanded by the Legislature to do one or the other.

13. The Legislature has made no such command in the SDWA.

14. DER's consideration of seriousness, willfulness and duration of the violation in assessing the civil penalty was an appropriate exercise of discretion.

15. DER abused its discretion in assessing a civil penalty of $5,000.

16. A civil penalty in the amount of $3,000 is appropriate.

ORDER

AND NOW, this 10th day of September, 1991, it is ordered that Appellant's appeal is sustained, in part, and dismissed, in part, in accordance with the foregoing Adjudication.

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

DATED: September 10, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Julia Smith Zeller, Esq.
Central Region

For the Appellant:
Eugene E. Dice, Esq.
Harrisburg, PA

sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOA

GEORGE MATUSAVIGE	:	**EHB Docket No. 91-160-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 10, 1991

OPINION AND ORDER SUR MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

The Board grants the Department of Environmental Resources' (Department) motion to dismiss. Under §§21.11(a) and 21.52(a) of the Board's rules of practice and procedure, 25 Pa.Code §§21.11(a) and 21.52(a), a notice of appeal must be received by the Board within 30 days of the appellant's receipt of written notice of the Department's action in order for the Board to have jurisdiction.

OPINION

This matter was initiated by the filing of a notice of appeal with the Board by George Matusavige (Matusavige) on April 22, 1991. Matusavige appealed from a March 20, 1991, order issued by the Department which directed him to stop accepting tires and to stop dumping, depositing, or storing the tires on his property.

On July 8, 1991, the Department filed a motion to dismiss for lack of jurisdiction. The Department argues that the Board does not have jurisdiction because more than 30 days elapsed between Matusavige receiving written notice of the action and the filing of his appeal. Matusavige filed a response to the motion on July 25, 1991, asserting that his appeal was timely because he mailed it on April 17, 1991.

The Department's motion must be granted. For the Board's jurisdiction to attach, an appeal must be received by the Board within 30 days of the date an appellant receives notice of the Department's action. 25 Pa.Code §§21.11(a) and 21.52(a) and Eugene Petricca v. DER, 1986 EHB 309.

Matusavige acknowledges in his notice of appeal that he received written notification of the Department's action on March 20, 1991. To have filed his appeal within the period prescribed by 25 Pa.Code §21.52, Matusavige's appeal had to have been received by the Board no later than Friday, April 19, 1991. The Board did not receive Matusavige's notice of appeal until three days after the April 19, 1991 deadline, and, therefore, we have no jurisdiction.

O R D E R

AND NOW, this 10th day of September, 1991, it is ordered that the Department's motion to dismiss for lack of jurisdiction is granted and the appeal of George Matusavige 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

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 10, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
G. Allen Keiser, Esq.
Northeastern Region
For Appellant:
George Matusavige
R. D. 5, Box 656
Tunkhannock, PA 18657

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

HARLAN J. SNYDER and FRED EYRICH	:	
	:	
v.	:	**EHB Docket No. 88-196-F**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	**Issued: September 13, 1991**
OLEY TOWNSHIP, Permittee and MARATHON	:	
LAND CORPORATION, Intervenor	:	

OPINION AND ORDER SUR
MOTION TO EXTEND TIME
FOR COMPLETION OF DISCOVERY

By Terrance J. Fitzpatrick, Member

Synopsis

Appellant's Motion to Extend Time Set for Completion of Discovery is granted where Appellant shows that progressive settlement discussions were proceeding during the discovery period and where the opposing party does not show that prejudice or injury will result if the motion is granted.

OPINION

This case involves an appeal brought by Harlan J. Snyder and Fred Eyrich (Snyder and Eyrich) of the Department of Environmental Resources' (DER) approval of a revision to the Oley Township sewage facilities plan, allowing on-lot sewage disposal for six residential units located in the Pine Creek Subdivision of Oley Township, Berks County. Marathon Land Corporation (Marathon), the developer for the subdivision, has intervened in this

matter.[1]

This Opinion and Order addresses a Motion to Extend Time for Discovery filed by Snyder and Eyrich on December 6, 1990. Some of the pertinent background facts leading up to this motion are set forth in the following discussion. On March 14, 1989, Snyder and Eyrich filed a motion to compel discovery, which was granted on February 26, 1990. No deadline for completing the discovery was set in the order. On September 10, 1990, Marathon filed a Motion to Set Date for Completion of Discovery, requesting the Board to set a deadline of 30 days after its ruling on the motion. On October 3, 1990, Snyder and Eyrich sent a letter to the Board stating that the parties had entered into settlement negotiations, and requesting an extension to October 18, 1990 to file its response to Marathon's motion. The extension was granted, and on October 17, 1990, Snyder and Eyrich responded to Marathon's motion, urging that because the parties were involved in settlement discussions the discovery deadline should be postponed until forty-five days after termination of settlement negotiations. On October 23, 1990, the Board ruled on the Motion to Set Date, setting the deadline for completion of discovery at December 7, 1990. On December 6, 1990, Snyder and Eyrich filed their Motion for Extension of Time, requesting a sixty-day extension for completion of discovery.

In their motion, Snyder and Eyrich indicate that no discovery was attempted from early October 1990 to December 6, 1990 because Marathon and Snyder and Eyrich were involved in settlement negotiations. They specify that, on October 11, 1990, Snyder and Eyrich submitted a written settlement proposal to Marathon. On November 30, 1990, upon Snyder and Eyrich's request

---

[1] Oley Township, which is not actively participating in this appeal, and DER did not file reply briefs to the motion.

for a response, Marathon sent a letter to Snyder and Eyrich stating that Marathon was formulating a response to Snyder and Eyrich's settlement proposal. (Appellant's Motion to Extend, Exhibit C). As of the date of Snyder and Eyrich's motion, however, Marathon's response had not been received. Snyder and Eyrich base their motion, then, on grounds that engaging in discovery during settlement negotiations would be wasted, should settlement occur.

Marathon responded to the motion for extension on December 20, 1990. In its response, Marathon does not refute the allegations that settlement negotiations were in progress when the Motion for Extension was filed. Rather, Marathon emphasizes that ample time has already been afforded Snyder and Eyrich for completing the discovery. Marathon concludes that Snyder and Eyrich's failure to comply with the December 7, 1990 discovery deadline is not excused by the fact of settlement negotiations, and that the existence of these negotiations does not create a cause sufficient to justify extending the discovery deadline.

The rules governing practice and procedure before the Board provide that the Board may grant extensions for good cause upon motion before the expiration of the prescribed period. 25 Pa. Code §21.17; 1 Pa. Code §31.15. In the present case, we will grant Snyder and Eyrich one additional 60 day period to complete discovery. We recognize that discovery conducted while settlement negotiations are taking place may, if the case is settled, constitute a waste of time. At the same time, we realize that parties often need the discipline provided by deadlines (including discovery deadlines) to prod them to reach an agreement, if an agreement is possible. Balancing these concerns, we will grant Snyder and Eyrich one additional 60 day extension to complete discovery. However, we will not view further requests for extensions favorably.

ORDER

AND NOW, this 13th day of September, 1991, it is ordered that the deadline for completion of discovery and for filing of Appellants' pre-hearing memorandum is extended to November 8, 1991.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: September 13, 1991

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
Louise S. Thompson, Esq.
Southeast Region
For Appellant:
Randall J. Brubaker, Esq.
Philadelphia, PA
For Permittee:
Earle S. Hughes, Esq.
Oley, PA
For Intervenor:
Dino A. Ross, Esq.
Harrisburg, PA

jm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

GEORGE SKIP DUNLAP	:	
	:	
v.	:	**EHB Docket No. 89-135-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 17, 1991**

OPINION AND ORDER SUR PETITION FOR RECONSIDERATION

By Terrance J. Fitzpatrick, Member

Synopsis

A petition for reconsideration of a Board opinion and order denying a motion for summary judgment is denied where the petitioner did not show that exceptional circumstances are present. Summary judgment cannot be granted because material questions of fact are unresolved.

OPINION

This proceeding involves an appeal brought by George Skip Dunlap (Dunlap) of the Department of Environmental Resources' (DER) denial of a dam permit application. Dunlap had applied for the permit under the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, No. 325, as amended, 32 P.S. §693.1 *et seq.* to dam Quemahoning Creek to form a shallow recreational lake.

A hearing for the matter had been scheduled for February 5, 6 and 7, 1990. On January 22, 1990, the parties filed a pre-hearing stipulation of facts, documents and relevant issues pursuant to the Board's Pre-Hearing Order

No. 2. Based on facts agreed to in the stipulation, DER moved for summary judgment on February 20, 1990.

On November 21, 1990, we issued an Opinion and Order denying the motion for summary judgment because we found that DER did not establish the lack of disputed material facts. Specifically, we found that there was a material question of fact regarding whether there were sufficient public benefits from the project to warrant granting the permit application.

DER petitioned the Board for reconsideration of its ruling on the motion for summary judgment on December 12, 1990. First, DER asserts that the Board's opinion rested on a legal ground not considered by any party, because Dunlap's objection concerning public benefits was not raised until Dunlap responded to the motion for summary judgment. Second, DER asserts that the ruling must be reconsidered because the ruling was based on the unverified allegation of a party, in violation of Pa. RCP 1035(d). Third, DER claims that the ruling should be reconsidered because Dunlap cannot deny that his property constitutes an "important" wetland under the regulations, where Dunlap has stipulated to all the required elements constituting an "important" wetland. Finally, DER argues the ruling should be reconsidered because DER's filing of the motion for summary judgment did not delay the hearing, and so did not violate Board procedure as was alluded to in the opinion.

The Board will grant reconsideration of interlocutory rulings, such as the present one, only where "exceptional circumstances" are demonstrated. Baumgardner v. DER, 1989 EHB 400, City of Harrisburg v. DER, EHB Dkt. No. 88-120-F (Jan. 30, 1991). Applying this standard to the present case, we will deny DER's petition for the reasons stated below.

The central argument raised by DER in its petition is that we erred in finding that summary judgment was barred due to the existence of material

questions of fact regarding public benefits of the project. DER appears to be correct when it states in its petition that Dunlap failed to raise the issue of public benefits in his notice of appeal, which would preclude him from raising the issue at the hearing unless he could show "good cause."[1] See Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Commw. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989), Davailus v. DER, EHB Dkt. No. 88-407-F (July 22, 1991). However, even assuming that public benefits are not an issue here, that does not eliminate all of the relevant issues. Although we did not focus on these issues in our previous opinion, Dunlap asserts in his notice of appeal that DER failed to discuss its environmental concerns with Dunlap prior to denying the permit (Objection No. 1), and that the project can be modified to mitigate or eliminate any adverse impact on wetlands (Objection No. 2). These are relevant issues where DER denies a permit to conduct activities in a wetland. See Davailus, *supra*, at pp. 12-18.[2] Dunlap is entitled to submit proof on these issues at a hearing.

Since summary judgment is barred due to the existence of material

---

[1] It is interesting to note that DER did not previously alert us to the fact that Dunlap had failed to raise the public benefits argument in his notice of appeal. DER's motion for summary judgment (para. 13) criticized Dunlap's assertions regarding public benefits; however, the motion did not assert that Dunlap was barred from raising the issue. Indeed, it appears that DER signed a stipulation stating that public benefits were an issue in the proceeding. (DER motion for summary judgment, Exh. 1, p.4)

[2] DER appears to argue that under 25 Pa. Code §105.17(b) (relating to "important wetlands"), Dunlap had a duty to come forward with evidence of public benefits before DER had an obligation to consult with him regarding mitigation of environmental harm. See 25 Pa. Code §105.16(a). We express no opinion on whether this construction of the regulations is valid; however, we note that DER's letter denying Dunlap's application cited 25 Pa. Code §§105.14 and 105.16, but did not cite §105.17. This raises the question whether DER has changed its view of the applicable procedure during the course of this litigation.

questions of fact, it is clear that exceptional circumstances are not present to warrant reconsideration of our previous opinion denying DER's motion for summary judgment.

ORDER

AND NOW, this 17th day of September, 1991, it is ordered that the Department of Environmental Resources' petition for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: September 17, 1991

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
Charney Regenstein, Esq.
Western Region
For Appellant:
Robert P. Vincler, Esq.
WEISS, MICHALEK & VINCLER
Pittsburgh, PA
jm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAR

EMPIRE SANITARY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 90-158-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 17, 1991**

OPINION AND ORDER SUR
MOTION TO EXCLUDE EVIDENCE

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for sanctions is denied where the moving party has not shown a violation of a Board Order directing compliance with discovery procedures. The Appellant is granted leave to amend its Pre-Hearing Memorandum to address information disclosed by the Department of Environmental Resources two days after the discovery deadline.

OPINION

This case involves an appeal brought by Empire Sanitary Landfill, Inc. (Empire) of a Department of Environmental Resources' (DER) order and civil penalty assessment of $5,000 for alleged malodors coming from Empire's landfill in Lackawanna County, Pennsylvania on March 13 and 15, 1990. Empire appealed the March 23, 1990 order and assessment on April 20, 1990.

This Opinion and Order addresses a motion to exclude evidence filed by Empire on November 30, 1990. The following background information pertains to the resolution of this motion. On April 24, 1990, the Board issued its

Pre-Hearing Order No. 1, setting a deadline of July 9, 1990 for completion of discovery and filing of Empire's pre-hearing memorandum. On May 17, 1990, Empire filed and served its Interrogatories and Requests for Production of Documents (interrogatories and requests) on DER. Upon requests by the parties, the Board granted extensions for DER's response to the interrogatories and requests, as well as of the deadline for completion of discovery and for filing of Empire's Pre-Hearing Memorandum, ultimately to November 5, 1990.

On June 25, 1990, DER made an adjustment of its order. The order originally stated that Empire was being cited for malodors coming from the landfill on March 13 and 14 of 1990. However, when it was preparing responses to Empire's interrogatories, DER discovered that the alleged odors had been released on March 13 and 15, 1990. DER responded to the interrogatories and requests on September 24, 1990. In its response, DER did not produce any inspection reports for March 15, 1990.

On October 30, 1990, Empire telephoned DER, stating that DER's response to Interrogatory 42 (asking where DER first detected the odors) was insufficient, and requesting DER to supplement its response by November 5, 1990.

As required by Pre-Hearing Order No. 1 (as amended), Empire filed its pre-hearing memorandum on November 5, 1990. In its pre-hearing memorandum, Empire addressed DER's failure to produce any evidence supporting the March 15 allegation. On November 7, 1990, DER produced an inspection report for March 15, 1990, as well as its supplemental response to Interrogatory No. 42.

In its motion to exclude evidence, Empire urges the Board to bar the introduction of the March 15, 1990 inspection report and DER's supplemental response to Interrogatory No. 42 because both were submitted after the Board-

ordered deadline for completion of discovery, and after Empire submitted its pre-hearing memorandum. Empire argues that its motion should be granted because DER's submission of its discovery past the November 5, 1990 deadline violated a Board order, and thus the Board may sanction DER under 25 Pa.Code §21.24. Empire adds that the Board may sanction DER under Pa. R.C.P. 4019(a)(1)(i) and 4019(a)(1)(vii) because DER failed to properly respond to the request for production of documents and failed to sufficiently answer the interrogatory.

DER filed a response, stating that sanctions should not be imposed because it did, indeed, comply with the Pre-Hearing Order No. 1 in supplying responses to the requests for production and interrogatories on September 24, 1990. DER adds that it was not foreclosed from having 30 days to supplement its response to Interrogatory No. 42 just because Empire requested the supplement so late in the discovery period. Furthermore, DER argues, Empire required in its interrogatories continuing supplemental answers to its interrogatories as to any information obtained between the time of the initial response and the time of the hearing. DER explains that it wasn't until it was supplementing the response to Interrogatory No. 42 that it came across the March 15, 1990 inspection report. DER claims that it had an ethical duty to supply the report as newly obtained information. Finally, DER urges that sanctions should not be imposed because Empire never filed a motion to compel further answers to it interrogatories.

We will deny Empire's motion to exclude evidence. As Empire recognizes in its memorandum of law, its motion is really a motion seeking the imposition of sanctions pursuant to Pa. R.C.P. 4019(a)(1) for failure to disclose information through discovery. While we agree with Empire that DER did not supply the information regarding the March 15, 1990 inspection by the November 5

discovery deadline, we do not agree that DER's transgression warrants the sanction of excluding all evidence regarding the March 15, 1990 inspection. The Board has in the past followed the general practice of courts not to impose sanctions under this rule unless a party refuses to obey an order directing compliance with discovery procedures. See, Griffin v. Tedesco, 355 Pa. Superior Ct. 475, 513 A.2d 1020, 1024 (1986), Concerned Residents of the Yough, Inc. v. DER, 1990 EHB 1144, Donan v. DER, 1990 EHB 1601. No such order is necessary here since DER has supplied the requested information, albeit two days late. Moreover, as a matter of equity, DER's conduct here does not warrant the harsh sanction of excluding all evidence regarding the March 15, 1990 inspection.

With regard to Empire's assertion that it has been prejudiced by DER's failure to submit complete responses to discovery requests by the November 5, 1990 deadline, this assertion is based upon the fact that Empire filed its Pre-Hearing Memorandum on that same date, and, thus, it could not address the information produced on November 7, 1990. This harm is easily remedied by permitting Empire to amend its Pre-Hearing Memorandum, and we will grant Empire until October 17, 1991 to do so.

O R D E R

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

1) Empire's motion to exclude evidence is denied.

2) Empire is granted leave to October 17, 1991, to amend its Pre-Hearing Memorandum to respond to the information which DER supplied on November 7, 1990.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: September 17, 1991

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
G. Allen Keiser, Esq.
Northeast Region
For Appellant:
Charles N. Bowser, Esq.
Leslie B. Hope, Esq.
BOWSER, WEAVER & COUSOUNIS
Philadelphia, PA

jm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

EMPIRE SANITARY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 90-158-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 17, 1991**

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for summary judgment is denied where the moving party fails to show that the Department of Environmental Resources' (DER) issuance of an Order and Civil Penalty Assessment was errant as a matter of law. The Appellant did not show that DER will fail to meet its burden of proof as a matter of law where it based its finding of malodorous emissions on "nasal sensitivity" observations and not on scientific testing.

OPINION

This proceeding involves an appeal brought by Empire Sanitary Landfill, Inc. (Empire) of an Order and Civil Penalty Assessment (CPA) issued by DER on March 23, 1990. In the CPA, DER assessed a $5,000 penalty against Empire for alleged malodorous emissions from Empire's landfill, located off Keyser Avenue in Taylor Borough and Ransom Township, Lackawanna County. The order cites the malodors as violations of 25 Pa. Code §§273.217(a), 273.218(b), and 123.31(b); Sections 3, 8 and 13 of the Air Pollution Control

Act (APCA), Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §§4003, 4003(7), 4008, 4013, and 4013.4; and the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§6018.610(2)(4)(9). The order required, *inter alia*, immediate abatement of the malodors and submission of a plan under 25 Pa. Code §273.136 and §273.218(b).

This Opinion and Order addresses a motion for summary judgment filed by Empire on December 20, 1990. Empire urges that the Order and CPA be reversed on grounds that the order is insufficiently supported because DER made no scientific tests on the odors before citing Empire. The central dispute regarding this motion is whether DER erred as a matter of law when it cited Empire for malodorous emissions based only upon "nasal sensitivity" observations.

The Board has the authority to grant summary judgment only when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summerhill Borough v. DER, 34 Pa. Commw. 574, 383 A.2d 1320, 1322 (1978). Furthermore, the Board must view a motion for summary judgment in the light most favorable to the non-moving party. Palisades Residents in Defense of the Environment v. DER, 1988 EHB 8, 10-11.

It is undisputed that DER's evidence of "malodorous emissions" rests upon the sense of smell of certain DER employees rather than upon scientific tests. Empire concludes that DER's failure to conduct or submit scientific tests of the malodors violated the requirements of the APCA, the regulations, and DER standards and procedures.

As support for this conclusion, Empire cites APCA §4004(3), which reads:

> The department shall have power and its duty shall be to -
>
> (3) Enter upon any property on which an air contamination source may be located and make such tests upon the source as are necessary to determine whether the air contaminants being emitted from such air contamination source are being emitted at a rate in excess of a rate provided for by board rule or regulation or otherwise causing air pollution. Whenever the department determines that a source test is necessary, it shall give reasonable written notice to the person owning, operating, or otherwise in control of such source, that it will conduct a test on such source.

35 P.S. §4004(3) (our emphasis).

Empire interprets this language - "its duty shall be" - as mandating a source test in the current circumstance. However, the language emphasized above shows clearly that it is left to DER's discretion to determine whether a source test was necessary to discern whether malodors coming from the landfill were escaping into the neighboring areas. Therefore, this section does not require DER, as a matter of law, to conduct source testing in every case.

Empire also maintains that DER's own regulations and procedures required DER to test the source before citing Empire for escaping malodors. Turning to 25 Pa. Code §139.3(a), Empire states that DER is required to "use the methods set forth in this chapter to assess emissions from stationary sources or ambient levels of contaminants." 25 Pa. Code §139.3(a). As a supplement to Chapter 139, DER publishes a Source Testing Manual (STM), which contains detailed information on source test methods, procedures, and guidance for reporting emissions to DER. 25 Pa. Code §139.3(b). The STM states that "it is the duty of the Division of Technical Services and Monitoring to perform source testing to determine the nature and extent of contaminants released, and violations of DER regulations." The STM also

provides, Empire points out, standards and procedures for sampling and testing hydrogen sulfide and sulfur oxides and various other decomposition products which are often emitted from garbage and household wastes. These provisions, Empire argues, required DER to scientifically test the source.

We do not construe 25 Pa. Code §139.3(b) as requiring DER, as a matter of law, to conduct scientific testing to confirm the presence of odors. Section 4003 of the APCA defines air contaminant as "smoke, dust, fumes, gas, odors, mist, vapor, pollen, or any combination thereof." 35 P.S. §4003(4) (our emphasis). Section 123.31(b) of 25 Pa. Code, promulgated under the APCA, states that "a person may not permit the emission into the outdoor atmosphere of any malodorous contaminant from any source, in such a manner that the malodors are detectable outside the property of the person on whose land the source is being operated." The applicable definition of malodor is "an odor which causes annoyance or discomfort to the public and which the Department determines to be objectionable to the public." 25 Pa. Code §121.1. The term "odor" is not defined in the APCA or the regulations, however, its common meaning is "a quality of something that stimulates the olfactory organ ... a sensation resulting from adequate stimulation of the olfactory organ: SMELL." Webster's Ninth New Collegiate Dictionary, p. 818 (1988).

If an "odor" is something which stimulates our sense of smell, and the sensation which results, then it seems permissible to us to establish the presence of an odor by the testimony of someone who experienced it. The fact that odors involve personal sensations seems to distinguish them from the other types of air contaminants listed in the APCA; therefore, we are not prepared to say that DER must conduct tests to detect and measure the presence of the various constituents which contribute to an odor.

Finally, we disagree with Empire that case law requires scientific

tests to detect the presence of odors. In Bortz Coal Company v. Air Pollution Commission, 2 Pa. Commw. 441, 279 A.2d 388 (1971), Commonwealth Court held that in measuring the density of smoke, the Commonwealth must utilize a device known as the "Ringelman Smoke Chart" rather than relying solely upon the visual observations of its employees. Significantly, however, the regulation which Bortz was alleged to have violated established a standard which was based upon the Ringelman Smoke Chart. 279 A.2d at 396. Similarly, in North American Coal Corp. v. Air Pollution Control Commission, 2 Pa. Commw. 769, 279 A.2d 356 (1971), Commonwealth Court held that the Commonwealth could not establish a violation of the numerical standards for emissions of particulate matter, set in the regulations, solely through the visual observations of a Commonwealth employee, where the Commonwealth could have conducted stack tests, ground tests, and ambient air tests. Unlike Bortz and North American, the instant case does not involve a regulation which establishes a specific, objective standard. To the extent Empire decries the subjectivity of DER's "nasal sensitivity" evidence, it is really complaining about a statute and regulations which - rather than setting some objective, numerical standard - are cast in terms of "odors" and "malodors" which cause "annoyance or discomfort to the public." 25 Pa. Code §121.1[1]

The instant case is analogous to Eureka Stone Quarry, Inc. v. Commw., 118 Pa. Commw. 300, 544 A.2d 1129 (1988). That case involved the violation of 25 Pa. Code §123.2, which is similar to 25 Pa. Code §123.31(b), but refers to

[1] This case would be analogous to Bortz and North American if DER's regulations measured odors in terms of the amounts of various constituents, such as hydrogen sulfides and sulfur oxides. If this were the case, DER's nasal sensitivity evidence would be insufficient.

visible emissions rather than odors.[2] As here, the DER official in Eureka Stone Quarry noted the violation on the basis of personal observation - both outside the site and at the site. The Commonwealth Court found that it was not unreasonable for the trial court to infer that the permittee had caused prohibited emissions where a DER employee, upon receipt of complaints and observation of flying dust at the quarry site, testified that equipment was not required to determine a violation of the regulation. See also, Scurfield Coal Co. v. Commonwealth, __ Pa. Commw. ____, 582 A.2d 694 (1990).

In summary, we reject Empire's argument that DER cannot possibly meet its burden of proof in the circumstances now before us. The motion for summary judgment is denied.

---

[2] 25 Pa. Code §123.2 states: "No person shall cause, suffer, or permit fugitive particulate matter to be submitted into the outdoor atmosphere from any source or sources specified in §123.1(a)(1)-(9) ... if such emissions are visible, at any time, at the point such emissions pass outside the person's property."

ORDER

AND NOW, this 17th day of September, 1991, it is ordered that the Motion for Summary Judgment filed by Empire Sanitary Landfill, Inc. is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: September 17, 1991

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
G. Allen Keiser, Esq.
Northeast Region
For Appellant:
Leslie Bowser Hope, Esq.
James P. Cousounis, Esq.
Charles W. Bowser, Esq.
BOWSER, WEAVER & COUSOUNIS
Philadelphia, PA
jm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

GEORGE D. BOWLING	:	
	:	
v.	:	**EHB Docket No. 90-423-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 18, 1991

OPINION AND ORDER SUR
MOTION TO DISMISS APPEAL AS MOOT

By Joseph N. Mack, Member

Synopsis

An appeal of a civil penalty assessment will be dismissed as moot where the Department of Environmental Resources (DER or Department) has vacated the assessment.

OPINION

This matter originated with the filing of an appeal by George D. Bowling on October 10, 1990, from a Civil Penalty Assessment dated September 11, 1990. The subject matter of the assessment was an allegation of open burning of solid waste on or about July 9, 1990, in violation of §610(3) of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. 6018.101 et seq., at §6018.610(3).

On May 16, 1991, the Department and Wilbert Bowling, father of the appellant, entered into a consent assessment with regard to the aforesaid burning of solid waste. The consent assessment recited that George Bowling,

appellant herein, assisted by Wilbert Bowling and others, demolished a house owned by George Bowling in the Borough of Snow Shoe and that the resulting waste was burned by Wilbert Bowling on property of the appellant. The consent assessment further stated that no permit had been issued authorizing Wilbert Bowling to burn the demolition waste, and assessed a civil penalty against Wilbert Bowling in the amount of $3000. In return, the Department agreed to withdraw its complaints against both George Bowling (EHB Docket No. 90-423-MJ) herein as well as Wilbert Bowling (EHB Docket No. 91-015-MJ). Thereafter, The Department, by letter dated May 20, 1991 signed by A. Paul Franklin, Regional Director, in consideration of the payment prescribed by the consent assessment, vacated the previous civil penalty assessments issued against Wilbert Bowling and George Bowling and agreed therein to move to dismiss the appeals from said civil penalty assessments at the within recited dockets. Notice of the settlement was published pursuant to §616 of the Solid Waste Management Act, 35 P.S. §6018.616.

By motion filed on or about July 9, 1991, the Department asks that this appeal be dismissed because no controversy continues to exist between the parties and the matter is therefore moot. The appellant, George Bowling, has filed no response or opposition thereto.[1]

We agree with the Department and will dismiss for mootness. Where DER acts in a fashion creating a circumstance as to the appeal in which we can no longer grant meaningful relief, the matter should be dismissed as moot. Snyder v. DER, 1989 EHB 591; Franconia Township v. DER, 1986 EHB 1333.

---

[1]The appeal of Wilbert Bowling at Docket No. 91-015-MJ was dismissed as moot by order of the Board on September 6, 1991 on the joint motion of the parties.

O R D E R

AND NOW, this 18th day of September, 1991, it is ordered that the Department's Motion to Dismiss Appeal as Moot is granted and the appeal docketed at 90-423-MJ 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

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 18, 1991

cc: See next page

EHB Docket No. 90-423-MJ
September 18, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Michael J. Heilman, Esq./Western
Carl B. Schultz, Esq./Central
For Appellant:
James Bryant, Esq.
Millheim, PA

rm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAI

ANDREW J. AND GEORGIA V. ZETTS	:	
	:	
	:	
v.	:	**EHB Docket No. 91-348-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 18, 1991**
and E. M. BROWN, INC., Permittee	:	

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Robert D. Myers, Member

Synopsis

The Board denies a Petition for Supersedeas, filed by a fish hatchery in connection with a surface coal mining permit for a tract of land 2,500 feet from the hatchery, when the petitioners present no scientific evidence to support their belief that the mining will adversely affect the quantity and quality of that water. The preponderance of the evidence (presented by the permittee's hydrogeologist) indicates that neither surface water nor groundwater can migrate from the mining site to the fish hatchery.

OPINION

On August 21, 1991 Andrew J. Zetts and Georgia V. Zetts, t/d/b/a Zetts Fish Farm and Hatcheries, filed a Notice of Appeal from the issuance by the Department of Environmental Resources (DER) of Surface Mining Permit No.

17900117 to E. M. Brown, Inc. (Permittee). The Permit, issued on August 13, 1991, pertained to a site in Cooper Township, Clearfield County. Appellants also filed a Petition for Supersedeas on August 21.

A hearing on the Petition was held in Harrisburg on September 5, 1991 before Administrative Law Judge Robert D. Myers, a Member of the Board. DER and Permittee were represented by legal counsel; Appellants elected to proceed without legal counsel. The record consists of the pleadings, a hearing transcript of 117 pages and 10 exhibits.

Appellants' fish hatchery occupies a 148-acre site in Cooper Township about 2,500 feet north of the Permit site. The fish ponds, some of which are 40 to 45 feet deep, are fed by clear spring water of constant temperature - a very crucial element in fish culture. Previously mined areas are a significant feature of the fish hatchery vicinity and some of these produce acid mine drainage. The 4.1-acre Permit site is on the northern edge of one of these areas, the Moravian Underground Mine site which has been deep-mined, surface-mined and heavily blasted.

Although previous mining has not adversely affected the quantity or quality of the fish hatchery water, Appellants fear that Permittee's mining of the Permit site will remove a geological barrier they believe currently blocks acid mine drainage from flowing off the Moravian Underground Mine site to the fish hatchery ponds. Unfortunately, they produced no scientific evidence to furnish a basis for their belief.

Permittee's hydrogeologist, who performed an overburden analysis, concluded that the Permit site would not produce acid mine drainage. She also concluded that there was no hydrologic connection between the Permit site and the fish hatchery, based upon a consideration of surface water and groundwater flows. A topographic map and a geologic cross-section reveal that the Permit

site is more than 100 feet higher than the fish hatchery. Both sites are in the Crawford Run watershed extending from high ground west of the sites eastward to Moshannon Creek.

The watershed is divided into two subwatersheds by an intervening ridge. Crawford Run flows along the south flank of this ridge in a hollow separating the Permit site and the ridge. An unnamed tributary of Crawford Run flows out of the fish hatchery on the north side of the ridge and enters Crawford Run east of the sites. Surface water flowing from the Permit site would enter Crawford Run and be carried eastward past the confluence with the unnamed tributary and into Moshannon Creek. The direction of flow of these streams, as well as the intervening ridge, make it impossible for surface water to get from the Permit site to the fish hatchery.

Moshannon Creek, according to Permittee's hydrogeologist, is a regional groundwater discharge zone. Groundwater within the Crawford Run watershed will flow eastward to this point unless geologic structures create a local condition diverting groundwater in a different direction. One of these local conditions is the Lower Kittanning coal seam that was deep-mined as part of the Moravian Underground Mine and will be surface-mined by Permittee. This seam dips toward the South and currently discharges water south and southeast of the Permit site. An underclay lying beneath the Lower Kittanning coal seam will retard the infiltration of groundwater into deeper zones. Any infiltration that finds its way through the underclay will be deflected southward by the Clarion Coal seam, about 100 feet deeper than the Lower Kittanning. In addition, since the Clarion seam is incised by the hollow through which Crawford Run flows, any groundwater managing to flow northward (upgradient) in the Clarion seam will enter Crawford Run and be carried eastward to Moshannon Creek.

To be entitled to a supersedeas, Appellants must show, *inter alia*, by a preponderance of the evidence that they will suffer irreparable harm and that they are likely to prevail on the merits: section 4(d), Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d); 25 Pa. Code §21.78(a). While we appreciate Appellants' obvious concern about irreparable damage to their fish hatchery, we are unable to conclude from the evidence before us that they are likely to prevail on the merits. The preponderance of the evidence indicates the opposite.

ORDER

AND NOW, this 18th day of September, 1991, it is ordered that Appellants' Petition for Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: September 18, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Dennis Whitaker, Esq.
Central Region
For the Appellant:
Dolores Zetts Pollock
Winburne, PA
For the Permittee:
William T. Gorton, III, Esq.
BUCHANAN INGERSOLL
Philadelphia, PA
sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAF

A.C.N., INC.	:	
	:	
V.	:	**EHB Docket No. 89-167-M**
	:	**(consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 19, 1991**

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

By Robert D. Myers, Member

Syllabus

The Board sustains the assessment of civil penalties in the amount of $58,000 against a corporation operating a municipal solid waste transfer station in Philadelphia. The Board concludes that the assessment was mandated by §605 of the SWMA and complied with the provisions of that statutory enactment. The Board also concludes that the assessment was an appropriate exercise of DER's discretion despite the corporation's argument that the violations were caused by conditions beyond its control.

Procedural History

On June 14, 1989 A.C.N., Inc. (ACN) filed a Notice of Appeal at Board Docket No. 89-167-M from an Order and Assessment of Civil Penalties (O&A) issued by the Department of Environmental Resources (DER) on May 15, 1989. The O&A found ACN to be in violation of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, at its municipal solid waste transfer station in Philadelphia. ACN was ordered to

cease operations and to take remedial action; its permit was suspended and a civil penalty imposed on it in the amount of $58,000.

DER issued another Order on January 8, 1990 finding continuing violations at the ACN transfer station. The Order, *inter alia*, revoked the permit and forfeited the bond. A hearing on the O&A, scheduled to begin on February 6, 1990, was cancelled at the request of the parties in order that the proceeding could be combined with an appeal from the Order. This appeal was filed at Board Docket No. 90-065-MR on February 7, 1990 and was consolidated with the first appeal on July 6, 1990.

Another hearing, scheduled to begin on March 19, 1991, also was cancelled in order to permit ACN to find replacement legal counsel. The order cancelling the hearing set another hearing date (May 6, 1991) and authorized DER to file a Motion for Partial Summary Judgment on or before March 29, 1991. DER filed such a Motion and it was granted in an Opinion and Order issued April 23, 1991. Summary judgment was granted to DER (on the basis of factual stipulations made by ACN in proceedings in Commonwealth Court at No. 200 M.D. 1990) on all issues except the propriety of the amount of the civil penalty assessment.

A hearing limited to that issue was convened in Harrisburg on May 6, 1991 before Administrative Law Judge Robert D. Myers, a Member of the Board. Unable to retain legal counsel, ACN appeared by its sole owner, Bonnie Nickels. DER was represented by legal counsel. Post-hearing briefs were filed by DER on June 5, 1991 and by ACN on June 20, 1991. The record consists of the pleadings, a transcript of 21 pages and 3 exhibits. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. ACN is a Pennsylvania corporation with its principal place of business at 2700 South 58th Street, Philadelphia, PA 19153 (Notice of Appeal).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the SWMA, 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 regulations adopted pursuant to said statutes.

3. On July 2, 1986 DER issued to ACN permit no. 101403 for the operation of a municipal solid waste transfer station at 2700 South 58th Street, Philadelphia (Commonwealth Court Stipulation, abbreviated hereafter as "Stip.").

4. Inspections of ACN's transfer station were conducted by DER on October 17, 1988, November 2, 1988 and February 2, 1989. On one or more of those dates:

(a) the leachate collection system was not properly maintained and operated and leachate was flowing onto the ground;

(b) municipal solid waste was dumped on the access ramp rather than in the transfer building;

(c) the access ramp and transfer building were so overloaded with municipal solid waste that waste was spilling over the sides of the ramp and into the truck loading pits; piles of municipal solid waste were around the building;

(d) excessive litter was blowing throughout the site and litter control fencing was down;

(e) the transfer station was not being maintained or operated so as to prevent and minimize fire, explosion or release of solid waste constituents to the air, water and soils; and

(f) there was extensive structural damage to the steel support beams in the transfer building

(Stip.).

5. As a result of these conditions, DER issued the O&A on May 15, 1989.

6. James A. Pagano, an Environmental Protection Compliance Specialist for DER's Southeast Region, drafted the O&A and the Order and calculated the civil penalties. In making the calculation, Pagano:

(a) used a civil penalty worksheet, developed by DER as a guide for Compliance Specialists in an effort to promote uniformity, and which contains spaces for calculating penalty amounts for severity, willfulness, costs incurred by the Commonwealth, savings to the violator, promptness of reporting, past history of violations, and other relevant factors;

(b) considered the conditions described in Finding of Fact No. 4(a) to involve -

(i) the middle degree of severity and the lowest degree of willfulness for the inspection of October 17, 1988 and calculated a penalty of $5,500;

(ii) the middle degree of severity and the middle degree of willfulness for the inspection of February 2, 1989 and calculated a penalty of $15,000;

(c) considered the conditions described in Finding of Fact No. 4(b) to involve -

(i) the lowest degrees of both severity and willfulness for the inspection of October 17, 1988 and calculated a penalty of $1,500;

(ii) the lowest degree of severity and the middle degree of willfulness for the inspection of November 2, 1988 and calculated a civil penalty of $7,500;

(iii) the lowest degree of severity and the middle degree of willfulness for the inspection of February 2, 1989 and calculated a penalty of $9,000;

(d) considered the conditions described in Finding of Fact No. 4(c) to involve -

(i) the lowest degrees of both severity and willfulness for the inspection of October 17, 1988 and calculated a penalty of $1,500;

(ii) the lowest degree of severity and the middle degree of willfulness for the inspection of November 2, 1988 and calculated a penalty of $7,500;

(iii) the lowest degree of severity and the middle degree of willfulness for the inspection of February 2, 1989 and calculated a penalty of $8,000;

(e) considered the conditions described in Finding of Fact No. 4(d) to involve the lowest degrees of both severity and willfulness for the inspection of February 2, 1989 (because, even though the condition was observed on the October 17 and November 2, 1988 inspections, the violation had not been brought to ACN's attention) and calculated a penalty of $1,500;

(f) considered the conditions described in Finding of Fact No. 4(e) to involve the lowest degrees of both severity and willfulness and calculated a penalty of $1,500;

(g) did not calculate a penalty for the conditions described in Finding of Fact No. 4(f); and

(h) did not calculate a penalty for costs incurred by the Commonwealth, savings to the violator, promptness of reporting, past history of violations or other relevant factors.

7. The conditions described in Finding of Fact No. 4 did not exist prior to October 1988 when Bonnie Nickels (who had no prior experience in operating the business) became sole owner of ACN and took over management of business operations. The transportation difficulties she encountered caused municipal solid waste to accumulate at the transfer station (N.T. 18-20).

DISCUSSION

In civil penalty cases DER has the burden of proof: 25 Pa. Code §21.101(b)(1). To carry the burden DER must show by a preponderance of the evidence that the assessment was lawful and an appropriate exercise of its discretion. Since the O&A was issued pursuant to the SWMA and contained a cessation order, DER was required to assess a civil penalty: §605 of the SWMA, 35 P.S. §6018.605. Under this statutory authority, an assessment can be made for each separate violation of the SWMA, the regulations, permit conditions or orders of DER and for each day the violation exists. The maximum amount per offense is $25,000. DER's assessment against ACN complied with these statutory provisions and was, therefore, lawful.

Whether the assessment was an abuse of discretion is another matter. James A. Pagano calculated the amounts using a DER worksheet as a guideline. The worksheet incorporates the penalty calculation criteria of §605 of the SWMA and of 25 Pa. Code §271.412 - willfulness, severity of the environmental

damage, costs of abatement, savings to the violator and other relevant factors. It gives a recommended range of penalty amounts for each of these factors.

Pagano assessed only for willfulness and severity and used the minimum recommended amounts for these categories (totalling $1,500) the first time each violation occurred. The only exception to this was the leachate violation which Pagano considered to involve the middle degree of severity ($5,000 - $12,000 range) on the first violation. He used the lowest figure in this range ($5,000) and combined it with the lowest recommended amount for willfulness ($500) to produce a total figure of $5,500.

When a violation occurred the second time, Pagano raised the willfulness to the middle degree and used the lowest recommended amount for that category ($5,000). He did not raise the degree of severity to another category but moved from the lowest amounts to higher amounts within the recommended ranges. For third violations, Pagano used the same amounts calculated for willfulness on the second violations but moved to higher figures within the recommended ranges for the same degree of severity. The maximum recommended amounts were not used in any instance.

ACN objects only to the amounts calculated for willfulness. As noted, these represent the minimum recommended amount ($500) for each first violation and $5,000 for each second and third violation. They account for $27,500 of the total assessment of $58,000. ACN argues that, since the violations resulted from conditions beyond its control, they were not willful to any degree. We doubt that any of the violations were premeditated in the sense that ACN planned them ahead of time. Yet, they resulted from actions or inactions that were conscious decisions of ACN. Attempting to operate with inexperienced management and trying to maintain the same level of business

despite ongoing transportation difficulties are just two areas where ACN made specific choices that raised a definite risk of violations. ACN's persistence in running this risk after the first violations and after the second violations demonstrates an even higher degree of willfulness.

We are not unmindful of the immense problems associated with running a business engaged in the handling of solid waste; but we cannot let our appreciation of those difficulties cause us to forget the motivation for the regulatory scheme embodied in the SWMA and the regulations. As stated by the Legislature (§102 of the SWMA, 35 P.S. §6018.102), "improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare...." While this statement applies with equal force in all corners of the Commonwealth, it is especially significant where great numbers of people are concentrated in large urban areas. Those who undertake to do business in this highly sensitive field of endeavor must be prepared to pay a penalty when their operations fall short of the regulatory standard - a penalty which under §605 of the SWMA "may be assessed whether or not the violation was willful or negligent."

Finding no abuse of discretion in the amount of the penalty, we sustain the assessment.

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 assessment of civil penalties was authorized by law and a proper exercise of its discretion.

3. The O&A having contained a cessation order, DER was required to assess a civil penalty under §605 of the SWMA.

4. The civil penalty assessment complied with the provisions of §605 of the SWMA.

5. The civil penalty assessment was a proper exercise of DER's discretion.

ORDER

AND NOW, this 19th day of September, 1991, it is ordered that these consolidated appeals are 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

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 19, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Louise Thompson, Esq.
Southeast Region
For Appellant:
Bonnie Nickels
Fort Washington, PA

sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAI

PAULINE HUGHES	:	
	:	
v.	:	EHB Docket No. 91-241-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and SKY HAVEN COAL, INC., Permittee	:	Issued: September 19, 1991

OPINION AND ORDER SUR MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

In a third-party appeal, the 30-day appeal period does not start running until publication of notice in the Pennsylvania Bulletin, even though the appellant has received prior written notice of DER's action.

OPINION

This matter commenced with the filing of a notice of appeal by Pauline Hughes ("Ms. Hughes") on June 18, 1991, challenging the Department of Environmental Resources' ("DER's") grant of a surface mining permit to Sky Haven Coal, Inc. ("Sky Haven") for mining to be conducted at the McPherson No. 3 Operation in Lawrence Township, Clearfield County. Ms. Hughes was notified of DER's approval of the permit by letter dated May 15, 1991.

On July 31, 1991, Sky Haven filed a motion to dismiss, asserting that the appeal was filed more than thirty days after Ms. Hughes had received notice of the aforesaid permit approval and, therefore, jurisdiction of the Board did not attach to the appeal, pursuant to 25 Pa.Code §§21.11(a) and

21.52(a). Both Ms. Hughes and DER were advised by letter of the Board that any objections to the motion to dismiss were to be filed by August 20, 1991. No objections were filed.

The Board's rules at 25 Pa.Code §21.52(a) provide that jurisdiction shall not attach to an appeal from an action of DER unless the appeal is filed with the Board within thirty days after the appellant has received written notice of the action or publication in the Pennsylvania Bulletin. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). Section 21.36 of the rules states that publication of a notice of action by DER in the Pennsylvania Bulletin shall constitute notice to all persons, except a party, effective as of the date of publication. 25 Pa. Code §21.36.

In the present case, Ms. Hughes' appeal states that she received notification of DER's action "on or about May 17, 1991." Publication occurred in the Pennsylvania Bulletin on June 15, 1991 at 21 Pa. Bull. 2750. Ms. Hughes' appeal was filed on June 18, 1991, more than 30 days from when she received DER's letter, but within 30 days of publication in the Pennsylvania Bulletin. The issue, therefore, is which event--written notice from DER or publication in the Pennsylvania Bulletin--started the 30-day period for filing an appeal.

In Lower Allen Citizens Action Group v. Commonwealth, DER, 119 Pa. Cmwlth. 236, 538 A.2d 130 (1988), aff'd on reconsideration ___ Pa. Cmwlth. ___, 546 A.2d 1330 (1988), the Commonwealth Court determined that the third-party appellant, a citizens group, appealing DER's issuance of a mine drainage permit, was not a "party" but rather a "person" under 25 Pa. Code §21.36, and had 30 days from the date of publication of notice of the permit issuance in the Pennsylvania Bulletin in which to file an appeal, despite the

fact that the citizens group had received actual written notice of the permit approval more than two weeks prior to publication in the Bulletin. The court held that the group's appeal, which was filed approximately 46 days after it had received written notice of the permit approval from DER but within 30 days of publication in the Bulletin, was timely.

In the present case, as in Lower Allen, we are dealing with a third-party appellant and, therefore, based on the holding in Lower Allen we are constrained to find that the thirty-day appeal period began running from the date of publication in the Pennsylvania Bulletin, even though Ms. Hughes had received prior written notice of the permit issuance from DER. Because Ms. Hughes' appeal was filed within 30 days of publication in the Bulletin, it must be considered timely. Therefore, we must deny the motion to dismiss.

O R D E R

AND NOW, this 19th day of September, 1991, Sky Haven's motion to dismiss is denied for the reasons stated herein.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 19, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Julia Smith Zeller, Esq.
Central Region
For Appellant:
Anthony S. Guido, Esq.
DuBois, PA
For Permittee:
Ann B. Wood, Esq.
Clearfield, PA

rm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

EDGEWATER MUNICIPAL UTILITIES AUTHORITY	:	
	:	
	:	
v.	:	**EHB Docket No. 90-329-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 25, 1991

OPINION AND ORDER
SUR
MOTION TO STRIKE APPELLANT'S PRE-HEARING MEMORANDUM AND DISMISS APPEAL

Robert D. Myers, Member

Synopsis

The Board strikes from a pre-hearing memorandum two legal contentions not raised in the Notice of Appeal and orders the litigant to file a supplement containing more detailed information on scientific tests, expert testimony and other witnesses.

OPINION

This appeal was instituted on August 6, 1990 by Edgewater Municipal Utilities Authority (Edgewater) to obtain review of a letter issued by the Department of Environmental Resources (DER) on July 5, 1990. In the letter DER denied Edgewater's application for a waiver of the provisions of Governor's Executive Order No. 1989-8, dated October 17, 1989. The waiver would have permitted Edgewater to dispose of sewage sludge directly at the Geological Reclamation Operations and Waste Systems, Inc. (G.R.O.W.S.) landfill at Morrisville, Bucks County.

On June 25, 1991 DER filed a Motion to Strike Appellant's Pre-hearing Memorandum and Dismiss Appeal to which Edgewater filed a response on July 19, 1991. In its Motion DER recites certain alleged procedural and substantive defects in Edgewater's pre-hearing memorandum and requests that we strike the memorandum and dismiss the appeal.

The first point of attack is Edgewater's "contentions of law." Our Pre-hearing Order No. 1 requires the pre-hearing memorandum to contain "contentions of law and detailed citations to authorities, including specific sections of statutes, regulations, etc., relied upon." DER claims that 3 of the 5 contentions set forth by Edgewater are not included in the Notice of Appeal and cannot be raised now under the ruling in *Pennsylvania Game Commission v. Commonwealth, Dept. of Environmental Resources*, 97 Cmwlth. 73, 509 A.2d 877 (1986). Edgewater's Point I asserts that DER gave *de facto* approval to Edgewater's application prior to the promulgation of the Governor's Executive Order. This assertion is not made in the Notice of Appeal. The assertion made there is that Edgewater had a contract with G.R.O.W.S. that antedated the Governor's Executive Order, entitling Edgewater to a waiver under paragraphs 2(b) and 2(e) thereof. That contention falls far short of a contention that DER gave *de facto* approval to a permit application.

Point IV claims that DER's action in following the Executive Order is beyond the scope of DER's statutory authority. This Point is adequately raised in the Notice of Appeal where Edgewater states that DER's action is "without basis and is an arbitrary and capricious assertion of its powers." See *Croner, Inc. v. Commonwealth of Pa., Dept. of Environmental Resources*, __

Cmwlth. _____, 589 A.2d 1183 (1991). Point V raises the issue of the Commerce Clause of the U.S. Constitution. Nothing in the Notice of Appeal even remotely deals with this contention and it cannot be raised at this point.[1]

DER objects to Edgewater's Points II and III on grounds that they are not adequately referenced with legal or statutory citations. We reject DER's arguments. We agree with DER's objections, however, to Edgewater's listing of scientific tests, expert testimony and order of witnesses. These portions of the pre-hearing memorandum do not comply with the requirements of Pre-hearing Order No. 1.

---

[1] We note also that Spectraserv, which processed Edgewater's sludge in the past and then shipped it to the G.R.O.W.S. landfill, is based in New Jersey. While DER's action prevents Edgewater from sending the sludge directly to G.R.O.W.S., Edgewater can still dispose of it at this landfill by going through Spectraserv. Since interstate commerce will result in either case, we are at a loss to understand how the Commerce Clause could be violated.

ORDER

AND NOW, this 25th day of September, 1991, it is ordered as follows:

1. DER's Motion to Strike Appellant's Pre-hearing Memorandum and Dismiss Appeal is granted in part and denied in part.

2. Points I and V of Edgewater's Contentions of Law are stricken.

3. On or before October 15, 1991 Edgewater shall supplement its pre-hearing memorandum by describing precisely the scientific tests it will rely upon, naming and summarizing the testimony of experts it intends to call as witnesses, and naming the other witnesses it intends to call.

4. DER shall not be required to file its pre-hearing memorandum until 15 days after Edgewater has filed its supplement.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: September 25, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Kenneth A. Gelburd, Esq.
Southeast Region
For Appellant:
Ernest F. Salzstein, Esq.
Secaucus, NJ
sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

C & K COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 91-138-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 1, 1991**

OPINION AND ORDER SUR
PETITION FOR RECONSIDERATION BY THE BOARD
EN BANC AND PETITION TO AMEND BOARD ORDER
TO PERMIT INTERLOCUTORY APPEAL

By: Richard S. Ehmann, Member

Synopsis

A Petition To Amend Board Order To Permit Interlocutory Appeal will be denied where it is filed less than two months before the date set for commencement of the hearing on the appeal's merits absent any showing by Petitioner that such an interlocutory appeal will materially advance the ultimate determination of the matter.

Petitioner's simultaneously filed Petition For Reconsideration By The Board En Banc seeks review of an interlocutory order on discovery but fails to allege the existence of any extraordinary circumstances which warrant such a reconsideration of an interlocutory order. That the opinion from which reconsideration is sought was written on an issue of first impression does not constitute such a circumstance. Accordingly, the Petition must be denied.

OPINION

On August 26, 1991, the Boardmember to whom this case was assigned for primary handling issued an Opinion and Order granting C & K Coal Company's ("C&K") Motion To Withdraw Admissions under Pa. R.C.P. 4014(d) and denying the Department of Environmental Resources' ("DER") Motion For Summary Judgment because once the admissions were withdrawn, there existed a dispute between the parties as to material facts. Thereafter, on September 9, 1991, DER filed the instant petition.

As the Opinion dated August 26, 1991 contains a procedural history of this matter, it will not be repeated here except as germane to an issue.

PETITION TO AMEND BOARD ORDER TO PERMIT INTERLOCUTORY APPEAL

Certification of appeals to the Commonwealth Court from interlocutory orders of this Board is governed by 42 Pa. C.S. §702. As stated in The Carbon/Graphite Group, Inc. v. DER, EHB Docket No. 90-524-E (Opinion issued March 22, 1991) ("C/GG-I"), the test for such a Petition is whether it shows: (a) a controlling question of law; (b) on this question, there is substantial grounds for difference of opinion; and (c) it is likely that an immediate appeal could advance the ultimate determination of the merits of the appeal. Here, DER's Motion For Summary Judgment was denied because of the dispute on material facts which sprang into existence when C&K's deemed admissions were withdrawn through the granting of C&K's motion. We thus have no trouble finding a controlling question of law exists as to C&K's Motion. We are not convinced by the allegations in DER's Petition that there is a substantial ground for difference of opinion; however, we need not reach that issue. On July 31, 1991, we scheduled this matter for a hearing on the merits which is

to begin on October 23, 1991. This date is less than two months from the date of filing of this Petition. While the Petition says an interlocutory appeal may materially advance the resolution of this matter on its merits, it does not explain how this could be the case with the merits hearing occurring so soon. In C/GG-I, we denied a similar motion in similar circumstances (with a similar time frame before commencement of the merits hearing). We have been offered no reason by DER to reach a different result here. Accordingly, we deny the Petition.

PETITION FOR RECONSIDERATION BY THE BOARD EN BANC

DER seeks reconsideration by the Board En Banc of the August 26, 1991 Opinion and Order entered in this matter. That opinion was clearly interlocutory in nature. As a result, reconsideration is not governed by 25 Pa. Code §21.122 but, as a long line of cases holds, the Petition must show exceptional circumstances to warrant reconsideration. See Conneaut Condominium Group v. DER, 1987 EHB 504; Luzerne Coal Corporation et al. v. DER, 1990 EHB 23; City of Harrisburg v. DER et al., 1990 EHB 585; Cambria Coal Company v. DER, EHB Docket No. 90-394-MJ (Opinion issued March 4, 1991); and The Carbon/Graphite Group, Inc. v. DER, EHB Docket No. 90-524-E (Opinion issued April 23, 1991).

The only possible allegation that this circumstance is exceptional is found in Paragraph 9 of DER's Petition, wherein DER says this is a decision of first impression which appears to overrule a number of prior Board decisions. DER's argument that a decision of first impression overrules prior decisions is interestingly illogical. As pointed out in City of Harrisburg, DER's disagreement with the conclusions in a prior opinion does not create

exceptional circumstances warranting reconsideration. Further, contrary to DER's assertion, one Boardmember cannot overrule decisions reached by the Board as a whole. Finally, we observe the decision does not overrule the prior Board decisions by implication, either. The August 26, 1991 Opinion was issued in response to a C&K Motion To Withdraw Admissions, which, in turn, was prompted to be filed by DER's Motion For Summary Judgment. Not one of the cases cited in Paragraph 9 of DER's Petition deals with such a circumstance. There were no Motions To Withdraw Admissions in any of those cases and in all of them we allowed the parties to rely on the admissions of another party. So, too, had C&K's Motion not been granted in the instant proceeding or had it never been filed, could DER could have relied on C&K's deemed admissions herein. Accordingly, the validity of those decisions is not affected by the prior opinion in this case.

In short, however, the successful use by C&K's counsel of the procedure outlined in Pa. R.C.P. 4014(d) does not overrule the opinions cited by DER nor does it constitute an exceptional circumstance. Use by a party of procedures outlined in the Rules of Civil Procedure does not constitute exceptional circumstances warranting reconsideration. The same is true where a Boardmember writes an opinion of first impression. We point out that if it were otherwise, we would inundate ourselves with requests for reconsideration. Accordingly, this Petition must be denied and we enter the following Order.

O R D E R

AND NOW, this 1st day of October, 1991, DER's Petition For Reconsideration By The Board En Banc and its Petition To Amend Board Order To Permit Interlocutory Appeal are denied.

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

DATED: October 1, 1991

cc: See next page

EHB Docket No. 91-138-E

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Steven Lachman, Esq.
Western Region
For Appellant:
Henry Ray Pope, III, Esq.
Clarion, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

MCDONALD LAND & MINING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 91-173-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 1, 1991**

OPINION AND ORDER SUR
PETITION FOR SUPERSEDEAS

By: Richard S. Ehmann, Member

Synopsis

Supersedeas from compliance orders issued by the Department of Environmental Resources ("DER") to McDonald Land & Mining Co., Inc. ("McDonald") for discharges of acid mine drainage and suspension of McDonald's permit for non-compliance with these orders is granted after hearing, upon McDonald's showing of the factors outlined in 25 Pa. Code §21.78.

By showing a permit block placed by DER on issuance of further permits to McDonald, the cost of compliance with these orders and receipt of a notice of DER's intent to suspend reissuance of McDonald's annual mining license because of non-compliance therewith, McDonald has established that it will be irreparably harmed. Where the evidence shows the Compliance Orders are issued for three intermittent seeps which neither reach a surface stream nor any water supplies but only flow across the surface of the ground for a maximum distance of 85 feet before disappearing through a combination of infiltration and evapotranspiration, McDonald shows no harm to other parties

if supersedeas is granted. Though McDonald has only shown a reasonable possibility that it will prevail on the merits rather than a likelihood thereof, it has made an adequate showing for purposes of being granted supersedeas since in weighing any Petition For Supersedeas this Board conducts a balancing amongst these factors.

OPINION

Background

On April 1, 1991, DER issued McDonald Compliance Order 914017. Part 1 of this DER order addresses a "discharge of water" from an area disturbed by mining activities at McDonald's Schrot mine, a strip mine located in Ferguson Township, Clearfield County and mined pursuant to Surface Mining Permit No. 17860128. Parts 2 and 3 of this Order each address a separate "discharge of water" from the same mine. The Order requires that within fifteen days McDonald submit an interim treatment plan for the three discharges. It directs that plan to be implemented within 60 days of DER's approval thereof. Next, the Order gives McDonald 60 days to submit to DER a plan to abate or permanently treat these discharges and requires the plan's implementation by McDonald within 15 days of its approval by DER.

McDonald reacted to DER's order by an appeal to this Board on April 30, 1991. This appeal was assigned Docket No. 91-173-E.[1]

---

[1]Prior to the consolidation of this appeal with subsequent appeals by McDonald which is discussed below, DER filed a Motion For Summary Judgment in the instant proceeding. It alleged the discharges were on the mine site and thus McDonald was liable therefor. DER's argument there was similar to that advanced here but not identical. McDonald responded by opposing Summary Judgment for several reasons, including that DER failed to show the discharges reached the waters of the Commonwealth. DER's Motion For Summary Judgment was denied by our Opinion and Order dated July 25, 1991 because of DER's failure (footnote continued)

On June 13, 1991, DER issued McDonald Compliance Order No. 914017A. It covers the same three seeps but extends to July 1, 1991 the date for McDonald to implement its interim treatment plan. When McDonald appealed this order to the Board on July 15, 1991, we assigned it Docket No. 91-288-E.

Finally, also on July 15, 1991, we received McDonald's appeal from DER Compliance Order 914052AE. DER's Order 914052AE was issued on July 3, 1991. It found that McDonald failed to comply with Compliance Order 914017A and directed McDonald to cease all activities not related to implementing an approved treatment plan and to implement such a plan. This order was also appealed and received Docket No. 91-287-E.

On July 31, 1991, McDonald moved to consolidate these appeals and with DER's concurrence by Order dated August 12, 1991, these three appeals were consolidated at Docket No. 91-173-E.

Five days prior to consolidation McDonald had filed Petitions For Supersedeas in the unconsolidated appeals. Our order of August 9, 1991 had set a single hearing date of August 22, 1991 for all three petitions.

McDonald's Petitions all make virtually identical assertions. As to the first discharge (hereinafter "X-1"), it avers the seep has no or very little flow and when there is flow, it flows about 85 feet before being absorbed or evaporating but without ever reaching any stream or watercourse. As to the second discharge (hereinafter "X-2"), McDonald says the discharge is presently dry but when it flowed it too travelled about 83 feet before being

---

(continued footnote)
to show that the material facts were not in dispute. DER's Motion and McDonald's Response did not then present us the factual platform necessary for the Board to rule on the issue of McDonald's liability for these discharges, whereas the Petition For Supersedeas and the evidentiary record made in response thereto changes that situation.

absorbed or evaporated. The Petition says X-2 also failed to reach any stream or watercourse. McDonald's Petition identifies the third discharge (hereinafter "X-3") as a seep from a pipe inserted into the hillside with a flow of from .11 gallons per minute (gpm) varying to .01 gpm which flows to pond next to a wet area on an abandoned road but again alleges X-3 fails to reach a stream or watercourse. McDonald then alleges no water supplies exist in the area to be affected by these seeps, that treatment thereof is estimated to cost $34,200 for treatment facility construction and $12,175 per year in facility operations' costs and that the company cannot afford this cost at present. It also alleges DER has blocked issuance of further permits to McDonald because of its failure to comply with these orders which irreparably harms it. The Petition contends that DER has the burden of proving that the seeps reach the waters of the Commonwealth and thus the seeps are in violation of the applicable statutes, which DER cannot show. It concludes by averring that McDonald is likely to prevail on the merits and is irreparably harmed, that no party is harmed and that granting supersedeas will not adversely affect the public interest. McDonald supports its Petition with affidavits from four persons.

On August 19, 1991, we received DER's Response To Petition For Supersedeas the sole support of which is an affidavit that the facts alleged in it are true. It concedes as to X-1 and X-2 that the current drought conditions have reduced flows and that no discharges have been observed into another surface water body but denies that there is no discharge to the waters of the Commonwealth. As to X-3, it avers the water discharged flows to a small pond of water or the wet area but admits no observation of a discharge from the pond. As to X-3, DER again denies there is no discharge to the

waters of the Commonwealth. It denies that the wet area at X-3 is a possible wetland as alleged by McDonald. The DER Response admits a permit block but says economic loss occasioned thereby is not irreparable harm. It alleges the flows in non-drought circumstances are greater and the waters of the Commonwealth are degraded. It also asserts that McDonald has not met the test for supersedeas because the discharges are themselves waters of the Commonwealth which became polluted by McDonald's mining and McDonald is liable, without regard to fault, for all discharges arising on its mine site regardless of whether this flow ever reaches any stream or watercourse. It concludes that McDonald has neither shown irreparable harm nor a likelihood of success on the merits so the Petitions should be denied.

On August 22, 1991, we held a hearing on the Petition.[2] At the close of the hearing we ordered the parties to file Post-Hearing Memoranda of

---

[2]At the commencement of this hearing, counsel for McDonald raised questions concerning DER's letter of August 20, 1991 (Board Exhibit No. 1). The letter purports to suspend McDonald's permit for the Schrot mine and to give notice of DER's future intent to suspend McDonald's mining license and forfeit the bonds posted for the mine site involved in this proceeding. As of the hearing date no appeal therefrom had been filed with this Board by McDonald. The parties agreed that this letter was issued by DER because DER contends McDonald has failed to comply with any of the three Compliance Orders. Through their respective counsel, the parties stipulated on the record that if we grant supersedeas to McDonald in the instant proceeding, it would apply as supersedeas of the impact of DER's letter, too. Since that hearing, McDonald has formally appealed from that letter to this Board and we have assigned this appeal Docket No. 91-356-E. McDonald also sought both consolidation of these appeals and supersedeas of the August 20, 1991 letter through a Petition For Supersedeas. By Order entered on September 6, 1991 with the consent of the parties, we consolidated the appeal at 91-356-E with the instant appeal and directed that the question of supersedeas therein would be decided based on the supersedeas record in the instant consolidated proceeding.

Law on the issues raised. This both parties did. By Order dated September 20, 1991 we granted supersedeas to McDonald and indicated this opinion would be forthcoming shortly.

The Evidence

At the hearing on August 22, 1991, the evidence showed that McDonald had mined the Schrot mine pursuant to a permit therefor issued to it by DER. Coal removal operations there ceased some time ago and the site had been backfilled, graded and revegetated.[3]

The discharge identified as X-1 was completely dry with neither flow nor damp ground in the dry conditions of August 1991 which immediately preceded the hearing. (This area was parched enough to be within that covered by the Governor's Declaration of a Drought Emergency. See Exhibit C-3.) McDonald's staff found no discharge at X-1 when they were at the site in May, June, July and August of this year, though McDonald does not dispute that an X-1 discharge existed earlier in 1991. X-1 is located at the northern edge of McDonald's haul road (a road built on the mine site by the miner for use in hauling the extracted coal off-site and moving his equipment) on a portion of

---

[3]At several locations in the transcript and the papers filed in this proceeding yet another proceeding before this Board and between these parties as to the Schrot site is referenced by the witnesses and both counsel. The appeal referenced is found at Docket No. 90-464-E (Consolidated). The matter at that docket number represents a series of consolidated appeals from compliance orders issued to McDonald by DER in relation to a discharge identified in that proceeding as Discharge No. 1. Discharge No. 1 arises west of the same unnamed tributary involved in this case and the water therefrom flows over the surface of the ground into this tributary. Discharge No. 1 is acid mine drainage. It arises outside the Schrot permit's boundary immediately adjacent to areas where the Schrot site permit and a permit issued to Benjamin Coal Company overlap. In that case McDonald was granted supersedeas and a merits hearing has been held, but the time for filing of the parties' Post-Hearing Briefs is just expiring with the briefs being filed so an adjudication of the merits therein has not been issued.

the mine site north of the headwaters of an unnamed tributary of Wilson Run. (X-1, X-2 and X-3 are located relative to this tributary as shown on Exhibit M-11). X-1 is located within the boundaries of the Permit for McDonald's Schrot mine. The parties do not dispute that the discharge, when flowing, was acid mine drainage. DER offered no evidence to show the water discharging at X-1 ever flowed across the surface and into the tributary, nor did it offer proof of either infiltration of X-1's water into this tributary or into the water table or saturated zone beneath the mine site. X-1's water was shown to flow a maximum of 80-95 feet before either infiltrating the surface or evaporating (or both). DER's witnesses saw it flow only 30 to 40 feet.

Discharge X-2 was located on the same northern edge of the same haul road at a point about 190 feet east of X-1. It, too, is north of the unnamed tributary but according to the photo marked as Exhibit C-1 and the map marked as Exhibit M-1 lies north-northeast of the tributary. The water quality of this discharge is worse than that at X-1. Neither X-1 nor X-2 lies in an area from which McDonald extracted coal but they are both in an area affected by mining activity and graded and planted by McDonald during site restoration activities.

As with X-1, X-2 had no flow on two of the three visits to it by McDonald's witnesses in August. On two of these occasions the area was dry. They observed small flows at X-2 in May and June and, after a four day rain in July, McDonald's staff measured a flow from X-2 of .2 gpm. Again, as with X-1, DER produced no evidence that the X-2 discharge flowed across the surface of the ground, left the mine site and entered the unnamed tributary of Wilson Run. This tributary is the nearest flowing "stream" to X-1 and X-2 but is

located outside the boundary of the mine site as shown on Exhibit M-2. There was also no evidence that X-2's polluted water infiltrated into this tributary or into the water table beneath the mine site. DER's hydrogeologist, David Bisko ("Bisko") saw a flow of water here which travelled 30 to 40 feet before evaporating, infiltrating or both.

X-3 is also located within the mine site's boundary. Like X-1 and X-2, it is at a lower elevation than the coal seam mined by McDonald. X-3 is located directly east of the unnamed tributary to Wilson Run at a point 300 feet from the nearest area where coal was extracted. As to X-3's location, McDonald presented evidence showing its belief that DER meant X-3 to be a discharge through a corroded pipe placed into the hillside at an elevation about 50 feet lower than the bottom of the coal seam mined by McDonald. Water exiting this pipe flowed 8 to 10 feet and pooled or ponded near the edge of an abandoned private roadway lying between the pond and the tributary. The pipe and pond are located in a wooded area near the southern border of the permit boundary. At one side of this pond was a wet soil area. The only person to testify for DER as to X-3's location was Bisko. He identified X-3 as a discharge from the pond rather than that at the pipe. Since this is DER's Order requiring collection and treatment of X-3 and the Order locates X-1, X-2 and X-3 merely by showing marks on a portion of surface map attached to DER's Order, we accept Bisko's more specific designation of X-3 as controlling. Across the abandoned road from the pond and wet area is a ditch which leads from the opposite side of this abandoned road toward the unnamed tributary. While Bisko has seen water in a portion of this ditch, he has never seen any

discharge to the ditch from this pond.[4] Samuel Yost, a registered surveyor employed by McDonald, testified the pond is about nine feet by fifteen feet, with the wet area about 33 feet in size. Moreover, while its staff measured flows as high as .33 gpm from this pipe (in April of 1991), the evidence also showed that in the last two of the three visits to X-3 in August of 1991 by McDonald's witnesses, the water had ceased to flow from this pipe. (On a visit on August 2, 1991, McDonald's staff measured a flow of .01 gpm at this pipe.) Finally, Edward Morgan testified on McDonald's behalf that between early and mid-August the pond's volume had dropped slightly, Samuel Yost said he saw no surface discharge from the pond and DER's Response to McDonald's Petition admits no observation of a pond discharge.

DER failed to offer evidence showing a discharge from X-3 infiltrating into groundwater connected to this unnamed tributary or into the water table. However, Bisko testified that the water from all these discharges infiltrates the ground at each location and is absorbed, although he admits a portion of the water at each of these points evaporates and he opines that evapotranspiration is greatest at X-3 because of the large vegetation (trees) around it.[5]

---

[4]The quality of the "expert" testimony offered on behalf of DER left much to be desired, particularly as to the discharge at X-3. As an example, but only that, the hydrogeologist opined, without performing any tests or measuring any volumes of flow, that more water was discharged from X-3 than the pipe discharged into the pond. His basis for this opinion was a visual observation of the area only and from this observation he then concluded "other flows" must be getting to this ponded water, though he reported seeing none, performed no tests to validate this conclusion and admitted that a portion of the adjacent surface area was sloped to allow precipitation falling thereon to drain to this ponding point.

[5]The evidence at the hearing showed that evapotranspiration is the (footnote continued)

DISCUSSION

When this Board considers the merits of a request for supersedeas, it does so through an evaluation of the evidence pursuant to the factors found at 25 Pa. Code §21.78(a). Pennsylvania Mines Corporation v. DER, EHB Docket No. 91-247-E (Consolidated) (Opinion issued August 2, 1991). To prevail, McDonald must show: (a) it is likely to prevail on the merits of its appeal; (b) it is irreparably harmed if supersedeas is not granted; and (c) the public or other parties are not likely to be harmed if supersedeas is granted.

When we review a Petition For Supersedeas, we generally conduct a balancing test amongst these factors, Joseph Kaczor v. DER, EHB Docket No. 91-191-E (Opinion issued May 30, 1991), but if a petitioning party fails to show one of these factors, its petition cannot be granted, Bethayres Reclamation Corporation v. DER et al., EHB Docket No. 91-008-W (Opinion issued May 22, 1991). Moreover, 25 Pa. Code §21.78(b) bars our issuance of supersedeas where pollution or the danger of pollution is threatened during the period when the supersedeas would be in effect. Chambers Development Company et al. v. DER et al., 1988 EHB 68, affirmed, 118 Pa. Cmwlth. 97, 545 A.2d 404 (1988).

Turning to these factors, DER's Response to Petition For Supersedeas admits no public or private water supplies exist in the immediate area and no water supplies would be affected by the water coming from X-1, X-2 and X-3. It also admits none of this water is flowing to the stream or any other watercourse. There was no evidence offered by DER to show harm to the public or others if supersedeas is granted; thus, the evidence above suffices to show

---

(continued footnote)
combination of water lost from the earth's surface through evaporation and that lost by the uptake of water from the ground by plant life.

no likelihood of harm if supersedeas is granted. DER's admission shows no danger of pollution to surface waters from these three discharges and, as set forth below, it is less than clear that there is a threat to the underground portion of the waters of the Commonwealth. Accordingly, 25 Pa. Code §21.78(b) does not bar a grant of supersedeas.

With regard to irreparable harm to McDonald, the owner of the company testified to a "permit block" by DER which bars issuance of new permits to McDonald or approvals by DER of additional increments within existing McDonald permits as long as McDonald does not comply with these Compliance Orders. The evidence also establishes that installation of the ponds designed by McDonald, based on certain assumed flows, will cost $32,200, with additional annual maintenance and operational costs of $12,175. (See Exhibit M-14). These costs are not too steep for a company with gross sales of $8,208,661.63 if it is making a profit, but in the last year McDonald operated at a loss of $310,921.95 (see Exhibit M-16) and it currently has 50 percent of its employees laid off. Moreover, DER's letter to McDonald announces its intent to suspend McDonald's license to mine coal in the future and McDonald's annual license, which DER proposes to suspend, is up for renewal at the end of September. It is clear that without an unsuspended license McDonald cannot mine coal. See James E. Martin v. DER, 1987 EHB 273, affirmed, 120 Pa. Cmwlth. 263, 548 A.2d 672 (1988), and Section 3a of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.3a. At the hearing and in its Post-Hearing Memorandum of Law, DER disputed whether or not the costs of the constructing and operating the ponds should be as high as McDonald estimates if the flows at these points are less than assumed for design purposes. However, DER approved McDonald's

design of these ponds and ordered them to be built, so this point is moot absent withdrawal of this directive to McDonald. DER also argued no irreparable harm because this harm only comes about by non-compliance with DER's Order. This argument's fatal flaw is its presumption of merit in DER's Orders and permit suspension. Of course if they have merit and are sustained, McDonald only has costs incurred in non-compliance with proper and lawful orders. McDonald, however, contends the Orders and permit suspension and resulting permit block are improper, and if it complies with these orders and prevails on its appeals, DER is not offering to reimburse McDonald for its costs of compliance which will then be lost to McDonald. Moreover, if McDonald does not comply with DER's directives, it appears DER will put McDonald out of business by refusing or suspending the license renewal or suspending McDonald's existing license and blocking issuance of new permits. In either scenario, McDonald would be out of the coal mining business. That is irreparable harm for purposes of 25 Pa. Code §21.78(a).

Thus, we turn to the last factor which is the likelihood that McDonald will prevail on the merits in appeals from the Compliance Orders and Permit suspension (in which DER bears the burden of proof at the merits hearing). To examine this factor we must turn to the legal contentions of the parties and their application against the factual matrix produced at the supersedeas hearing while keeping in mind the balancing test mentioned in Kaczor.

McDonald's Likelihood of Success on the Merits

DER contends, and we agree, that decisions by the appellate courts and by this Board impose liability on coal miners for discharges from the areas affected by mining activities. Thompson & Phillips Clay Company v. DER,

___ Pa. Cmwlth. ___, 582 A.2d 1162 (1990); Benjamin Coal Company v. DER, 1987 EHB 402. DER is also correct based on the cases it cites that none of those cases or others have explicitly imposed a burden on DER of showing a mine discharge reaching a specific body of the waters of the Commonwealth. Further, DER is correct that many of the cases cited by DER speak of discharges of mine drainage from a mine without identifying the receiving stream. See, e.g., Thompson & Phillips Clay Company, Inc. v. DER, 1990 EHB 105. In C & K Coal Company, Inc. v. DER, 1987 EHB 615, for example, DER was able to present testimony to show the hydrogeologic connection between the mine and two off-site discharges so the Board found little likelihood that C & K could prevail on the merits.

Having reviewed the cases cited by DER and studied its legal argument, it is clear that DER now seeks a decision in its favor beyond that decided in any of the prior decisions it has cited to us. Here DER has not shown any off-site surface or groundwater discharge; thus, cases on those issues are of limited value here. DER is asking us to find McDonald liable for water intermittently appearing on the surface of McDonald's mine site where there is no evidence that this contaminated water flows off-site on the surface or reaches what is referred to by many as the water table.

To convince us of the merits of its position, DER argues that the phrase "waters of the Commonwealth" as defined in Section 1 of Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1, is not narrow but rather is very broad and includes all bodies and conveyances of water. DER also argues that the discharges are into impoundments and ditches which are included as "waters of the Commonwealth". It further asserts that all seeps are springs and all springs are manifestations of the groundwater

and therefore springs and the groundwater are both "waters of the Commonwealth." It thus argues any seep is a protected water of the Commonwealth. With this definition in hand DER then argues that section 315(a) of the Clean Streams Law bars all discharges from mines to the waters of the Commonwealth and thus bars these discharges.

Separately, DER also asserts that water on the surface of the ground makes the ground damp through infiltration. It then asserts this area of damp soil is one of three zones of groundwater which are interconnected in hydrogeologic theory and that underground water does not only mean just aquifers found at the water table or saturated zone (the deepest of the three zones) but also means water located above that at the surface (the soil water zone) and the vadose zone (unsaturated groundwater zone separating the other two zones). Using this hydrogeologic theory of interconnection, it asserts infiltration of X-1, X-2 and X-3 drainage back into the surface of the mine site pollutes this uppermost groundwater zone of the "waters of the Commonwealth." Further, DER also argues its Compliance Order cites McDonald for violating 25 Pa. Code §87.102 which forbids all discharges not in compliance with the effluent limitations set forth therein. Finally, DER asserts liability for McDonald as to these discharges under §316 of the Clean Streams Law (35 P.S. §691.316).

McDonald argues that 25 Pa. Code §87.102 and Section 315(a) of the Clean Streams Law require more than the presence of water on the surface of the mine site. It asserts that for liability to attach, the operative words in statute and regulation are "discharge into" and "discharge from." In turn, these require some showing of communication of these polluted waters in the seeps to another "water regime" before liability attaches. McDonald contends

in its two Memoranda of Law (one pre-dating the hearing) that in light of the absence of such a showing by DER, McDonald is likely to prevail on the merits and is entitled to supersedeas since it meets the other tests set forth in 25 Pa. Code §21.78.

DER's Compliance Orders cite McDonald for violating 25 Pa. Code §87.102(a) which provides in relevant part:

> A person may not allow a discharge of water from an area disturbed by coal mining activities...which exceeds the following groups of effluent criteria. (Emphasis added)[6]

Thus, McDonald's argument of a "discharge from" a mine shows some merit which is reinforced by subsection 315(a) of the Clean Streams Law which addresses "a discharge from a mine into the waters of the Commonwealth."

DER admits there is no discharge to surface streams and its hydrogeologist testified:

> Q Would you please describe the different types of subsurface water?
>
> A There are several types of subsurface water. The first type of subsurface water is usually the water associated with the soil profile. It's known as soil water.
>
> Immediately below that, we come into a zone where we have unsaturated groundwater. This is known as the vadose zone.
>
> Then once we reach an adequate depth, we get in an area called the water table, or the saturated groundwater zone.
>
> Q What is the hydrologic significance of these zones?

---

[6]The Order cites McDonald with violating 25 Pa. Code §87.102(a)(1, 2, 3 and 5). There is no subsection (a)(1, 2, 3 and 5) within 25 Pa. Code §87.102(a) and has not been since its amendment in June of 1990. This error is not cause for us to find for McDonald, however, since DER could amend the Order to address its staff's error and since from the descriptions of the violations in the Compliance Order the violations charged are clearly of the effluent criteria in Group A of 25 Pa. Code §87.102(a).

> A The hydrologic significance is that they are all within a balance known as the hydrologic balance, and they are all -- they all have -- they are all interconnected the theories of hydrogeology.
>
> (T-141-142)

But just because this is current hydrogeologic theory we have no evidence to support DER's implicit assertion that when the legislature included within "waters of the Commonwealth" the concept of "and all other bodies or channels of conveyance of surface and underground water, or parts thereof" in section 1 of the Clean Streams Law, 35 P.S. §691.1, the legislature intended more than preventing pollution of portions or parts of the saturated zone or water table. After all, the legislature did not use the phrase "groundwater" in defining waters of the Commonwealth but, rather, elected to use the phrase "underground water."

The expansion of the "waters of the Commonwealth" definition to the degree sought by DER is, moreover, fraught with many real world problems. In raising crops, farmers frequently apply liquid fertilizers, fungicides and pesticides to the soils in which crops grow. Are such applications discharges to the waters of the Commonwealth when they make the soils damp? Here, DER's order directs construction by McDonald of a pond on the mine site's surface which will treat these seeps once they are collected.[7] Clearly, such ponds will cause the soils on their interior surface to be wet at least in the period when they hold water. If they are damp, is that damp condition also a discharge to the "waters of the Commonwealth"? Just as clearly, sludge generated by sewage treatment plant operation is now spread on surface mine

---

[7]At the hearing DER agreed that it could not make McDonald do more than build these ponds as long as the discharges remained dry.

sites as part of post-mining site reclamation and on farm fields as fertilizer, making the surficial soil wet, at least briefly, as do ponds built for temporary storage of brines produced in creating oil and gas wells. Further, on-lot sewage systems permitted under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq., use renovation of septic tank effluents in the surficial soils as part of their treatment process. Yet none of these activities is considered groundwater pollution solely by its occurrence. However, each may contaminate the water table if improperly conducted.

As part and parcel of its expansive view of "waters of the Commonwealth, DER also argues that any surface conveyance or surface impoundment to which the seeps flow are "waters of the Commonwealth", regardless of how small or slight they are, because the definition of "waters of the Commonwealth" includes "all other bodies or channels of conveyance of surface...water, or parts thereof." DER says channel of conveyance or bodies of water (impoundments) are not size-limited in the definition and the Board cannot limit these terms in defining them either.

This argument can not apply to seep X-3 because of its location. DER's Memorandum of Law says the pond at X-3 is an "impoundment" of waters of the Commonwealth. This may be true, but Bisko testified X-3 is not water flowing from the pipe to the pond. When, at the hearing, this Boardmember asked him to clarify whether X-3 was that discharge or the discharge from the pond, he responded it was the water discharged from the pond. According to the testimony at the hearing, the pond edges a portion of a 33-foot damp or wet area but there is no evidence of a discharge facility or channel with bed or banks such as might be a channel of conveyance running from the pond into

this area. DER points to Exhibit C-1 wherein McDonald's Samuel Yost talked of a small amount of water running overland and discharging into the receiving stream. At the hearing Edward Morgan also testified about water from the end of the pipe flowing 8 to 10 feet before reaching the pond and Yost testified about this corroded pipe and no flow from the pond. This was before Bisko's testimony and both men obviously believed the discharge out of the pipe rather than the discharge out of the pond was what DER called X-3. Under these circumstances we believe Yost's statement in C-1 and the transcript of the testimony at the hearing are consistent and there is no admission of a discharge to the unnamed tributary as asserted by DER.

As to X-1 and X-2, DER's photographs (Exhibits C-8, C-9 and C-10) and McDonald photographs (Exhibits M-2, M-3, M-4 and M-5) clearly show existing conditions. With regard to X-1, no channels of conveyance or impoundments are visible other than water lying in a tire track on the haul road. The same is true as to X-2. X-1 is located at a low spot on the haul road and surface water and seep water flows across the road here. While C-8 appears to show a volume of flowing water at this point, cross-examination showed this picture to be taken in winter with much of what appears to be water actually being ice. The DER photograph of X-1 taken in October (C-9) shows damp earth and a trickle of water on the road's surface; no discernible channel is visible.[8]

---

[8]DER's aerial photograph (Exhibit C-7) shows a clearly discernible but dry surface water channel north and uphill of X-1 which drains through the point at which X-1 exists. Further, Bisko testified to seeing water in this uphill channel. On Exhibit C-7 the channel is not discernible downhill of X-1 (below the haul road), though bare spots appear to exist in the vegetation on this backfilled area. Such bare spots do not establish a channel of conveyance below X-1.

As to X-2, there is no discernible channel in either DER's or McDonald's photographic exhibits.

Moreover, we are well aware that water flows downhill and gathers in this flowing at low points to continue such a journey. A swale between two heights and draining surface runoff water from them would not appear to be a "channel of conveyance" absent more than mere location. Absent more than location a low point for drainage remains nothing more than a low point for drainage. A bed or banks creating a discernible channel would seem to be needed for a channel of conveyance. DER's aerial photograph (Exhibit C-7) shows a dry but discernible channel north and uphill of X-1 which drains through the point at which X-1 is located and Bisko testified to seeing water in that channel but C-7 does not show a discernible channel downhill of X-1 (south of the haul road). Based upon the evidence submitted so far, we have no channel of conveyance in existence on the mine site below X-1 and X-2 for the distance there is any flow or damp earth.

Other than the tire track on the haul road, the only specific impoundment at either location X-1 or X-2 which was identified at the hearing is found at X-2. Bisko testified to it being 18 inches by 12 inches with a depth of one or two inches. This is not an impoundment as is a reservoir, farm pond or lagoon, but is commonly called a puddle. To obtain a sample at X-1 Bisko testified he dug a hole and, after it filled with water, he collected a sample. Following DER's argument Bisko's hole is an impoundment, too. There is no case law cited to us by DER showing that puddles and holes are impoundments under the Clean Streams Law. Where there is a lack of case law after all the years of this statute's enforcement, this raises questions for us as to whether DER's position can be sustained in an adjudication. See

East Penn Manufacturing Company v. DER, EHB Docket No. 90-560-F (Opinion issued February 21, 1991)

DER also argues the water flowing from the seeps is itself waters of the Commonwealth. Its hydrogeologist opined at the hearing that every seep is a spring and thus every seep is a surface manifestation of the groundwater. Thus, DER asserts each seep is a "water of the Commonwealth," apparently even if it dries up after flowing 80 feet across the mine site's surface and has not discharged onto the surface for many months.[9] DER cites us to our cases imposing liability on miners for pollution of springs to support this position. However, those cases involved springs and wells of third persons located off the mine site but adversely affected by the mining operation. Commonwealth, DER et al. v. PBS Coals, Inc., 112 Pa. Cmwlth. 1, 534 A.2d 1130 (1987); Lucas Coal v. DER, 1979 EHB 114, affirmed, 53 Pa. Cmwlth. 598, 420 A.2d 1 (1980); and The Rondell Company et al. v. DER, 1988 EHB 519. Again, no case law exists imposing liability on a miner in a fact scenario like that before us.

This being true we must examine the statute and cited regulation to determine whether they cover this appeal's scenario as well. DER asserts that the broadly defined "waters of the Commonwealth" includes any surficial discharges at points X-1, X-2 and X-3. It then argues the rules of statutory

---

[9]In its Post-Hearing Memorandum of Law, DER also asserts the fact that a discharge from a mine is not continuous does not impact adversely on the issue of a miner's liability therefor. We agree. An off-site discharge may occur on only one day but that does not mean it did not occur. The same is true as to liability based on the size of the flow. A miner does not cease being liable because the discharge from the mine is as low as the .01 gallons per minute measured as flowing into the pond from which X-3 is the discharge, but pursuit of such cases with the vigor evidenced here by DER may raise questions for others about how DER decides to allocate its limited resources.

construction, particularly 1 Pa C.S. 1921(6), and case law prevent us from ignoring the clear legislative intent to place these discharges within "waters of the Commonwealth."

We cannot put blinders on and consider the definition of "waters of the Commonwealth" as if it were the entire statute. Without such blinders, we see DER's argument for extension of this definition to this degree as potentially stretching this statute too far.

DER's position is troubling, first, because DER's Order charges violation of 25 Pa. Code §87.102(a). As a result, at a minimum, this necessitates interpretation of regulation 87.102(a) in addition to this statutory definition. DER implicitly recognizes this by arguing for its definition of waters of the Commonwealth and then arguing that we interpret 25 Pa. Code §87.102(a) and section 315(a) of the Clean Streams Law as not requiring a showing of a discharge to a particular water of the Commonwealth. Unfortunately, DER's arguments never reach or address the issue raised by McDonald of how to read the statute and regulation without interpreting what the phrase "a discharge of water from an area disturbed by coal mining activities" and "a discharge from a mine into the waters of the Commonwealth" means, either alone or standing together and the remainder of the Clean Streams Law.

As McDonald points out, "discharge" is not defined except at 25 Pa. Code §92.1 and that definition only addresses adding pollutants to navigable waters. According to the record so far, X-1, X-2 and X-3 neither add pollutants to navigable waters nor constitute such themselves. McDonald is also correct in pointing out that even this definition of discharge suggests an off-site movement, so mere presence on a mine site of an "on-site seep"

would be found not to be a discharge under this inference. "From" is defined in Webster's New World Dictionary, 2nd College Edition, as "a point of departure for motion, duration, distance, action, etc.; a source or beginning of ideas, action, etc...." Thus, when "from a mine into the waters of the Commonwealth" or "from an area disturbed by coal mining activities" is considered in this light, support exists for the McDonald argument that discharges must exit a mine site which could be said to have side boundaries and be bottomed by the lowest seam of coal authorized for mining by the permit.

Further, DER's interpretation of "waters of the Commonwealth" says waters discharged at points X-1, X-2 and X-3 are already "waters of the Commonwealth" which McDonald's mine has polluted and which it must now collect and treat. If this is so, when and where were the pollutants discharged thereto within the meaning of Section 315(a) and regulation 87.102(a)? It must be at the time that water percolating more or less vertically from the surface through the backfilled and graded site picked up from the fragmented regraded overburden (which has been returned to the pits from which the coal has been extracted) ferrous sulfate and sulfuric acid from the overburden's oxidized pyritic material.[10] Of course such a point of discharge from a mine in turn means that under Section 315(a) and regulation 87.102(a), miners have potential liability for collection and treatment of all mine site subsurface acid mine drainage without regard to whether it ever surfaces or

---

[10]How acid mine drainage comes into existence chemically in a deep mine is described in footnote 9 of Commonwealth v. Barnes & Tucker Company, 472 Pa. 115, 371 A.2d 461, 465 (1977). As to its formation in a strip mine, a brief discussion is found in Hawk Contracting, Inc. et al. v. DER, 1981 EHB 150, 158; and Hepburnia Coal Company v. DER, 1986 EHB 563.

percolates downward far enough to reach the water table. This is a strained and potentially extreme interpretation of "waters of the Commonwealth" as applied through Section 315(a) and regulation 87.102(a) and DER has provided us no basis to show it is legislatively intended. Moreover, the ramification of such a pronouncement, on future surface mining in Pennsylvania are not considered in DER's assertion of this position. Accordingly, it may be that not every discharge is or flows to a water of the Commonwealth, even though water flows downhill.

Finally, DER asserts liability on McDonald's behalf under Section 316 of the Clean Streams Law, 35 P.S. §691.316. This section authorizes issuance of an order by DER to landowners and occupiers whenever DER finds that pollution or the danger of pollution is resulting from a condition at this site. DER correctly asserts that McDonald would fall within the concept of a land occupier and that liability has been imposed on surface miners under section 316. See William J. McIntire Coal Co., Inc. et al. v. Commonwealth, DER, 108 Pa. Cmwlth. 443, 530 A.2d 140 (1987); Harbison-Walker Refractories v. DER, 1989 EHB 1166. In each case cited by DER, however, pollution of the surface or underground waters of the Commonwealth was occurring. That is not the case here, nor was there evidence offered at the supersedeas hearing that pollution of the waters of the Commonwealth is threatened by the water at X-1, X-2 and X-3 unless as damp earth is a water of the Commonwealth or these seeps are such. While DER is correct that this section could be basis for McDonald's liability, at this point in this appeal its potential remains unrealized based on the existing factual record.

Earlier, we cited Kaczor for the principle that we conduct a balancing of factors set forth in Section 21.78(a) in deciding whether

supersedeas is appropriate. DER's legal arguments as to the meaning of this statute are not supported with case law agreeing with those arguments. Moreover, these arguments take the definitions it utilizes to reach its conclusion far ahead of where the courts and this Board have gone to date. McDonald clearly does not subscribe to DER's assertions but asserts a contrary position which is plausible and not as potentially extreme as that asserted by DER. However, McDonald has not proven it will prevail on the merits, though it may because of the nature of both its arguments and those of DER. As stated in Houtzdale Municipal Authority v. DER, 1987 EHB 1, this likelihood of success factor must be balanced with the others on which McDonald has made the requisite showing. Under the circumstances present in this case at this time, McDonald has made all of the showing required of it as to success on the merits for the Board to grant the relief sought.

In response, we enter the following order.[11]

O R D E R

AND NOW, this 1st day of October, 1991, the Order of this Board dated September 20, 1991 is affirmed.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: October 1, 1991

---

[11]Counsel for each party has asserted to this Boardmember that if his client is unsuccessful in advancing its position on the issues discussed above, it intends to seek an immediate appeal. Such assertions are not addressed herein.

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Western Region
For Appellant:
Carl A. Belin, Jr., Esq.
Clearfield, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

CHEVRON U.S.A., INC.	:	
	:	
v.	:	**EHB Docket No. 85-410-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 2, 1991**

OPINION AND ORDER
SUR
MOTION FOR CLARIFICATION AND/OR
RECONSIDERATION OF ORDER

Robert D. Myers, Member

Synopsis

The Board revises the Order issued as part of its Adjudication to require DER to act on Chevron's 1990 NPDES permit renewal application instead of Chevron's 1985 NPDES permit. The Board further orders a supersedeas to remain in effect.

OPINION

On June 24, 1991 the Board issued an Adjudication which, (1) sustained in part and dismissed in part Chevron's appeal from an NPDES permit issued in 1985, and (2) remanded the permit to DER for reissuance within 90 days in accordance with terms of the Adjudication. On July 15, 1991 DER filed a Motion for Clarification and/or Reconsideration of Order to which Chevron filed a Response on August 5, 1991. In the meantime, the Board (with the consent of legal counsel for both parties) entered an Order on July 23, 1991 granting reconsideration "solely for the purpose of tolling the appeal period" to allow the Board to consider the merits of DER's Motion.

In its Motion DER points out that the NPDES permit issued in 1985 carried an expiration date in September 1990. At DER's urging Chevron had filed a renewal application on March 20, 1990 without prejudice to its appeal of the 1985 permit. No action has been taken on this permit application. Both parties agree that it makes more sense for DER to act on the renewal application than to reprocess the 1985 permit. We agree and will revise our Order accordingly.

DER also wants us to rule that our Adjudication automatically voided the October 29, 1985 Supersedeas which suspended the 1985 permit and directed Chevron to adhere to its previous permit conditions. To do so would require Chevron to comply with a permit (1985) we found to be defective and which DER claims is no longer in force. Nothing but additional confusion would result from such action. Accordingly, we will enter the following:

ORDER

1. DER's Motion for Clarification and/or Reconsideration of Order is granted in part and denied in part.

2. The Order attached to our Adjudication of June 24, 1991 is revised to read as follows:

    1. Chevron's appeal is sustained in part and dismissed in part.
    2. Within 180 days after the date of this revised Order, DER shall issue a draft NPDES permit to Chevron based upon Chevron's March 20, 1990 renewal application (as supplemented) and in accordance with the principles set forth in our Adjudication.
    3. Until DER issues a final NPDES permit to Chevron on its March 20, 1990 renewal application (as supplemented),

Chevron shall continue to be governed by paragraph 4 of the Supersedeas Order of October 29, 1985.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Board Chairman Maxine Woelfling and Board Member Richard S. Ehmann did not participate.

DATED: October 2, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Kenneth A. Gelburd, Esq.
Southeast Region
For the Appellant:
Philip Katauskas, Esq.
PEPPER, HAMILTON & SCHEETZ
Philadelphia, PA

sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

GREENBRIAR ASSOCIATES	:	
	:	
v.	:	**EHB Docket No. 90-004-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 2, 1991**

OPINION AND ORDER
SUR
PETITION FOR ALLOWANCE TO APPEAL
COMPLIANCE ORDERS NUNC PRO TUNC

Robert D. Myers, Member

Synopsis

The Board denies a petition to appeal *nunc pro tunc* and quashes appeals from Compliance Orders issued by DER to a surface coal miner. While acknowledging that "good cause" necessary to warrant *nunc pro tunc* appeals can involve misleading information given by an agency official, the Board holds that the statements made to Appellant, even if true, were not legally sufficient to justify his failure to appeal within the 30-day periods following receipt of the Compliance Orders.

OPINION

Richard M. Heberling, trading and doing business as Greenbriar Associates (Appellant), filed Notices of Appeal on January 4, 1990 seeking review of Compliance Order (C.O.) 894143, issued by the Department of Environmental Resources (DER) on September 20, 1989, and C.O. 894148AE, issued

by DER on November 2, 1989. Both C.O.s relate to Appellant's operations at the Kofsky & Sutow #1 surface coal mine in Beccaria Township, Clearfield County.

Each Notice of Appeal averred, *inter alia*, that the "appeal is timely or leave to file the same nunc pro tunc should be granted for the following reasons...." In the absence of any motion to dismiss filed by DER, the Board raised the timeliness question *sua sponte*, since the Board's jurisdiction depends on it. A hearing was held in Harrisburg on February 5, 1991 before Administrative Law Judge Robert D. Myers, a Member of the Board, for the sole purpose of receiving evidence pertaining to the timeliness question. Both parties were represented by legal counsel and presented evidence in support of their legal positions. Although not required to do so, Appellant filed on that same date a formal Petition for Allowance to Appeal Compliance Orders Nunc Pro Tunc. Post-hearing briefs were filed by Appellant on March 13, 1991 and by DER on May 15, 1991.

Evidence developed at the hearing reveals that DER issued C.O. 894143 to Appellant on September 20, 1989. This C.O. charged Appellant with mining beyond his permit boundaries (paragraph A) and with failing to revegetate backfilled areas as soon as required (paragraph B). He was directed (with respect to paragraph A) to cease mining immediately and, by October 20, 1989, to submit an application for a permit covering the affected area. With respect to paragraph B, he was ordered to begin revegetation by April 15, 1990 and to complete it by May 30, 1990. The C.O. contained DER's standard notice informing Appellant of his right to appeal to this Board "within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period."

Upon receipt of C.O. 894143, Appellant sought to set up a meeting with Gary J. Byron, District Mining Manager of DER's Hawk Run office in Clearfield County. There is some uncertainty about the purpose of this meeting. Appellant testified that, when a copy of the C.O. was handed to him on September 20 by DER's John P. Varner, Mine Inspector Supervisor for the Hawk Run District, he was told that Byron wanted to see him. Byron's recollection was that the meeting was scheduled to discuss complaints Appellant had voiced throughout the summer of 1989 concerning the DER inspectors. When the meeting took place on October 17, 1989 both matters were discussed. By that time, the 30-day appeal period had nearly run its course.

The results of the October 17 meeting are in dispute. Appellant testified that the off-permit mining violation in paragraph A was generated by conflicting boundary surveys that DER could not resolve and about which DER had requested assistance on August 21, 1989 from the U.S. Department of the Interior's Office of Surface Mining (OSM). Upon receipt of C.O. 894143, Appellant retained Nicholas Sherokey, a surveyor, and Lawrence P. Opalisky, a professional engineer, to survey Appellant's property and to amend the maps, if necessary. According to Appellant, Byron told him at the October 17 meeting not to submit any maps until OSM had completed its work. Byron called Timothy Grieneisen, a DER Compliance Specialist, into the meeting and told him to "put the matter on hold." Appellant interpreted this to mean that the compliance date in paragraph A (October 20) was "abated, suspended." As a result, he instructed Opalisky to suspend his work - testimony corroborated by Opalisky. Similar instructions were not given to Sherokey because his work had been completed.

Byron denies telling Appellant that the compliance date was waived. He only agreed to withhold the civil penalty assessment until the boundary

problem was resolved. He called Grieneisen into the meeting solely for this purpose. Grieneisen, whose job is the assessment of civil penalties, corroborates Byron's testimony concerning the instructions given to him. Byron maintains that the appeal period was not discussed during the meeting. Appellant concedes that Byron never told him that the appeal period would be waived. Nonetheless, he did not file an appeal at that time, according to his testimony, because he believed the entire matter had been put on hold pending OSM's resolution of the boundary dispute.[1]

On November 6, 1989 Appellant received C.O. 894148AE, dated November 2, citing him for failure to comply with paragraph A of C.O. 894143. This C.O. also contained DER's standard appeal notice. According to Appellant's testimony, he was "shocked" to receive C.O. 894148AE because the matter "had been placed on hold per the meeting of October 17th, 1989." He telephoned Byron at his home that evening and was told that the C.O. had gone out without Byron's knowledge. At a meeting at the Hawk Run office the following morning, Byron told him that "when he returned to his desk...it would be vacated." Appellant left under the impression that C.O. 894148AE "would have been vacated...within a half hour after I departed the building probably."

Byron acknowledges that C.O. 894148AE went out without his specific knowledge, but, once again, his testimony concerning the November 7 meeting is different. He maintains that he handed to Appellant the results of an independent examination of the off-permit mining violation by two other DER inspectors who confirmed the earlier findings. He did not rescind C.O. 894148AE because of those findings, he says.

---

[1] OSM personnel worked for several days on Appellant's mine site beginning November 14, 1989. The maps prepared by OSM and submitted to DER were made available to Appellant in January 1990.

Appellant prepared a letter to Byron on November 13, 1989 which he hand-delivered the following day. This letter contains a recitation of facts that confirms some of Appellant's testimony and some of Byron's testimony. Portions of the letter read as follows:

> On November 7, 1989, you advised that Compliance Order No. 894148AE had gone out without your knowledge and that you would see to it that it was vacated that same day. To date I have not received notification of the vacating of the Order, however, assume that the delay is only clerical.
>
> ***
>
> With our mutual agreement of October 17, 1989, suspending the statute per Compliance Order 894143, I would ask that you notify me prior to the reinstatement of the appeal period.

Appellant never received an oral or written response to this letter. Byron testified that, although a response was prepared pointing out inaccuracies in Appellant's letter, it was not sent because of the advice given by DER legal counsel.

Appellant filed no appeal from C.O. 894148AE within the 30-day appeal period, according to his testimony, because he relied on Byron's statement that the C.O. would be rescinded. Nonetheless, he authorized his own legal counsel on December 2, 1989, to file appeals from both C.O.s. Two days later, on December 4, 1989, Appellant received Grieneisen's letter of November 30, 1989 informing him of a proposed civil penalty assessment based on C.O. 894148AE and inviting him to discuss the proposed assessment at a conference on December 12. This conference subsequently was rescheduled for December 20 to follow immediately upon another conference concerning OSM's report. The evidence reveals that the permit boundary dispute was not resolved at that conference; there is no evidence concerning the results of the civil penalty conference.

The appeals were filed on January 4, 1990, more than 30 days beyond the dates of Appellant's receipt of the C.O.s. Since the Board's jurisdiction depends on timely filing of appeals (25 Pa. Code §21.52(a)), we cannot proceed with Appellant's challenge to the C.O.s unless we can grant him permission to appeal *nunc pro tunc* under the provisions of 25 Pa. Code §21.53 and the decisions construing it. The "good cause" required to be shown to justify an appeal *nunc pro tunc* includes, *inter alia*, the receipt of misleading information from an agency official: *Cadogan Township Board of Supervisors v. Commonwealth, Dept. of Environmental Resources*, _____ Pa. Cmwlth. _____, 549 A.2d 1363 (1988); *Albert M. Comly et al. v. DER*, 1981 EHB 446.

Appellant relies on this line of cases to justify his untimely filing. He maintains that Byron's putting the matter "on hold" at the October 17 meeting induced him to believe that C.O. 894143 had been "abated, suspended." He claims also that Byron's representations at the November 7 meeting led him to believe that C.O. 894148AE had been "vacated." Because of Byron's statements, Appellant withheld the filing of the appeals.

While we are willing to accept Appellant's averments of what he believed the situation to be, we are not ready to agree that his beliefs were justified. Even if we accept Appellant's version of what was said at the October 17 meeting, we find justification only for the belief that the paragraph A compliance date (October 20) had been suspended. Byron said nothing about the appeal period; the subject was not even discussed. Accordingly, there was no legally sufficient basis for Appellant to allow the 30-day appeal period to expire without taking an appeal. The concluding paragraph of Appellant's November 13 letter to Byron (quoted *supra*), written and delivered weeks after the appeal period had expired, cannot serve as a bootstrap for after-the-fact justification.

We have difficulty also in finding adequate ground for excusing the late filing of an appeal from C.O. 894148AE. Even if, again, we accept Appellant's version of what transpired at his November 7 meeting with Byron, the most we can conclude is that the C.O. would be vacated promptly. A week later, when Appellant still had not received any evidence of this, he wrote to remind Byron of the fact. He received no response, written or oral. Apparently, by December 2 Appellant had concluded that C.O. 894148AE would not be vacated, for on that date he authorized his legal counsel to file appeals from both C.O.s. Any remaining doubt in Appellant's mind had to vanish two days later when he received the proposed civil penalty assessment on C.O. 894148AE. The 30-day appeal period on this C.O. did not expire until December 6, four days after Appellant had authorized the appeals. No evidence has been offered to explain why this time was allowed to expire without the filing of an appeal or why it took nearly another 30 days (until January 4, 1990) to get the appeals in to this Board.

We strongly disapprove of DER's decision not to respond to Appellant's November 13, 1989 letter. While such conduct often is tolerated when engaged in by private parties, it is inexcusable when done deliberately by a governmental agency. DER's failure to respond to the letter, although reproachable, is not controlling for two reasons. One is the evidence that Appellant had ceased relying on it before the 30-day appeal period expired. The other is the decision in *C&K Coal Company v. Commonwealth, Dept. of Environmental Resources*, 112 Pa. Cmwlth. 505, 535 A.2d 745 (1988), which casts doubt on whether any reliance can be placed on a non-response.

For the foregoing reasons, we conclude that Appellant has not shown "good cause" to warrant our granting permission for him to file his appeals *nunc pro tunc*.

ORDER

AND NOW, this 2nd day of October, 1991, it is ordered as follows:

1. The Petition for Allowance to Appeal Compliance Orders Nunc Pro Tunc, filed by Appellant, is denied.

2. The appeals are quashed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge

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: October 2, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Marc A. Roda, Esq.
Central Region
For Appellant:
John Sughrue, Esq.
Clearfield, PA
sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BC

PARADISE TOWNSHIP CITIZENS COMMITTEE, INC., *et al.*	:	**EHB Docket No. 91-152-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 2, 1991
and	:	
PARADISE TOWNSHIP, Permittee	:	

OPINION AND ORDER SUR MOTION TO QUASH

By Maxine Woelfling, Chairman

Synopsis

A motion to quash an appeal as untimely filed is denied where crucial facts relevant to the disposition of the motion are not presented by the moving party. It is impossible for the Board to ascertain whether the period for the third party appellants to file their appeal runs from the date they received actual notice of the action in question where it cannot be established whether the Department of Environmental Resources (Department) published notice of its action in the Pennsylvania Bulletin. Similarly, the appeal cannot be dismissed on the basis of the appellant-citizens group's participation in a prior related proceeding where the name and address of the citizens group in the prior related proceeding are different than the name and address of the appellant-citizens group in the present appeal.

OPINION

This matter was initiated with the April 18, 1991, filing of a notice of appeal by the Paradise Township Citizens Committee, Incorporated, Reynold Schenke, and Garland and Ora Hoover (collectively, Appellants) seeking the Board's review of the Department's April 15, 1987, approval of a 1974 Sewerage Feasibility Study as the official sewage facilities plan for Paradise Township, Lancaster County, as well as a revision to the official plan to incorporate a sewage treatment plant on Pequea Creek (collectively, official plan). Appellants allege numerous deficiencies in its preparation, review and approval by the Department.

A motion to quash the appeal for lack of jurisdiction was filed by Paradise Township (Township) on June 18, 1991. In essence, the Township contends that the appeal is untimely, since Appellants had notice of the Department's action on at least three occasions between 1987 and 1990. To support this assertion, the Township points to, *inter alia*, the Paradise Township Citizens Committee's inclusion of the Department's approval letter and the plan revision as potential exhibits in the hearing on the merits in Bobbi Fuller *et al.* v. DER and Paradise Township Sewer Authority, EHB Docket No. 89-142-W.[1] The Township also contends that the appeal should be quashed on the grounds of laches in that the Appellants waited four years to file this appeal while the Township expended over a half-million dollars to install the collection lines which would convey sewage to the disputed treatment plant.

The Department joined in the Township's motion to quash by letter dated July 8, 1991.

---

[1] The adjudication of that appeal is published at 1990 EHB 1726; the Commonwealth Court is reviewing the adjudication at No. 157 C.D. 1991.

Appellants responded to the motion to quash on July 8, 1991, by filing a memorandum. The memorandum did not address the Township's assertions that Appellants had notice of the Department's action as much as four years before the filing of the appeal, but rather justified the 1991 filing on the basis of information concerning the Lancaster County Planning Commission's position regarding the plan revision purportedly discovered in April, 1991. In the alternative, Appellants requested the Board to allow their appeal *nunc pro tunc* on the grounds that the Township had deceived the Department with regard to the Lancaster County Planning Commission's position regarding the plan revision.[2]

The Township thereafter filed a motion to strike Appellants' memorandum, which motion the Board treated as a reply to Appellants' response. The Township alleged that Appellants' response was not in conformance with the Board's rules of practice and procedure or the Rules of Civil Procedure, that factual allegations were unverified, and that the memorandum contained scandalous and impertinent matter.

The Board has no jurisdiction over appeals which are not timely filed, Joseph Rostosky v. Comm., Dept. of Environmental Resources, 26 Pa.

---

[2] On July 22, 1991, Appellants filed a motion to expedite the Board's decision on the motion to quash in light of the federal Department of Housing and Urban Development's intent to release construction moneys to the Township. The motion was not opposed by the Township, and was granted in part by order dated August 1, 1991. (That order erroneously refers to the "Appellants' motion to quash" rather than "Appellants' motion to expedite.") Appellants' motion to expedite requested that the Board render its decision within 30 days of the date of filing of the motion, or by August 21, 1991. The Board's order explained that although it would expedite the decision, it could not assure that the decision would be issued by August 21, 1991, in light of the necessity for concurrence of a majority of Board Members in any order granting the Township's motion.

While the Board is cognizant of the importance to both parties of a swift decision on this motion, its task in reaching such a decision was complicated by the deficiencies in the parties' filings which are addressed herein.

Cmwlth. 478, 364 A.2d 761 (1976). In the case of a third party appeal of a Department action, as is the case here, the appeal must be filed with the Board within 30 days after notice of the action has been published in the Pennsylvania Bulletin by the Department, Lower Allen Citizens Action Group, Inc. v. Department of Environmental Resources, 119 Pa. Cmwlth. 236, 538 A.2d 130 (1988), aff'd on reconsideration, ___ Pa. Cmwlth. ___, 546 A.2d 1330 (1988). Where the Department has not published notice of its action in the Pennsylvania Bulletin, the appeal period for a third party will run from the date it has received actual notice of the Department's action, New Hanover Township *et al.* v. Department of Environmental Resources and New Hanover Corporation, EHB Docket No. 88-119-W (Opinion issued July 30, 1991). Thus, the critical facts here are whether notice of the Department's approval of the official plan was published in the Pennsylvania Bulletin and when the individual appellants and the Paradise Township Citizens Committee, Incorporated received notice of the plan approval. Unfortunately, we cannot make these determinations, for the Township's motion is predicated mostly on assumptions and suppositions, rather than on properly supported factual allegations, and Appellants completely ignore the jurisdictional issue in their memorandum of law, preferring to argue their case on the merits.

As to the issue of publication in the Pennsylvania Bulletin, the Township provided a copy of the notice from the Pennsylvania Bulletin (17 Pa.B. 1032 (March 7, 1987)) indicating that the Department had received the Township's request for approval of the plan (Exhibit C, Motion to Quash) and a copy of the Department's letter approving the official plan (Exhibit D). The only other reference in the Township's motion to this issue is in Paragraph 24 of the Township's motion to quash, which alleges that Appellants are "estopped from asserting the Department's alleged failure to publish the approval in the

Pennsylvania Bulletin as grounds for claiming a failure of notice." The notice of appeal filed by the Appellants states that "As far as Appellants know, there never has been any official notice by the Department of Environmental Resources of this action." We cannot conclude, based on these allegations and exhibits, that notice of the Department's action was not published in the Pennsylvania Bulletin.[3]

The Township has also fashioned its notice arguments around notice allegedly received by the appellants in Bobbi Fuller. But, it is impossible to determine whether the Paradise Township Citizens Committee, Incorporated, an appellant herein, and the Paradise Township Citizens Association, an appellant in Bobbi Fuller, are one and the same organization.[4] The former has a mailing address of Box 272, Paradise, PA 17562,[5] while the latter had a mailing address of 3809 Lincoln Highway East, Paradise, PA 17562.[6] This uncertainty is compounded by the Paradise Township Citizens Association being referred to as the "Concerned Citizens Group" and the "Paradise Township Concerned Citizens Committee" in the hearing on the merits in Bobbi Fuller.[7] Given these inconsistencies, and, without further factual support in the Township's motion, we cannot conclude that the Paradise Township Citizens Committee, Incorporated and the Paradise Township Citizens Association are one

---

[3] An affidavit from the Department official who approved the plan revision would have resolved this issue.

[4] Appellants, in their zeal to argue the substantive merits of their appeal, do not address this issue.

[5] Notice of Appeal, EHB Docket No. 91-152-W.

[6] Finding of Fact No. 1 at 1990 EHB 1733-1734.

[7] See N.T. 129, 156-157 at Docket No. 89-142-W, of which the Board takes official notice. 1 Pa. Code §35.273 and Abbruzzese v. Com., Bd. of Probation and Parole, 105 Pa. Cmwlth. 415, 524 A.2d 1049 (1987).

and the same and, therefore, reach a determination that Appellants had notice of the Department's approval of the Township's official plan at the very least on June 11-12, 1990, the dates of the hearing on the merits in Bobbi Fuller, wherein the official plan was proffered as an exhibit by the Paradise Township Citizens Association.

Since we must view this motion in the light most favorable to the non-moving party, Eagle Crest Development, Ltd. v. DER, EHB Docket No. 90-074-F (Opinion issued February 21, 1991), and since we cannot grant a motion to dismiss where the factual allegations are not properly supported, William Fiore v. DER, 1990 EHB 1628, we have no choice but to deny the Township's motion.[8] In light of the denial of the motion, it is unnecessary to dispose of Appellants' petition for allowance of appeal *nunc pro tunc*.

O R D E R

AND NOW, this 2nd day of October, 1991, it is ordered that:

1) The motion to dismiss of Paradise Township is denied;

2) On or before October 14, 1991, the Department of Environmental Resources shall file an affidavit addressing the issue of whether notice of its approval of Paradise Township's official plan was published in the Pennsylvania Bulletin;

---

[8] The Township has not sought to dismiss the appeals of Messrs. Schenke and Hoover, the individual appellants herein. The Board, *sua sponte*, raises the issue of whether it has jurisdiction over their appeals and will direct the parties to address this issue in the order accompanying this opinion. The participation of Messrs. Schenke and Hoover in the hearing on the merits in Bobbi Fuller led to the raising of this issue by the Board. In addition, that participation, as well as the testimony in Bobbi Fuller that Ora Hoover was secretary of the Paradise Township Citizens Association (N.T. 159), may bear upon whether the Paradise Township Citizens Committee received actual notice of the Department's approval of the Township's official plan. The parties will be directed to brief this issue in the accompanying order.

3) A rule is issued upon Messrs. Reynold Schenke and Garland Hoover to show cause why their appeal should not be dismissed for lack of jurisdiction because of untimely filing in light of their testimony in Bobbi Fuller, *supra*. In responding, Messrs. Schenke and Hoover are specifically directed to address jurisdictional issues and not the substantive merits of their appeal. Failure to do so may lead to the imposition of sanctions under 25 Pa. Code §21.124. The rule is returnable, in writing, to the offices of the Board, on or before October 31, 1991.

4) On or before November 15, 1991, the parties shall submit a memorandum of law on the issue of whether notice of the Department's approval of the Township's official plan may be imputed to the Paradise Township Citizens Committee, Incorporated by virtue of the testimony in Bobbi Fuller, *supra*, of Reynold Schenke and Garland Hoover regarding the official plan and by the testimony of Garland Hoover that his wife Ora was secretary of the Paradise Township Citizens Association.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: October 2, 1991

cc: See following page.

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Justina M. Wasicek, Esq.
Central Region
For Appellants:
John E. Childe, Jr., Esq.
Hummelstown, PA
For Permittee:
Jan P. Paden, Esq.
RHOADS & SINON
Harrisburg, PA
and
Frank P. Mincarelli, Esq.
BLAKINGER, BYLER & THOMAS
Lancaster, PA
bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAI

KEYSTONE COAL MINING CORPORATION	:	
	:	
v.	:	**EHB Docket No. 90-179-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 10, 1991**

OPINION AND ORDER SUR
MOTION TO COMPEL

By Terrance J. Fitzpatrick, Member

Synopsis

A Motion to Compel filed by the Department of Environmental Resources is granted in part and dismissed in part. Interrogatories requesting identification of an expert witness's opinions and factual support for those opinions are not sufficiently answered by a response that the expert is conducting an investigation. An expert's testimony may be restricted at hearing for failure to adequately respond to interrogatories regarding expert witnesses under Pa. R.C.P. 4003.5(c). Where a motion to compel is partly based on the fact that no response at all has been supplied by the requested party, and the party responds to the discovery after the motion is filed, that part of the motion to compel is moot.

OPINION

This case involves an appeal brought by Keystone Coal Mining Corporation (Keystone) objecting to certain terms and conditions the Department of Environmental Resources (DER) imposed in Keystone's Coal Mining

Activity Permit 32841312, issued on April 3, 1990.

This Opinion and Order addresses DER's motion to compel answers to its discovery requests. The following background details the dispute. On June 25, 1990, DER served its first set of interrogatories and requests for production of documents (First Discovery Request) on Keystone. Keystone responded on November 5, 1990, identifying Mr. Larry Simmons as an expert who will testify concerning Keystone's objections to the effluent discharge limitations in the appealed permit. Instead of identifying Mr. Simmons' opinions and any factual basis for those opinions, as DER requested, Keystone's response simply states that Mr. Simmons is conducting an investigation. DER states that it has not received the results of Simmons' investigation or any synopsis of his opinions and facts as of the date of DER's motion. On November 20 and 29, 1990, DER served its second and third sets of Interrogatories and Requests for Production of Documents (Second and Third Discovery Requests) on Keystone. As of the date of its motion, DER had not received responses to those discovery requests.

In its motion, DER avers that Keystone's response to the First Discovery Request is incomplete and inadequate regarding the testimony of Mr. Simmons. As for the Second and Third Discovery Requests, DER avers that answers were due on December 20 and 29, 1990 respectively under Pa. R.C.P. 4006. DER argues that Keystone's failure to fully answer its discovery requests has prejudiced DER in preparing its pre-hearing memorandum.[1] On these grounds, DER requests the Board to compel Keystone to respond fully and adequately to its discovery requests or to impose sanctions pursuant to 25 Pa.

---

[1] Upon consideration of DER's Motion for Extension of Time filed on January 30, 1991, the Board suspended the deadline for filing DER's pre-hearing memorandum until further order.

Code §21.124.

On January 30, 1991, Keystone responded to the motion to compel, stating first that, while Keystone had expected its expert would have conducted studies and investigations to support Keystone's contentions in this appeal, he has not yet done so, and the information DER requests in that regard simply is not available. Second, Keystone states that responses to the Second and Third Discovery Requests were to be mailed to DER on January 31, 1991. Keystone claims that its delay in responding to DER's discovery requests has not prejudiced DER in preparing its pre-hearing memorandum because DER has already prepared pre-hearing memoranda in other appeals in which the same issues have been raised as are in the instant appeal. Keystone concludes by arguing that sanctions are not appropriate where it will comply by January 31, 1991, with DER's Second and Third Discovery Requests.

As to DER's request for full answers to its interrogatories regarding Mr. Simmons' Testimony, we find Keystone's response insufficient and we will compel full answers of Keystone. DER's interrogatories are in accord with Pa. R.C.P. 4003.5(a). That rule entitles a party to request of its opponent identification of experts to testify at trial and the substance of the facts and opinions, along with a summary of the grounds for each opinion, to which the expert is expected to testify. Keystone has offered no explanation as to why, after six months time its expert witness has nothing to show regarding his testimony on the issue of effluent levels. We will not now allow Keystone an indefinite time to accumulate factual support for its case, while leaving its opposing counsel in the dark - potentially up to the date of the hearing. The Board has held that, before commencing a hearing where issues raised in the notice of appeal are to be supported by scientific fact and opinion, all parties are entitled to equal footing with respect to expert testimony. Any

attempt to thwart opposing parties' efforts to establish the basis and parameters of expert opinions may be nullified by requiring full and complete answers to discovery. Philadelphia Electric Company, *et al.* v. DER, 1990 EHB 1028, 1029 [citing Pa. R.C.P. 4003.5(a)(2)]. Furthermore, failure to comply with such an order may result in limiting the scope of the expert testimony to the information supplied in discovery, where the appropriate discovery requests have been made. Pa. R.C.P. 4003.5(c) and Comments (3) and (6). We, therefore, will require that Keystone supplement its responses to DER's first set of interrogatories with all opinions to which Mr. Simmons will testify, and any factual information used to support those opinions.

As to DER's request for an order compelling answers to its Second and Third Discovery Requests, the record shows that Keystone supplied those responses on February 4, 1991. Therefore, this issue is moot.

ORDER

AND NOW, this 10th day of October, 1991, it is ordered that the Department of Environmental Resources' Motion to Compel is granted in part and denied in part, as follows:

1) Keystone Coal Mining Corporation must provide full and complete information in response to the Commonwealth's First Set of Interrogatories and Request for Production of Documents, regarding the testimony of Mr. Larry Simmons, on or before November 12, 1991;

2) Failure to comply with the above may result in sanctions, including the limitation of prohibition of Mr. Simmons' testimony at hearing;

3) The Commonwealth shall file its pre-hearing memorandum on or before November 25, 1991;

4) The Commonwealth's request to compel answers to its Second and Third Sets of Interrogatories and Requests for Production of Documents is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: October 10, 1991

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
Theresa Grencik, Esq.
L. Jane Charlton, Esq.
Western Region
For Appellant:
Henry Ingram, Esq.
Stanley R. Geary, Esq.
BUCHANAN & INGERSOLL
Pittsburgh, PA

jm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

SOLOMON RUN COMMUNITY ACTION COMMITTEE	:	
	:	
v.	:	**EHB Docket No. 90-483-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
RICHLAND TOWNSHIP SUPERVISORS, Permittee	:	**Issued: October 11, 1991**

OPINION AND ORDER
SUR SOLOMON RUN COMMUNITY ACTION COMMITTEE'S
REQUEST TO REOPEN THE RECORD

By: Richard S. Ehmann, Member

Synopsis

Where a party seeks to reopen the record in an appeal after resting its case, it must make the showing set forth in 1 Pa. Code §35.231 or have its request to reopen denied. The requirement applies both to parties who are represented by counsel and those which appear *pro se* such as Solomon Run Community Action Committee ("SRCAC").

SRCAC's request that the Board reconsider its order refusing to accept written testimony on SRCAC's behalf after the close of the hearing record, absent the filing by SRCAC of a Petition To Reopen The Record, is denied. SRCAC's request to reconsider this interlocutory order does not show the existence of any exceptional circumstances which would warrant reconsideration of the order.

OPINION

On April 30, 1991 and May 1, 1991 this Board held hearings on the merits of the instant appeal. In this appeal SCRAC elected to proceed *pro se*, contrary to the advice and recommendation of this Board. (T-6)[1] Partway through the proceeding on the morning of May 1, 1991 the transcript of the hearing reveals the following exchange between the Boardmember taking the evidence and Larry Mummert, a member of the Solomon Run Community Action Committee.

> [Judge Ehmann:] All right. Now, do you have anything else by way of the case on behalf of the Solomon Run Citizen Action Committee?
>
> Mr. Mummert: No, we close.
>
> Judge Ehmann: You've rested your case.

(T-276)

Thereafter Richland Township Supervisors ("Richland") made a Motion to Dismiss the appeal and DER joined therein. The Motion was not granted. As a result, Richland proceeded and presented its evidence. Thereafter also on May 1, 1991 at the hearing, the following exchange occurred between the Board, counsel for Richland, counsel for DER and SRCAC's representative as reflected by the transcript.

> Mr. Kiniry: The Township rests.
>
> Judge Ehmann: Ms. Grencik, I assume since you didn't actually submit a Prehearing Memoranda or formally adopt the Prehearing Memoranda that Mr. Kiniry submitted, that you have nothing further?
>
> Ms. Grencik: That's correct.

---

[1]References such as "T__" refer to citations to the transcript of the aforesaid hearings.

Judge Ehmann: Mr. Mummert, do you have anything further?

Mr. Mummert: No, we rest our case.

Judge Ehmann: All right.

(T-444)

Thereafter, transcripts of the hearings having been received from the court reporter, we issued our Order of July 15, 1991 directing the parties to file their Post-Hearing Briefs.[2]

On August 14, 1991, SRCAC sent this Board a one page document captioned "Testimony by Larry E. Mummert" which is a notarized written statement signed by Mr. Mummert setting forth a series of facts allegedly relevant to the contentions raised by SRCAC in this appeal. Since the record was closed we treated it as a request to supplement or reopen. By letter of August 23, 1991, we acknowledged receipt of SRCAC's letter and in accordance with our practice advised the other parties of the deadline for any responses thereto. By letter of September 3, 1991 counsel for DER responded to the submission on behalf of SRCAC, opposing Board acceptance of same. As a result we issued our Order of September 4, 1991 which stated that the evidentiary record in this appeal was closed prior to receipt of SRCAC's submission and that SRCAC had failed to secure leave to reopen the record to insert this evidence. This Order further directed that if SRCAC wished the Board to consider this document it would have to file a Petition demonstrating that SRCAC's request meets the tests for doing so.

---

[2]On September 6, 1991, SRCAC filed its Post-Hearing Brief with this Board. The Post-Hearing Briefs of Richland and DER were received on September 27, 1991 and October 1, 1991. In accordance with our prior order we are now within the time period for the filing of any Reply thereto on SRCAC's behalf.

On September 17, 1991, the Board received a letter from SRCAC dated September 10, 1991 and signed by Mr. Mummert saying "I would like to petition the court to reconsider the order of September 4, 1991 returning my testimony." The letter goes on to say SRCAC assumed it would be allowed to do submit such written testimony when it filed its Post-Hearing Brief or it would have offered it at the merits hearing.

Again, we advised opposing counsel, by letter, of their deadline for response and again DER's counsel responded by letter opposing this request for the reasons set forth in its prior letter.[3] As DER failed to file a formal response to this letter as it should have, we will address SRCAC's letter without regard for the comments in DER's letter.

Reopening of the record before us is governed by 1 Pa. Code §35.231. We have held previously that to reopen the record the Petitioner must show:

> a. circumstances have changed or new evidence is available;
> b. petitioner could not, with due diligence, have presented the evidence at the hearing; and
> c. the evidence is such as would likely compel a different result in this case.

Lower Providence Township v. DER, 1986 EHB 391; McDonald Land & Mining Company, Inc. et al. v. DER, EHB Docket No. 89-096-MJ (Opinion issued July 29, 1991).

SRCAC meets none of these tests. It could have put Mr. Mummert on the stand to testify at the hearing since he was present at the hearing on both days on which the hearings were conducted. According to its August 14,

---

[3]DER's objections, some of which appear to have merit, include: the Board's rules of procedure do not allow this procedure; SRCAC did not petition to reopen the record, SRCAC did not offer to make Mr. Mummert available for cross examination as required by 25 Pa. Code §21.107 nor did SRCAC comply with §21.107 as to the proposed written testimony; Mr. Mummert was not sworn in as a witness and he did not testify at that hearing.

1991 submission SRCAC did not do so because it assumed it could submit this testimony in the fashion now sought. Nothing in the record supports this assertion or suggests any attempt by SRCAC to confirm this assumption at the hearing. Further, this evidence is not new and the September 10, 1991 letter from SRCAC so stated. It provided in part:

> My testimony is not new or damaging to the other side but only supports testimony already given.

Moreover, there is no allegation by SRCAC that this evidence is such as would likely compel a different result in the case or that there are changed circumstances.

All that is alleged by SRCAC is that as a *pro se* it was confused as to procedure for presenting its case. Almost from the inception of this appeal the Board has repeatedly advised SRCAC to retain counsel to represent it, but SRCAC elected not to take this advice. The burden of SRCAC's election cannot now be cast upon the shoulders of Richland, DER or the Board but must be borne by SRCAC. Fern E. Smith v. DER, EHB Docket No. 90-443-MR (Opinion issued June 25, 1991) Accordingly, the tests under 1 Pa. Code §35.231 are not met and we cannot grant SRCAC's request.

Insofar as SRCAC wrote to us by letter dated September 10, 1991 seeking reconsideration of our order returning this written testimony to SRCAC and directing SRCAC to petition to reopen the record if it wants the Board to consider this affidavit, this letter does not change the conclusion that we cannot consider this written evidence at this time. The Board Order dated September 4, 1991 only directed SRCAC to comply with the procedures for reopening and SRCAC has failed to do that.

Even if we were to construe SRCAC's letter of September 10, 1991 as a

Petition For Reconsideration this does not change the result. A long line of Board decisions, the most recent of which are George Skip Dunlap v. DER, EHB Docket No. 89-135-F (Opinion issued September 17, 1991) and C & K Coal Company v. DER, EHB Docket No. 91-138-E (Opinion issued October 1, 1991) hold that reconsideration of interlocutory orders is only granted in exceptional circumstances.

Such circumstances do not exist here. SRCAC appearing *pro se* and being unfamiliar with established procedure in these hearings made an incorrect assumption it now wishes to correct. Our rules of procedure and the opinions interpreting same are not hidden but are widely disseminated and available. SRCAC has pointed to nothing in the transcript suggesting any party or this Board misled SRCAC into making its faulty assumption. Finally, it was SRCAC that elected to represent itself and to forgo use of counsel to guide it in presentation of its case. In light of these circumstances nothing exceptional has been pointed out to this Board by SRCAC as having occurred which warrants reconsideration of this interlocutory order.

Accordingly, we enter the following Order.

ORDER

AND NOW, this 11th day of October, 1991, it is ordered that SRCAC's request that this Board reopen the record in this appeal to allow it to submit written testimony of Larry Mummert is denied, as is its request that this Board reconsider its Order of September 4, 1991.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: October 11, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Theresa Grencik, Esq.
Western Region
For Appellant:
Larry Mummert
Solomon Run Community Action Committee
Johnstown, PA
For Permittee:
Patrick T. Kiniry, Esq.
Johnstown, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAR

GORDON AND JANET BACK	:	
	:	**EHB Docket No. 87-177-W**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 15, 1991

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

By Maxine Woelfling, Chairman

Synopsis

An appeal of an order issued pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (the Clean Streams Law) is sustained in part and dismissed in part. The Department of Environmental Resources' (Department) issuance of the order to the appellants was not an abuse of discretion where the Department established by a preponderance of circumstantial evidence that oil pollution in a stream resulted from a condition on appellants' property. But, remedial measures in the order were an abuse of discretion where they were, by the Department's own admission, unnecessary because of circumstances occurring since the issuance of the order.

INTRODUCTION

This matter was initiated with the April 28, 1987, filing of a notice of appeal by Gordon and Janet Back (the Backs) seeking review of a March 31, 1987, order from the Department of Environmental Resources (Department). The order, issued pursuant to the Clean Streams Law and §1917-A of the

Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code), alleged that the Backs allowed the discharge of industrial waste into Commonwealth waters without a permit and caused pollution of Commonwealth waters when they permitted the discharge of fuel oil from their property. The Department further contended that such discharge by the Backs constituted a public nuisance at common law and under §§307 and 401 of the Clean Streams Law, 35 P.S. §§691.307 and 691.401.

In response to a request from the Backs, a view of the premises was conducted on October 14, 1988. Subsequently, the parties engaged in prolonged and unsuccessful settlement negotiations. The Backs filed a motion to limit issues on November 24, 1989, seeking to have the Board direct the Department to withdraw the order as moot in light of the results of sampling Beatty Run. By order dated November 30, 1989, the Board granted the motion with regard to Paragraph A(1) of the Department's order; that portion of the order required the Backs to place containment booms and absorbent material in Beatty Run to absorb any fuel oil.[1]

The parties raised a number of issues in their post-hearing briefs. The Department argued, *inter alia*, that the Backs had the burden of proof under 25 Pa. Code §21.101(d), that it properly ordered the Backs to abate the oil contamination, and that the abatement measures ordered by the Department were reasonable. The Backs, meanwhile, contended that the Department had the burden of proof to establish that any contamination in Beatty Run resulted from a source on the Backs' property and that the Department's order was

---

[1] Both parties interpreted the order as dealing only with issues relating to the remedial measures dictated by the Department and, at the hearing on the merits, presented evidence relating to the Backs' liability for the contamination in Beatty Run. We will proceed to adjudicate this matter in accordance with the parties' interpretation.

unreasonable, arbitrary, capricious, and an oppressive imposition of the police power.

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

FINDINGS OF FACT

1. Appellants are Gordon and Janet Back, individuals who, at the time of the issuance of the order in question, owned a residence at 17 Berkshire Drive, Nether Providence Township, Delaware County. (N.T. 265, 266, 283)[2]

2. Appellee Department is the agency charged with the duty to administer and enforce the provisions of the Clean Streams Law, the rules and regulations promulgated thereunder, and §1917-A of the Administrative Code.

3. A stream known as Beatty Run is located behind the homes on Berkshire Drive. (N.T. 10, 62)

4. The Backs bought their property on Berkshire Drive in June of 1986. (N.T. 265)

5. An above-ground, home heating oil storage tank was located on the Backs' premises, approximately 14 feet from Beatty Run. (N.T. 11, 12, 15, 51, 67)

6. In June, 1986, shortly after the Backs bought the house, a painter told Gordon Back that the tank fitting looked like it could leak. (N.T. 269)

7. Gordon Back saw an accumulation of oil on the elbow of the line going into the house, but saw no indication of leakage from the elbow onto the

---

[2] References to the transcript of the hearing on the merits are denoted by "N.T. ___." The Department's exhibits are referred to as "Ex.C-."

earth below. He tightened the fitting, checked it on several occasions, and never saw it leak. (N.T. 269, 270)

8. On August 8, 1986, Gary J. Cummings (Cummings), Manager of the Township of Nether Providence, received a complaint that contamination existed behind the houses on Berkshire Drive; when Cummings went to investigate, he smelled a petroleum odor and saw discolored water behind the properties at 15, 17, 19, and 21 Berkshire Drive. (N.T. 10; Ex. C-2)

9. Cummings had difficulty recalling the location and flow of the alleged contamination. (N.T. 34-35)

10. On August 8, 1986, Cummings observed continuous, but very slow, dripping of what appeared to be fuel oil from the fuel oil line of the Backs' oil tank. (N.T. 11-12)

11. Ruth Plant, a water quality specialist for the Department, also inspected the area on August 8, 1986, after receiving a complaint from the residents of 15 Berkshire Drive. (N.T. 45, 46)

12. On August 8, 1986, Plant detected a petroleum smell from the stream and saw discolored water 30 feet upstream of 15 Berkshire Drive, the Applegate residence, which is adjacent to the Backs' residence. (N.T. 45)

13. Plant noticed that the discoloration seemed to start 20 feet downstream of a storm sewer outlet, over 130 feet upstream from the Backs' property line. (N.T. 100-103)

14. In her log for August 8, 1986, Plant stated that because of a dark residual at the storm sewer inlet, she believed the discoloration and smell were caused by dumping into the storm sewer. (N.T. 48, 103, 104)

15. On August 12, 1986, Cummings wrote to the Backs, informing them of their neighbors' complaints of a foreign substance in Beatty Run, the

petroleum odor, and the leak Cummings saw coming from the fuel tank on August 8, 1986. (N.T. 14; Ex. C-1)

16. The Backs first learned of the contamination in Beatty Run on or about August 14, 1986, when Gordon Back received Cummings' letter of August 12, 1986. (N.T. 266-268)

17. In response to Cummings' letter, Gordon Back replaced the fuel line fitting which Cummings said he saw leaking. (N.T. 15, 28, 29, 270)

18. None of the Backs were at their Berkshire Drive residence during the two weeks before August 14, 1986. (N.T. 268, 283-284)

19. Cummings and Plant visited the stream together on August 19, 1986. (N.T. 50)

20. Plant did not see any leaking when she inspected the outdoor tank on August 19, 1986, nor did she notice any other particulars which would lead her to believe that the Backs' tank was the source of the malodor or the discoloration in Beatty Run. (N.T. 51, 114, 115)

21. Other than the fuel oil tank, which Plant noticed, but did not inspect on August 8, 1986, Plant's observations on August 19, 1986, were virtually the same as those she made on August 8, 1986. (N.T. 51)

22. On August 19, 1986, Plant took a water sample behind the Applegate residence, upstream from the Backs, because there was more discoloration behind the Applegate residence and that area provided her with the best representative sample. (N.T. 117-119)

23. Ultraviolet analysis of the sample, performed by the Department's Bureau of Laboratories, detected the presence of a weathered petroleum product, possibly oil. (N.T. 170; Ex. C-3)

24. Plant returned to the site on August 27, 1986, and examined the Backs' premises, including the fuel oil tank, the basement, the furnace, closets in the residence, and the fuel line. (N.T. 55, 287, 288)

25. Plant did not remember whether, on August 27, 1986, the discoloration started at the same point in the stream where it seemed to originate on August 8 and 19, 1986. (N.T. 55-56)

26. As on August 19, 1986, Plant, on August 27, 1986, took the water sample behind the Applegate residence because she felt that area provided her with the most representative sample of the discoloration. (N.T. 120-122)

27. The streambed consists of irregularly-shaped stones, except where it borders the Back residence, where, in addition to the stony stream bed, bedrock juts out into the stream. (N.T. 110-111)

28. Plant admitted that oil can seep into the rocky bed when puddles lie in the bed and that the oil would tend to seep out later, once the groundwater starts rising. (N.T. 120)

29. Plant never performed or had performed any kind of analysis to determine that there was seepage from the rocks, as opposed to puddling from upstream dumping. (N.T. 109-110)

30. On August 29, 1986, Cummings, on Plant's advice, wrote to the Department informing it of the contamination in the streambed of Beatty Run and the leak in the Backs' tank. (N.T. 15-16, 116, 117; Ex. C-2)

31. In August, 1986, Cummings made two inspections of a storm sewer which collects runoff from properties on Berkshire Drive and discharges into Beatty Run; he did not see evidence of the contamination at the inlets or outlet of the storm sewer. (N.T. 18-20, 27)

32. Cummings observed foreign material in Beatty Run during each of the several inspections he made of the stream. (N.T. 16)

33. After reviewing the laboratory analyses of her first two samples, Plant was unable to determine whether the substance in the stream was fuel oil, diesel oil, motor oil, or home heating oil. (N.T. 123-125; Ex. C-3 and C-5)

34. When Plant inspected Beatty Run on October 23, 1986, she saw oil seeping from the ground near the stream behind the Backs' house. (N.T. 65)

35. Plant did not see oil seeping from any other location on her October 23, 1986, inspection. (N.T. 65)

36. Plant observed no oil upstream from this seep during her inspections on October 23 and 24, 1986, or during any of her subsequent inspections. (N.T. 67-68)

37. When Plant inspected Beatty Run on November 25, 1986, she noticed a petroleum odor and again saw oil seeping near the stream behind the Backs' house. (N.T. 69)

38. During her December 4, 1986, and December 10, 1986, inspections, Plant obtained samples at the point of seepage, near the stream behind the Backs' house. (N.T. 72-74; Ex. C-8 and C-9)

39. Ultraviolet and infrared analyses of the samples showed that No. 2 fuel oil was present in a concentration of at least 50,000 parts per million. (N.T. 72, 76, 173; Ex. C-8 and C-9)

40. During her January 27, 1987, inspection, Plant found that oil continued to seep from the stream embankment behind the Backs' house. (N.T. 73, 78; Ex. C-9)

41. On her January 27, 1987, inspection, Plant obtained samples 75 feet upstream and 75 feet downstream from the point of seepage, as well as a sample at the seep itself. (N.T. 80, 81)

42. Ultraviolet analysis of the upstream sample detected a small amount of organics, possibly weathered oil. (N.T. 81, 174; Ex. C-13)

43. Ultraviolet and infrared analyses of the samples taken from the seep and downstream revealed No. 2 fuel oil in concentrations of at least 50,000 parts per million. (N.T. 81, 82, 175; Ex. C-14 and C-15)

44. On March 31, 1987, the Department issued an abatement order to the Backs, which is the subject of the instant appeal.

45. The order directed the Backs to submit a plan for the removal of fuel oil from the ground and affected waters.

46. The site is composed of Wissahickon Schist, a foliated rock having many undulating folds, covered by three to six feet of topsoil. (N.T. 218-219)

47. To Plant's knowledge, no one from the Department ever took a soil sample from the Backs' property. (N.T. 98, 99)

48. Back never saw any oil-soaked soil at or near the oil tank on his property. (N.T. 274)

49. Janet Back did not see oil on the ground in her back yard at any time up to the date of the order, March 31, 1987. (N.T. 297)

50. Plant never saw any oil or contamination on the grass, bushes, or elsewhere in the Backs' back yard. (N.T. 108, 109)

51. Robert Day-Lewis, a hydrogeologist for the Department, inspected Beatty Run and vicinity on June 19, 1987. (N.T. 215, 216; Ex. C-22)

52. Based upon his observations at the site, the geology of the area, the published information, the shallow soils, the limited depth of the bedrock, the shallow water table, the lateral distance between the tank and

the stream, the information that the tank leaked, and the seeps observed perpendicular from the tank to the stream, it was Day-Lewis' opinion that the tank was the source of the oil in the stream. (N.T. 221)

53. Day-Lewis' observations at the site were limited to the Back residence. (N.T. 247)

DISCUSSION

Generally, when the Department orders a party to undertake affirmative action to abate pollution, it has the burden of persuasion to establish by a preponderance of evidence that its order was not an abuse of discretion. 25 Pa. Code §21.101(b)(3) and Edward Davailus *et al.* v. DER, EHB Docket No. 88-407-F (Adjudication issued July 22, 1991). Here, however, the Department argues that the burden of persuasion should be placed on the Backs pursuant to 25 Pa. Code §21.101(d)[3] because it has been established that there is a risk of environmental harm and the Backs were in a position to know or should have known the facts relating to the environmental harm.

---

[3] This section of the Board's rules of practice and procedure provides that:

> When the Department issues an order requiring abatement of alleged environmental damage, the private party shall nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established:
>
> 1) that some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a *prima facie* is made that a law or regulation is being violated; and
>
> 2) that the party alleged to be responsible for the environmental damage is in possession of facts relating to such environmental damage or should be in possession of them.

The Department has failed to establish that the Backs knew or should have known the facts surrounding the damage. The Backs had purchased their home at 17 Berkshire Drive in June, 1986, and they were gone for close to two weeks of the time between the purchase and the first Department investigations of contamination in the stream. During their time at their Berkshire Drive residence, the Backs never saw oil in or on the soil in their yard and never saw the tank leaking. In light of the foregoing, we cannot conclude that the Department has established that the Backs knew or should have known the facts surrounding the environmental damage. The burden of persuasion and the burden of going forward with the evidence remain on the Department.

In order to establish by a preponderance of the evidence that its order was not an abuse of discretion, the Department must provide the Board with such proof as to lead the Board to conclude that it is more probable than not that the Backs contaminated Beatty Run. South Hills Health System v. Com. Dept. of Public Welfare, 98 Pa. Cmwlth. 183, 510 A.2d 934 (1986), and Midway Sewerage Authority v. DER, EHB Docket No. 90-231-E, (Adjudication issued August 26, 1991). The preponderance of the evidence standard is the lowest standard by which a party can carry its burden of persuasion. L. Packel and L. Poulin, Pennsylvania Evidence §303.1 (1987). Based on the evidence presented, we conclude that it is more probable than not that the Backs were liable for the contamination in Beatty Run.

The Department issued its order pursuant to a multitude of provisions of the Clean Streams Law, the most germane being §§316 and 401, as well as §1917-A of the Administrative Code. Section 316 of the Clean Streams Law authorizes the Department to order landowners to correct conditions on their

land which cause pollution or which pose the threat of pollution.[4] It is undisputed here that there was a pollution in Beatty Run; however, the critical question for establishing the Backs' liability under §316 of the Clean Streams Law for abating that pollution is whether it resulted from a condition on land owned or occupied by the Backs. Philadelphia Chewing Gum Company v. DER, 1976 EHB 269, 297. Considering the largely circumstantial evidence presented here, the Back's fuel oil tank was the source of that pollution.

The two alleged polluting conditions which are relevant for purposes of our analysis are the stream-bank seeps and the Backs' oil tank.

Turning first to the alleged contamination from the seeps, Ms. Plant testified that the seeps she observed were located on property owned or occupied by the Backs (N.T. 68). While the Department's evidence on this point could have been strengthened by testimony or exhibits concerning property boundaries, the Backs did not challenge Ms. Plant's conclusion that the seeps emanated from their property.[5]

---

[4] In pertinent part, §316 of the Clean Streams Law provides that:

> Whenever the [D]epartment finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the [D]epartment may order the landowner or occupier to correct the condition in a manner satisfactory to the [D]epartment....

A landowner or occupier may be ordered to take corrective action under §316 of the Clean Streams Law even where it is without fault. Western Pennsylvania Water Company v. DER, 1988 EHB 715, aff'd 127 Pa. Cmwlth. 26, 560 A.2d 905 (1989), aff'd *per curiam*, ___ Pa. ___, 586 A.2d 1372 (1991).

[5] In contrast, specific evidence of a party's interests in land on which a polluting condition allegedly existed was presented by the Department in Philadelphia Chewing Gum, *supra*; Western Pennsylvania Water Company, *supra*; footnote continued

As for the alleged tank leak, the Department's evidence here was again largely circumstantial. The tank was only 14 feet from Beatty Run. Both Mr. Cummings and Ms. Plant observed dripping from the fittings on the oil tank, although there was no evidence as to the amount. However, the testimony of Robert Day-Lewis, a Department hydrogeologist, coupled with these observations and the distance of the tank from Beatty Run, did establish that the Backs' oil tank was the most likely source of the pollution in Beatty Run.

The Department's order required the Backs to submit a plan for removal and disposal of oil-contaminated soils, and the Backs have argued that this requirement is an onerous one. There is no evidence on the record that the soils in the Backs' yard were oil-soaked. Furthermore, the Department admits in its brief that it would no longer require excavation of the soil without first requiring analysis of the soil because it is likely that the "free oil" has migrated from the soil (Department post-hearing brief, pp. 16, 19). Although the Department suggests that its order "may be fairly construed" to require such soil analysis and requests the Board to direct the Backs to perform such analysis, we do not so interpret the Department's order. Nor, do we believe it appropriate for the Board to do so.

Rather, if circumstances have so changed since the issuance of the Department's order, the more appropriate course of action would be to issue another order. The Department is not prohibited from doing so by this litigation. Blevins v. Comm., Dept. of Environmental Resources, 128 Pa.

---

continued footnote
and Newlin Corporation *et al.* v. DER, 1989 EHB 1106, aff'd ___ Pa. Cmwlth. ___, 579 A.2d 996 (1990).

Cmwlth. 533, 563 A.2d 1301 (1989). Thus, we conclude that the remedial portion of the Department's order is an abuse of discretion and sustain the Backs' appeal in this respect.[6]

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proof in an appeal of an order directing a party to take action to abate pollution. 25 Pa. Code §21.101(b)(3).

3. The Board will not place the burden of proof on an appellant pursuant to 25 Pa. Code §21.101(d) where the Department has not established that the appellant is in possession or should be in possession of facts relating to environmental damage.

4. Section 316 of the Clean Streams Law authorizes the Department to order landowners or occupiers to correct conditions on their land which cause pollution or which pose the threat of pollution.

5. To sustain its burden under §316, the Department must prove that a polluting condition existed on land owned or occupied by the Backs and that the pollution reached waters of the Commonwealth. Philadelphia Chewing Gum Company v. DER, 1976 EHB 269, 297.

6. The Department established by a preponderance of the evidence that a polluting condition on land owned or occupied by the Backs resulted in contamination of Beatty Run.

---

[6] We are hard-pressed to comprehend why the Department's resources were devoted to taking enforcement action in a situation involving a spill from a backyard oil tank in a residential subdivision into a stream that is little more than a drainage swale. However, it is not our task to assess the wisdom of the Department's exercise of its enforcement discretion.

7. Because of circumstances arising after the issuance of the order, the remedial action provisions of the order were an abuse of the Department's discretion.

O R D E R

AND NOW, this 15th day of October, 1991, it is ordered that the appeal of Gordon and Janet Back is dismissed as to liability and sustained as to the remedial provisions in the Department's March 31, 1987, order.

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

DATED: October 15, 1991

cc: **DER Bureau of Litigation:**
Library: Brenda Houck
For the Commonwealth, DER:
Louise S. Thompson, Esq.
Southeastern Region
For Appellant:
Peter E. Kane, Esq.
KENNEDY & KANE
Philadelphia, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAR

PHOENIX RESOURCES, INC.	:	
	:	
v.	:	**EHB Docket Nos. 91-122-MR**
	:	**91-123-MR**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 16, 1991**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT AND
MOTION TO DISMISS

Robert D. Myers, Member

Synopsis

Appeals from DER's "decision" to withhold final action on permit applications are dismissed because they seek review of an interlocutory rather than a final action. The Board holds that its jurisdiction does not extend to the numerous provisional decisions made by DER personnel during the permit review process. Appellant's Motions for Summary Judgment are denied for this same reason.

OPINION

These appeals, while not consolidated, are related. They were both filed on March 26, 1991 by Phoenix Resources, Inc. (Phoenix). The appeal docketed at 91-122 complains of the Department of Environmental Resources' (DER) refusal to reissue Solid Waste Management permit No. 301025. The appeal docketed at 91-123 complains of DER's refusal to issue a Solid Waste

Management Permit in response to Application No. 301106. The Permit and Application both pertain to a fly ash disposal facility in Duncan Township, Tioga County.

On June 14, 1991 Phoenix filed Motions for Summary Judgment in both appeals. DER filed its responses on July 15, 1991 and filed Motions to Dismiss two days later. Phoenix replied to DER's responses to the Summary Judgment Motions on July 30, 1991 and responded to the Motions to Dismiss on August 6, 1991. DER replied to the Phoenix responses on August 9, 1991.

The Phoenix Motions request summary judgment on the basis that there is no dispute about the fact that DER has withheld action solely because of its belief that Antrim Mining, Inc. (Antrim) had degraded a discharge at one of its surface coal mines. Antrim and Phoenix apparently are owned by the same family. Moreover, Solid Waste Management Permit No. 301025 (which is the subject of the appeal docketed at 91-122) was issued in Antrim's name and is to be transferred to Phoenix as part of the requested reissuance. There being no dispute about this fact, according to Phoenix, it is entitled to judgment as a matter of law because permits under the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, cannot be denied because of violations 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.*

DER's Motions claim that the appeals should be dismissed because the Board lacks jurisdiction to review alleged inaction on DER's part. Three cases are cited in support: *Marinari v. Commonwealth, Dept. of Environmental Resources*, 129 Pa. Cmwlth. 569, 566 A.2d 385 (1989); *Westinghouse Electric Corporation v. DER*, 1990 EHB 515; and *S.A. Kele Associates v. DER*, Board docket No. 90-223-F, Opinion and Order issued May 28, 1991. *Marinari* was a

mandamus action seeking to compel DER to act on an application for permit modification pending for nearly two years. DER's preliminary objection arguing that Marinari had an adequate remedy at law by appeal to this Board was rejected by Commonwealth Court with the following observation:

> The EHB is not statutorily authorized to exercise judicial powers in equity. Its power and duty are to hold hearings and issue adjudications on DER's orders, permits, licenses or decisions. Because DER had done none of these things, [Marinari's] remedy does not lie with the EHB, contrary to its assertion. (566 A.2d at 387)[1]

Relying on the *Marinari* decision, the Board dismissed an appeal in the *Westinghouse* case that sought review of DER's failure to reconsider effluent limits. In reaching its conclusion, the Board rejected Westinghouse's argument that DER's failure or refusal to act constituted a "decision" or "action." A similar contention was repudiated in the *Kele* decision where the appeal challenged DER's failure or refusal to act on a private request to revise an official sewage facilities plan.

Phoenix attempts to avoid these decisions by maintaining that the present appeals do not involve DER "inaction" but DER's "decision" to withhold permits because of Antrim's alleged mining violations. This "decision," according to Phoenix, is clearly shown in affidavits, depositions and answers to interrogatories.

The Board's jurisdiction, as set forth in §4(a) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(a), is limited to "orders, permits, licenses or decisions" of DER. The Board's Rules

---

[1] Subsequent to Commonwealth Court's decision on DER's preliminary objections, DER denied the application. In its subsequent opinion, *Marinari v. Commonwealth, Dept. of Environmental Resources*, ____ Pa. Cmwlth. _____, 583 A.2d 56 (1990), Commonwealth Court ruled that Marinari had to seek relief by appeal to this Board from the denial.

of Practice and Procedure refer to these collectively as DER "action." This item is defined in §21.2(a) to include an "order, decree, decision, determination or ruling by [DER] affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to construct sewers or treatment facilities; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties."

This definition is necessarily expansive because of the many types of actions DER can take under the numerous statutes it administers. Yet, it was never intended that the Board would have jurisdiction to review the many provisional, interlocutory "decisions" made by DER during the processing of an application. It is not that these "decisions" can have no effect on personal or property rights, privileges, immunities, duties, liabilities or obligations; it is that they are transitory in nature, often undefined, frequently unwritten. Board review of these matters would open the door to a proliferation of appeals challenging every step of DER's permit process before final action has been taken. Such appeals would bring inevitable delay to the system and involve the Board in piecemeal adjudication of complex, integrated issues. We have refused to enter that quagmire in the past, *JEK Construction Company, Inc. v. DER*, 1990 EHB 535, *Municipal Authority of Buffalo Township v. DER*, 1988 EHB 608, *North Penn Water Authority v. DER*, 1988 EHB 215, *Swatara Township Authority v. DER*, 1987 EHB 757, *Lancaster County Network v. DER*, 1987 EHB 592, and see no sound reason for entering it now.

Phoenix and every other permit applicant distressed by what it considers to be improper DER delay can request Commonwealth Court to invoke its equity powers to grant relief. As noted in the *Marinari* case, *supra*, the Board has no such powers.

ORDER

AND NOW, this 16th day of October, 1991, it is ordered as follows:

1. The Motions for Summary Judgment, filed by Phoenix, are denied.
2. The Motions to Dismiss, filed by DER, are granted.
3. The appeals are dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
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: October 16, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Carl B. Schultz, Esq.
Central Region
For Appellant:
Stephen C. Braverman, Esq.
Stephen G. Allen, Esq.
BUCHANAN INGERSOLL
Harrisburg, PA
sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAF

WASHINGTON TOWNSHIP CONCERNED CITIZENS	:	
	:	
v.	:	**EHB Docket No. 90-152-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 17, 1991**
and GABEL ENTERPRISES, INC., Permittee	:	

OPINION AND ORDER SUR LETTER/MOTION FOR RECONSIDERATION

By Terrance J. Fitzpatrick, Member

Synopsis

A letter/motion for reconsideration of a Board decision which granted the Department of Environmental Resources' (DER) motion to dismiss is denied. As stated in the Opinion dismissing the appeal, the Board lacks jurisdiction to review DER's decisions whether to initiate enforcement proceedings.

OPINION

This Opinion involves an appeal by the "Washington Township (Berks County) Concerned Citizens" (Citizens) filed April 18, 1990. On February 8, 1991, we issued an Opinion and Order granting DER's motion to dismiss this appeal. In our Opinion, we found that the Citizens' appeal was based upon the assertion that DER had failed to enforce conditions in a non-coal mining permit issued to Gabel Enterprises, Inc. (Gabel). As we stated in our Opinion, the Board lacks authority to review exercises of DER's prosecutorial discretion. Edney v. DER, 1989 EHB 1356, Downing v. Commonwealth, Medical Education and Licensure Board, 26 Pa. Commw. 517, 364 A.2d 748 (1976).

In their letter/motion for reconsideration, the Citizens bluntly allege that the Board's dismissal of their appeal was a "transparent act of bias." The Citizens also emphasize the harm which they contend is occurring as a result of Gabel's allegedly illegal operations.

The Board will generally grant reconsideration in only two situations: where the decision is based upon legal grounds which the parties have not considered and have not had a chance to brief, or where there is new evidence which would justify reversal of the decision and the evidence could not, with due diligence, have been offered at the original hearing. 25 Pa. Code §21.122. The letter/motion referred to above does not satisfy these standards; therefore, it will be denied.

There is probably nothing we can say to convince the Citizens that we are not the cowardly, heartless bureaucrats they portray in their letter/motion. Certainly, the Board strives to issue decisions which are just and fair. What the Citizens apparently fail to grasp, however, is that a desire to do justice does not justify attempted excursions beyond our jurisdiction. As we stated in our Opinion dismissing this appeal, the Board only has jurisdiction to review "actions", not "inactions", of DER. Westinghouse Electric Corp. v. DER, 1990 EHB 515. In addition, the decision to initiate an enforcement action is within DER's prosecutorial discretion, and such a decision is not subject to review by either the Board or the Courts. Edney v.

DER, 1989 EHB 1356, Downing v. Commonwealth, Medical Education and Licensure Board, 26 Pa. Commw. 517, 364 A.2d 748 (1976).[1]

The Citizens have not stated persuasive grounds for granting reconsideration; therefore, their letter/motion will be denied.

---

[1] With regard to the Citizens' query why we did not inform them when they filed the appeal that we lacked jurisdiction, we did not become aware of the issue until DER filed its motion to dismiss. While the Board will raise jurisdictional issues when it sees them, it has no affirmative duty to scrutinize every appeal to see if such issues exist.

ORDER

AND NOW, this 17th day of October, 1991, it is ordered that the letter/motion for reconsideration filed by the Washington Township Concerned Citizens is denied.

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: October 17, 1991

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
Louise Thompson, Esq.
Southeast Region
For Appellant:
Robert D. Barnes
Bechtelsville, PA
For Permittee:
Paul R. Ober, Esq.
Reading, PA

jm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAF

GEORGE W. HATCHARD	:	
	:	**EHB Docket No. 88-057-W**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 22, 1991

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

By Maxine Woelfling, Chairman

Synopsis

An appeal of a permit denial pursuant to the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.* (Dam Safety and Encroachments Act), is dismissed. The Department of Environmental Resources (Department) is justified in denying a permit to fill wetlands to create a parking lot extension where the permit applicant fails to demonstrate that filling the wetlands will not cause environmental harm, that the parking lot extension must be located in or near water, and that it will provide a public benefit. Finally, consultation with other governmental agencies does not taint the permit review process under Chapter 105.

INTRODUCTION

This matter was initiated by the March 2, 1988, filing of a notice of appeal by George W. Hatchard (Hatchard) seeking review of a January 28, 1988, letter from the Department denying Hatchard's after-the-fact application to place fill in approximately 5,400 square feet of wetlands along Red Run in Mount Pocono Borough, Monroe County, Pennsylvania. The Department denied

Hatchard's permit application because, *inter alia*, Hatchard did not adequately address the need for the fill and did not present sufficient information regarding alternatives in location and design. As a result of these deficiencies, the Department concluded that the fill would destroy aquatic habitat without creating a concomitant public benefit.

The Department filed a motion for summary judgment on October 11, 1988, alleging that because Hatchard did not appeal the U.S. Army Corps of Engineers' (Corps of Engineers) denial of a permit to fill the wetlands and its order to restore the site, those actions were final orders and the Department was barred from granting a permit in contravention of the Corps of Engineers' actions. The Department's motion was denied at 1987 EHB 442 because the Department failed to demonstrate that it was entitled to judgment as a matter of law in that it cited no authority for its position that it was compelled to deny Hatchard's permit application as a result of the Corps of Engineers' actions.

The Board conducted a hearing on the merits on September 27, 1990. Hatchard submitted his post-hearing brief to the Board on November 14, 1990, and the Department filed its brief on December 28, 1990. Any issues not raised in the parties' post-hearing briefs are deemed waived. Lucky Strike Coal Co. and Louis J. Beltrami v. Department of Environmental Resources, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988).

In his post-hearing brief, Hatchard contends that the permit review process was defective because the Department failed to weigh the social and economic benefits to the public against the harm to the environment as is required by 25 Pa. Code §105.16(a), and because the Department considered comments from other governmental agencies regarding the Hatchard permit application.

The Department, meanwhile, maintains in its post-hearing brief that denial of the permit was appropriate because filling the wetlands adversely affected the environment and because the permit application failed to address possible alternatives or explain why the project had to be near water. With regard to the specific issues raised in Hatchard's post-hearing brief, the Department responded that it does indeed have the authority to consider input from other agencies when reviewing permit applications under the Dam Safety and Encroachments Act and that the Department need not consider mitigation measures when the applicant fails to submit a specific mitigation plan and an adequate alternatives analysis.

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

FINDINGS OF FACT

1. Appellant is George W. Hatchard, owner of property at 663 Pocono Boulevard (Route 611), located one-half mile north of the intersection of Routes 940 and 196 in the Borough of Mount Pocono, Monroe County (site). (Stip. ¶ 4; N.T. 7)[1]

2. Appellee is the Department, the agency with the authority to administer and enforce the Dam Safety and Encroachments Act and the rules and regulations adopted thereunder at 25 Pa.Code §105.1 *et seq.*

3. The site has an office building constructed upon it and contains wetlands areas (wetlands). (Stip. ¶ 6; N.T. 8, 49)

---

[1] N.T.___ indicates a reference to a page in the hearing transcript of the hearing on the merits; Ex. C-___ indicates a reference to the Department's exhibits; Ex. H-___ indicates a reference to Hatchard's exhibits; and Stip. ¶___ indicates a reference to a paragraph in the parties' pre-hearing stipulations.

4. Mt. Pocono Family Care Center (Family Care Center) and Rent-A-Wreck automotive rentals (Rent-A-Wreck) are among the tenants at the site. (N.T. 8-11, 48)

5. A parking lot borders the north side of the office building. (Ex. H-11; Ex. C-4)

6. In May, 1985, Hatchard placed fill on approximately 5,400 square feet of wetlands on property along Red Run. (Stip. ¶ 7; N.T. 12, 44; Ex. H-1)

7. Hatchard added fill to the wetlands without obtaining necessary permits from the Department or the Corps of Engineers. (Stip ¶ 7)

8. The wetlands area filled by Hatchard lies just north of the parking lot and south of the berm supporting an impoundment overflow pipe which runs from east to west. (Ex. H-11; Ex. C-4)

9. The wetlands area Hatchard filled lies approximately 10 yards west of a lake; seeping water from the lake probably supported the wetlands area. (Ex. H-11)

10. Another, larger wetlands area lies north of the impoundment overflow pipe. It is a diverse, saturated wetland frequented by various species of animals. (Ex. H-11; Ex. C-4)

11. After Hatchard had placed the fill on the wetlands, the Corps of Engineers informed him that such activity was illegal without a permit. (Stip.¶ 9; N.T. 12)

12. Hatchard applied for an "after-the-fact" permit from the Corps of Engineers; the Corps of Engineers denied the permit on December 24, 1986, and directed Hatchard to remove the fill and restore the area to its previous condition. (Stip. ¶ 10; N.T. 14-15, 70-73, 171; Ex. C-2)

13. On January 12, 1987, Hatchard submitted an application to the Department requesting an after-the-fact permit. (Stip. ¶ 11; Ex. H-1)

14. By letter dated April 14, 1987, the Department requested that Hatchard submit additional information regarding the need to fill wetlands and alternatives in location, design, and construction. (Ex. H-3)

15. On June 9, 1987, Hatchard responded to the Department's request, stating that no alternatives existed to the proposed project, that the physical condition of the Family Care Center patients necessitated expansion of the parking area into the wetlands, and that he was willing to create 5,400 square feet of new wetlands to replace those that he filled. (Ex. H-4)

16. The assertions in Hatchard's June 9, 1987, letter were supported only by letters from involved medical professionals. (Ex. H-4)

17. Since Hatchard did not submit any narrative, plans, or maps analyzing alternatives in location, design and construction, the Department did not receive sufficient information regarding an alternatives analysis. (N.T. 116)

18. Alternatives exist which would allow Hatchard to extend the parking lot area without destroying wetlands. (N.T. 45-47)

19. Rent-A-Wreck stores vehicles on the lot, taking up spaces which might otherwise serve as additional parking for the Family Care Center. (N.T. 48-49)

20. The parking needs of the Family Care Center could be met by designating parking spaces adjacent to the facility for the exclusive use of patients. (N.T. 45-46)

21. The Department's file on the Hatchard permit application contained comments solicited from other government agencies, including the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, the Corps of Engineers, the Pennsylvania Fish Commission (Fish Commission), and the Pennsylvania Game Commission. (N.T. 97, 111-112)

22. The comments from the U.S. Fish and Wildlife Service consisted of a letter from field supervisor Charles Kulp, dated December 13, 1985, which encouraged the Corps of Engineers to deny Hatchard's federal permit application. (Ex. H-13)

23. Kulp's letter of December 13, 1985, also contended that Hatchard had a history of involvement with wetlands violations under §404 of the federal Clean Water Act, 33 U.S.C.A. §1344. (Ex. H-13)

24. The comments from the Pennsylvania Fish Commission in the Department's file consisted of two letters from Ron Tibbot, a hydraulic engineering technician, dated March 18, 1987, and August 21, 1987, recommending that the Department deny Hatchard's permit application. (Ex. C-1, Ex. C-5)

25. On or about July 9, 1987, Khervin Smith, Chief of Environmental Review for the Department's Division of Rivers and Wetlands Conservation, conducted an on-site investigation. (N.T. 100-102; Ex. H-11)

26. The Department decided to conduct the July 9, 1987, examination of the site because information contained in the permit application was inconsistent with information contained in the comments from other agencies. (N.T. 100)

27. The Department relied on the comments from other agencies only to focus its investigation; it conducted an independent evaluation of Hatchard's permit application. (N.T. 100, 119-122)

28. Parking for the Family Care Center is not a water-dependent activity. (N.T. 116)

29. The fill deposited by Hatchard on the site is not necessary to sustain a water-dependent activity. (N.T. 116)

30. The wetlands area filled by Hatchard is of moderate quality. (N.T. 144-145)

31. The wetlands, which are interconnected to Tunkhannock Creek through its Red Run tributary, serve flood control purpose if Tunkhannock Creek should overflow. (N.T. 145-146, 148)

32. The wetlands filter pollutants which run off from Route 611 before the pollutants reach Red Run. (N.T. 146-147)

33. Tunkhannock Creek watershed is a source of water supply for the Bethlehem Water Authority. (N.T. 148)

34. Placement of fill in the wetlands by Hatchard destroyed the aquatic habitat. (N.T. 119-121)

35. Placement of fill in the wetlands has resulted in environmental harm. (N.T. 147)

DISCUSSION

Under 25 Pa. Code §21.101(c)(1), a party appealing the denial of a permit by the Department bears the burden of proof. Edward Davailus et al. v. DER, EHB Docket No. 88-407-F (Adjudication issued July 22, 1991). We will not substitute our discretion for that of the Department unless Hatchard shows that the denial of the permit was arbitrary, capricious, contrary to law, or a manifest abuse of discretion, Warren Sand and Gravel Co., Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), nor will the Board mandate the issuance of the permit unless Hatchard proves he is clearly entitled to it. Sanner Brothers Coal Co. v. DER, 1987 EHB 202.

Very simply, Hatchard contends that he is entitled to a permit because the Department erroneously failed to balance the social and economic benefits of his project against the harm to the environment, as is required by 25 Pa. Code §105.16(a). Hatchard's argument belies the complex nature of the

permit application review process by focusing on a very narrow portion of it and, more importantly, ignores the conclusion in the Department's denial letter that the project would destroy aquatic habitant without a corresponding public benefit.

Section 9(a) of the Dam Safety and Encroachments Act authorizes the Department to grant a permit "if it determines that the proposed project complies with the provisions of this act and the regulations adopted hereunder...." An application to place fill in the wetlands must be in accordance with the requirements, *inter alia*, of 25 Pa. Code §§105.14, 105.16, 105.21, and 105.411.[2]

A number of these criteria relate to evaluation of the harms and benefits of a proposed project. For instance, Section 105.14(b)(7) directs the Department to consider whether a proposed project needs "to be located on or in close proximity to the water," as well as "alternatives in location, design, and construction which are available to minimize the adverse impact of the project upon the environment...." Similarly, §105.16(b) requires that projects involving the discharge of fill material not be approved "unless the applicant demonstrates and the Department finds that the benefits of the proposed project outweigh the harm to the environment and public natural resources". And, §105.411(3) prohibits the Department from approving an

---

[2] The Department did not contend here that the fill proposed by Hatchard affected "important wetlands" and was, therefore, subject to 25 Pa. Code §105.17. As we noted in Davailus, *supra*, there seems to be no practical distinction between what the Department characterizes as "important wetlands" and "wetlands" in general. The evidence on the record which indicates that these wetlands provide filtration of pollutants which may reach the Tunkhannock Creek watershed via runoff from Route 611, as well as flood storage capacity for the watershed, tends to lead to the conclusion that these wetlands constitute "important wetlands" under 25 Pa. Code §§105.17(a)(3) and (5). Yet, the Department did not treat these wetlands as "important wetlands".

application to discharge fill material into a wetlands area unless the applicant demonstrates there is "a public benefit which outweighs the damage to the public natural resources,..."

Hatchard did not present any evidence concerning the lack of environmental harm from the fill material. Moreover, he failed to rebut the evidence presented by the Department concerning the destruction of the aquatic habitat, the loss of pollutant filtration and the interference with flood storage capacity which result from the wetlands fill. Based on the evidence presented, we must conclude, as the Department did, that the project will result in environmental harm.

As for the need of the proposed project to be located in or near water, Hatchard's permit application did not address this issue when it was submitted (Ex. H-1), and the Department requested additional information concerning the justification for the project (N.T. 99-100; Ex. H-3).[3] Similarly, Hatchard's permit application initially failed to present and analyze alternatives to filling the wetlands to create parking spaces. When the Department requested additional information, Hatchard responded with a letter of his own and three letters from individuals at Family Care Center, one of the tenants in the office building (Ex. H-4). None of the letters Hatchard included addressed why the project had to be in or near water or what other alternatives existed; they merely set forth the conclusion, on the writer's part, that the project was the best of the available alternatives.[4]

---

[3] Under 25 Pa.Code §105.13(d) the Department is authorized to request any additional information which is necessary to determine compliance with Chapter 105.

[4] Hatchard's letter went so far as to say that there were no other
footnote continued

The evidence simply does not support the conclusion that there was either a need to locate the additional parking spaces in the wetlands area or that it was the alternative that would minimize any environmental impacts.

Hatchard contends that extending the parking area into the wetlands is the best alternative because the wetland area is close to the facility and Family Care Center is attracting increasing numbers of patients, many of whom are in ill-health and must park near the clinic (Ex. H-4). Assuming, *arguendo*, that there are increasing numbers of patients at the Family Care Center, the evidence presented at the hearing indicates that a number of plausible alternatives existed, some of which were more convenient for the patients at the Family Care Center. The most obvious was to designate parking spaces adjacent to the medical facility for handicapped or hospital use only, then extend the parking lot in non-wetland areas to accommodate any increase in parking demand (N.T. 46-48). In addition, Hatchard could allocate some of the parking lot extension for Rent-A-Wreck vehicles, which currently occupy parking spaces which might otherwise be available for the Family Care Center (N.T. 45-46).

What we are presented with here is a proposal which will result in adverse environmental impact. The applicant has failed to demonstrate any need for the obstruction to be placed in wetlands, as is required by §105.14(b)(7) and has failed to demonstrate that there is any public benefit in accordance with 25 Pa. Code §105.16(a). There are alternatives which do not involve placement of fill in wetlands that are more suitable and

---

continued footnote
alternatives. Dr. Keuler's letter to Hatchard, one of the three letters Hatchard included with his own to the Department, contradicts this, however. Dr. Kueler wrote, in part: "Recently, [Hatchard] presented to me several sites for the expansion of the existing parking facilities." In addition, the other two letters alluded to an alternative Hatchard considered across the street from the office building.

convenient. There is nothing here for the Department to balance under 25 Pa. Code §105.16, for there is no public benefit and there is no means, short of not filling the wetlands, to avoid the environmental harm. Edward Davailus et al., *supra*. Thus, there is also no need to evaluate mitigation measures. Since approval of the permit application would be contrary to 25 Pa. Code §§105.14(b)(7), 105.16(b), and 105.411(3), the Department's action in denying Hatchard's permit application was not an abuse of discretion.

Hatchard also contends that the Department somehow compromised the permitting process by considering comments from the Fish Commission, the U.S. Fish and Wildlife Service, and other governmental agencies. In the case of the Fish Commission, the Department is mandated by §9(a) of the Dam Safety and Encroachments Act to ascertain whether a permit application is in compliance with laws administered by the Fish Commission; the logical way to accomplish this is to solicit comments from and/or consult with the Fish Commission. Section 17(d) of the Dam Safety and Encroachments Act also authorizes the Department to consult with federal agencies such as the Corps of Engineers and the U.S. Fish and Wildlife Service. Moreover, there is nothing in the record to substantiate a conclusion that the Department did not independently reach the conclusion that Hatchard's permit application could not be approved; the comments[5] of the other agencies were only one part of the Department's evaluation. As such, the Department did not abuse its discretion.

---

[5] Under 25 Pa. Code §105.19(a), the Department must publish notice in the Pennsylvania Bulletin of its receipt of permit applications. The comments, objections, and other information received from interested persons, local governments, and other state and federal agencies are a valuable part of the permitting process.

Because Hatchard has failed to sustain his burden of proving that the Department abused its discretion, the denial of his permit application by the Department must be sustained.

CONCLUSIONS OF LAW

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

2. A party appealing the denial of a permit by the Department bears the burden of proving by a preponderance of the evidence that the Department abused its discretion. 25 Pa. Code §21.101(c)(1).

3. Hatchard failed to sustain his burden of proving that his proposed project would not cause environmental harm.

4. Hatchard failed to demonstrate that there was any need for his proposed project to be located in the wetlands or that there was any public benefit in doing so.

5. Where an applicant cannot demonstrate that a project will not cause environmental harm, that it must be located in or near water, or that it will provide a public benefit, the Department does not abuse its discretion in concluding that the project will result in environmental harm without any corresponding public benefit.

6. There is no need to consider mitigation measures where a project will cause environmental harm without having any public benefits.

7. The Department did not abuse its discretion in consulting with the Fish Commission and federal agencies. §§9(a) and 17 of the Dam Safety and Encroachments Act.

O R D E R

AND NOW, this 22nd day of October, 1991, it is ordered that the appeal of George W. Hatchard 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

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 22, 1991

cc: **DER, Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Nels J. Taber, Esq.
Central Region
For Appellant:
Mark S. Love, Esq.
MILLER AND LOVE
Mt. Pocono, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	EHB Docket No. 90-538-CP-W
U. S. WRECKING	:	Issued: October 23, 1991

OPINION AND ORDER
SUR PRELIMINARY OBJECTIONS

By Maxine Woelfling, Chairman

Synopsis

A preliminary objection in the form of a demurrer is sustained in a case involving a complaint for the assessment of civil penalties. The Board will treat a motion to strike as a demurrer where it is used to test the legal sufficiency of a claim. The Board will grant the demurrer where it is apparent from the pleadings that a defendant cannot prove facts legally sufficient to establish its right to attorneys fees.

OPINION

This matter was initiated by the Department of Environmental Resources (Department) on December 11, 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. 2119 (1959), as amended, 35 P.S. §4001. et seq.. The complaint alleged that U. S. Wrecking, Inc. (U. S. Wrecking) violated various provisions of the Air Pollution Control Act and the Department's rules and

regulations when it began demolishing a feed mill and surrounding buildings containing asbestos located at 711 Rohrerstown Road, in East Hempfield Township, Lancaster County without notifying the Department of this activity.

U. S. Wrecking did not answer the Department's complaint until May 13, 1990, after it had received a notice that the Department intended to seek a default judgment. The prayer for relief in U. S. Wrecking's answer requested the award of attorneys fees and costs.

On May 22, 1991, the Department filed preliminary objections to U. S. Wrecking's answer. First, the Department moved the Board to strike off U. S. Wrecking's prayer for relief, averring that it failed to state a claim and failed to comply with the Rules of Civil Procedure. In addition, the Department demurred to U. S. Wrecking's request for attorney fees, alleging that U. S. Wrecking failed to plead certain facts necessary to establish that it was entitled to attorneys fees.

The Board will treat U. S. Wrecking's prayer for relief as an additional claim. Similarly, the Department's motion to strike off will be treated as a demurrer, since it is being used to test the legal sufficiency of a claim. DER v. U. S. Wrecking, 1990 EHB 1474.

Preliminary objections in the form of demurrer will be sustained only when it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish his right to relief. Firing v. Kephart, 466 Pa 560, 353 A.2d 833 (1976). Based upon the information filed in its answer, U. S. Wrecking cannot prove facts legally sufficient to establish its right to attorney fees.

The Board requires express statutory authority to award attorney fees. U. S. Wrecking has not cited any authority for its request for attorney

fees. To our knowledge, the only applicable authority for doing so is the Act of December 13, 1982, P.L. 1127, 71 P.S. §2031 et seq., commonly referred to as the Costs Act. However, any request by U. S. Wrecking for attorneys fees under the Costs Act is premature and speculative, since this matter has not yet been adjudicated. DER v. U. S. Wrecking, 1990 EHB 1473, at 1478-9.

Since U. S. Wrecking has failed to plead facts which would entitle it to the relief requested, the Board will sustain the Department's demurrer for failure to state a cause of action.

O R D E R

AND NOW, this 23rd day of October, 1991, it is ordered that the Department's demurrer to U. S. Wrecking's prayer for relief, which prayer is treated as a counterclaim, is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: October 23, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Michael Heilman, Esq.
Western Region
For Defendant:
Thomas E. Harting, Esq.
Lancaster PA

rm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAR

MUSTANG COAL & CONTRACTING CORPORATION	:	
	:	
v.	:	**EHB Docket No. 89-494-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 24, 1991**

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

By Joseph N. Mack, Member

Synopsis

DER has sustained its burden of proof in this appeal of a civil penalty assessed for conducting mining activities beyond the bonded, permitted area of a surface mine. Where DER finds that an operator has conducted surface mining activities on an area which is not covered by the surface mining permit and orders that mining be ceased until the violation is corrected, DER is required to assess a civil penalty pursuant to 25 Pa.Code §86.193 and §86.194(c).

Procedural History

This matter arose on October 20, 1989 with the filing of a notice of appeal by Mustang Coal & Contracting Corporation (Mustang) from a civil penalty in the amount of $11,000 assessed against Mustang by the Department of Environmental Resources (DER) on September 22, 1989, for alleged violations 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.*; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; and the regulations promulgated thereunder. The penalty was assessed in connection with Compliance Order No. 894077, which was issued to Mustang on July 3, 1989 for allegedly conducting surface mining off the area covered by its mining permit at the Chandler site in Woodward Township, Clearfield County. The Compliance Order was not appealed.[1]

Mustang filed its pre-hearing memorandum on February 14, 1990. On February 23, 1990, DER moved to dismiss the appeal or in the alternative to strike the pre-hearing memorandum for failure to comply with the Board's Pre-hearing Order No. 1. Mustang filed objections to DER's motion to dismiss or strike on March 15, 1990, and enclosed various documentation, to which DER replied on April 4, 1990. By Order of June 11, 1990, the presiding Board member denied DER's motion to dismiss but granted the motion to strike, and ordered Mustang to file a pre-hearing memorandum complying with the requirements of Pre-hearing Order No. 1.

Mustang filed an amended pre-hearing memorandum on July 2, 1990. DER again moved to dismiss on July 6, 1990, which motion Mustang opposed on August 3, 1990. By Order of August 9, 1990, the presiding Board member denied DER's

---

[1]On March 1, 1990, Mustang was issued Compliance Order No. 904019 for allegedly mining off the surface area covered by Surface Mining Permit No. 17890106 at a site known as the Henderson Job in Woodward Township, Clearfield County. Mustang appealed the issuance of the Compliance Order on March 13, 1990, and it was consolidated with the present appeal. However, that appeal was withdrawn by Mustang's president at the start of hearing on January 10, 1991. The withdrawal of that appeal was confirmed by letter dated March 6, 1991, which was filed with the Board on March 13, 1991. (T. 7-8)

renewed motion to dismiss, but limited the testimony and evidence which Mustang was permitted to introduce at hearing to that which was included in its pre-hearing memorandum.

A hearing was held on January 10 and 11, 1991. Post-hearing briefs were filed by DER on April 23, 1991 and Mustang on April 25, 1991. Any matters not raised by the parties in their post-hearing briefs are deemed to have been waived. Laurel Ridge Coal, Inc. v. DER, 1990 EHB 486. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. The Appellant is Mustang Coal and Contracting Corporation, whose business address is P.O. Box 188, Houtzdale, Pennsylvania. (Notice of Appeal)

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, the State agency authorized to administer and enforce the CSL, SMCRA, and the rules and regulations promulgated thereunder.

3. Peter R. Swistock, Jr. is the president of Mustang. (T. 228)[2]

4. At the time the civil penalty which is the subject of this appeal was assessed, Mustang was the operator of a surface mine in Woodward Township, Clearfield County, Pennsylvania, known as the Chandler site, pursuant to Surface Mine Permit (SMP) No. 17823174. (Ex. C-2)

5. Mustang mined the Chandler site from April 14, 1981 through 1989. (T. 228)

---

[2]References to "T. ___" are references to a page in the transcript of the hearings. References to "Ex. C- ___" are to Commonwealth DER exhibits, and references to "Ex. A-___" are to appellant Mustang's exhibits.

6. On January 26, 1989, DER Inspector Eugene F. Lynch inspected the Chandler site in response to complaints by neighboring property owners that ribbon markers, designating the boundaries of the permitted area, had been moved. (T. 137, 141, 145)

7. As a result of Mr. Lynch's inspection, a notice of violation (NOV) was issued to Mustang on January 26, 1989. (T. 145, 154)

8. On February 27, 1989, DER issued Compliance Order (CO) 894011T which required Mustang to have the Chandler permit area surveyed and marked by durable boundary markers. (Ex. C-7)

9. In response to CO894011T, on March 13 and 14, 1989 Mustang placed durable boundary markers at the site. (T. 151-153; Ex. C-8)

10. Measurements taken at the site on March 22, 1989 by Mr. Lynch and Inspector Ike Isaacson of the federal Office of Surface Mining (OSM) showed that mining had progressed 200 to 300 feet off the permit area. (T. 155, 156, 158)

11. In response to CO894011T, Mustang contacted Ronald Lobb Associates to prepare a survey of the Chandler site in March 1989, and the results were sent to the DER Hawk Run office. (T. 152-153; Ex. C-10)

12. The Lobb survey concluded that there was insufficient information available to determine exact property lines. (Ex. C-10)

13. As a result of Mustang installing permanent boundary markers and submitting the Lobb survey, the NOV and CO894011T were lifted on March 31, 1989. (T. 153-154; Ex. C-8)

14. In April 1989, Roland Harper, a mining engineering technician with OSM, performed a survey of the Chandler site at the request of DER. (T. 10, 19, 20)

15. "Closing a survey" means that the survey is able to be completed within approximately 6 inches north, south, east, and west of where the survey commenced. (T. 30) It signifies that the survey is accurate. (T.30)

16. Mr. Harper was able to "close the survey" he conducted at the Chandler site. (T. 30)

17. The purpose of Mr. Harper's survey was to show the location of a highwall where Mustang had mined in relation to certain roads near the Chandler site. (T. 41, 66) From this, Mr. Harper was to generate an overlay to be placed on the map of the permit area. (T. 41)

18. From his survey, Mr. Harper produced a drawing of the map of the area (Ex. C-11) and a mylar overlay of the map (Ex. C-12). (T 22, 24)

19. Mr. Harper's original surveyed drawing did not contain his professional seal. (T. 23) Mr. Harper does not normally place his professional seal on drawings. (T.23) The lack of a seal on a surveyed drawing does not reduce its accuracy. (T. 23)

20. Mr. Harper was later required to seal the drawing at the request of his supervisor. (T. 24)

21. Ex. C-12 shows the location of the highwall from Mustang's mining at the Chandler site. (T. 33-34; Ex. C-12)

22. Ex. C-1 is an operations map of the Chandler site and shows the boundary of the area covered by the SMP. (T. 88; Ex. C-1)

23. When Ex. C-12 is aligned over Ex. C-1, the southern limit of the highwall is located south of the southern boundary of the area covered by the Chandler SMP. (T. 98, 124; Ex. C-1, C-12)

24. DER Mine Inspector Supervisor John Varner at various times observed mining and coal removal by Mustang taking place off the permitted and bonded area near the location of the highwall. (T. 123)

25. On July 3, 1989, a second compliance order, C0894077, was issued to Mustang, again for conducting mining activities off the permit area at the Chandler site. (T. 123-124, Ex. C-15)

26. C0894077 required Mustang to "cease operation and submit to [DER] all necessary materials and information, and bond, required to apply for a surface mine permit or commence reclamation of all disturbed area..." by July 24, 1989. (Ex. C-15, T. 180)

27. Prior to the issuance of C0894077, Mustang had applied for a permit to mine an area known as "the Henderson site." DER received the application on March 3, 1989 and processed it on March 7, 1989. (T. 90-91; Ex. C-16)

28. The Henderson site is located southeast of and contiguous to the Chandler site and includes the area on which the highwall discussed in Findings of Fact 21, 23, and 24 was located. (T. 88-89, 125-126)

29. The permit for the Henderson site was issued July 7, 1989. (T. 92; Ex. C-17)

30. The Henderson permit lists special conditions dealing with bonding for the area on which the highwall was located. (T. 126; Ex. C-17)

31. Issuance of the permit for the Henderson site lifted the cease order of C0894077. (T. 125, 130)

32. The Henderson permit was an extension to the Chandler site. (T. 88)

33. When an operator mines off the permit area, DER's procedure is to issue a cease order as was done in this case. (T. 197)

34. This procedure is followed even though a permit application may be pending for the affected area. (T. 198)

35. On September 22, 1989, a civil penalty in the amount of $11,000 was assessed against Mustang in connection with C0894077. The penalty assessment was appealed by Mustang on October 20, 1989 at Docket No. 89-494-MJ. (Notice of Appeal)

36. DER Compliance Specialist Timothy Grieneisen calculated the amount of the civil penalty. (T. 206-208, 212, 214; Ex. C-20, C-22)

37. Mustang is challenging only the fact of the violations underlying the penalty assessment and whether any penalty should have been assessed; it is not challenging the amount of the penalty. (T. 209-210)

38. Mustang conducted surface mining activities on an unbonded and unpermitted area. (T. 98, 123, 124; Ex. C-1, C-12)

DISCUSSION

In this appeal of a civil penalty assessment issued on September 22, 1989, Mustang is challenging the alleged violation on which the penalty was based, i.e. conducting surface mining activities on an unpermitted and unbonded area, and the issuance of a penalty assessment for said violation. It is not challenging the amount of the penalty assessed. (F.F. 37)[3] Therefore, if we find that Mustang committed the violation with which it is charged and that DER acted pursuant to statute and the regulations in assessing a penalty thereon, we need not determine whether the amount of the

---

[3]A reference to "F.F. ___" is a reference to a Finding of Fact in this adjudication.

penalty is reasonable. DER carries the burden of proving both the alleged violation and whether a penalty assessment was appropriate. 25 Pa.Code §21.101(a) and (b)(1).

DER argues that the testimony and evidence presented at hearing clearly show that the highwall from Mustang's mining was more than two-hundred feet beyond the Chandler site permit boundary and, therefore, satisfies DER's burden of proving that Mustang's mining activity extended into an unpermitted area. In response, the only defense presented by Mustang in its notice of appeal and pre-hearing memorandum is that Mustang at all times mined in accordance with the terms of its permit and the applicable statutes and regulations. In support of its position, Mustang relies primarily on the survey performed by Ronald Lobb Associates and questions the accuracy of the survey conducted by Roland Harper of OSM.

The results of the survey performed by Ronald Lobb Associates ("the Lobb survey") were introduced at the hearing as Ex. C-10. Mustang had this survey performed in response to C0894011T issued on February 27, 1989. (F.F. 11). According to the report accompanying the survey, the results of the survey were inconclusive, showing a number of "overlaps and gaps" in determining the Swistock property line. The final page of the letter from Lobb stated, "This will obviously require considerable time and expense in both surveying and legal resolution of the problems." No further work was done in attempting to resolve the deficiencies. Thus, the Lobb survey provides little support for Mustang's contention that at all times it mined and reclaimed within the permit boundaries.

On the other hand, Roland Harper's mylar map which shows the location of the highwall resulting from Mustang's mining, when aligned over the

operations map showing the permit boundaries of the Chandler site, clearly shows that the highwall extends beyond the permit boundaries. (F.F. 23; Ex. C-1 and C-12). DER Mine Inspector Supervisor John Varner testified that, at various times, he observed mining and coal removal taking place near the location of this highwall. (F.F. 24).

Mustang questioned the accuracy of the Harper survey because the original surveyed drawing submitted by Mr. Harper in April 1989 did not contain his professional seal, and he did not place his seal on it until later requested to do so by his supervisor. However, Mr. Harper testified that he does not normally place his professional seal on survey drawings in the course of his work, and that simply because a drawing is unsealed does not diminish its accuracy. (F.F. 19 and 20). In addition, measurements taken at the site by DER Inspector Eugene Lynch and OSM Inspector Ike Isaacson on March 22, 1989 revealed that mining had progressed 200 to 300 feet off the permit area. (F.F. 10).

The evidence presented by DER clearly shows that Mustang did in fact conduct mining activities beyond the bonded permit area. Mustang offered nothing which would rebut this finding. Mining an unbonded area constitutes a violation of §4(d) of SMCRA, 52 P.S. §1396.4(d), which requires that, prior to commencing mining, an operator must file a bond with DER covering the land to be affected. In addition, it constitutes a violation of 25 Pa.Code §86.13, which prohibits coal mining activities except pursuant to permit. Therefore, we find that DER has met its burden of proving the underlying violation on which the civil penalty was based.

The next issue concerns whether a penalty was properly assessed for the aforesaid violation. Section 18.4 of SMCRA, 52 P.S. §1396.22, and 25 Pa.

Code §86.193 deal with assessments of civil penalties for coal mining violations. Under §18.4 of SMCRA, DER has the authority to assess a civil penalty for violations of SMCRA, the regulations, orders of DER, or conditions of a permit. Pursuant to 25 Pa.Code §86.193(e),[4] DER is required to assess a civil penalty when an operator conducts surface mining activities on an area for which the operator is not permitted to conduct such activities. Moreover, pursuant to 25 Pa.Code §86.194(c), whenever a violation is included as a basis for an administrative order requiring the cessation of a mining operation, DER must assess a civil penalty for each day the violation continues. Where, as here, DER acts pursuant to a mandatory provision of a statute or regulation, the only question before the Board is whether to uphold or vacate DER's action based on the evidence before us. Warren Sand & Gravel Co. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 204, 341 A.2d 556 (1975). In this case, we have already determined that the evidence clearly supports DER's finding that Mustang mined off the permitted area. (F.F. 38). Based on this, DER was under a mandatory duty to assess a penalty against Mustang pursuant to 25 Pa.Code §86.193(e). Moreover, this violation was the basis of the cessation order of C0894077 which required Mustang to cease mining activities on the unpermitted area and to obtain a bond and permit covering that site. (F.F. 25, 26). Therefore, DER was also required to assess a civil penalty pursuant to 25 Pa. Code §86.194(c).

---

[4]Although DER cites subsection (d) of §86.193, that provision deals with assessing a civil penalty where an operator has violated 25 Pa.Code §86.102, relating to special areas where mining is prohibited or limited. Since there is no evidence indicating any violation of §86.102, we find that subsection (d) of §86.193 is not applicable.

The only question which remains is whether DER abused its discretion in assessing a penalty for mining off the permitted site when at the time of the penalty assessment, Mustang had applied for and obtained a permit to mine the area in question (the Henderson permit). (F.F. 28, 29). In addition, since issuance of the permit for the Henderson site corrected the violation contained in CO894077 in the time specified, it caused the cease order of CO894077 to be lifted. (F.F. 28, 29, 31). Under the provisions of SMCRA, correction of a violation within the period prescribed for its correction does not preclude DER from assessing a civil penalty for the violation. 52 P.S. §1396.22. Therefore, simply because Mustang corrected the violation, by applying for and obtaining a permit and bond coverage for the affected area, did not relieve it from being assessed a penalty for the violation.

Finally, since Mustang is challenging only whether any penalty should have been assessed and not the amount of the penalty, we need not determine the reasonableness of the penalty assessed by DER.

In conclusion, we find that DER has met its burden of proving that Mustang conducted mining activities on an unbonded area not covered by its mining permit. We further uphold DER's assessment of a civil penalty for said violation, as mandated by 25 Pa.Code §86.193(e).

CONCLUSIONS OF LAW

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

2. DER has the burden of proof in this appeal of a civil penalty assessment and the underlying violation on which the penalty is based. 25 Pa.Code §21.101(a) and (b)(1).

3. Coal mining activities may not be conducted except pursuant to a permit issued under Chapter 86 of the regulations. 25 Pa.Code §86.13.

4. Prior to commencing surface mining, an operator must file with DER a bond covering the land to be affected by the operation. 52 P.S. §1396.4(d).

5. Where an operator conducts surface mining activities on an area for which the operator is not permitted to conduct such activities, DER must assess a civil penalty pursuant to the terms of 25 Pa.Code §86.193(e).

6. Whenever a violation is included as a basis for an administrative order requiring cessation of a mining operation, DER must assess a civil penalty for each day the violation continues. 25 Pa. Code §86.194(c).

7. Correction of a violation within the period prescribed for its correction does not preclude DER from assessing a civil penalty for that same violation. 52 P.S. §1396.22.

8. Mustang conducted surface mining activities on an unpermitted and unbonded area in violation of 52 P.S. §1396.4(d) and 25 Pa.Code §86.13.

9. DER acted in accordance with 52 P.S. §1396.22 and 25 Pa.Code §86.193(e) in assessing a civil penalty against Mustang for conducting surface mining on an unbonded and unpermitted area and, therefore, did not abuse its discretion or act arbitrarily in issuing the penalty assessment to Mustang.

10. DER met its burden of proof in this appeal.

O R D E R

AND NOW, this 24th day of October, 1991, the appeal of Mustang Coal & Contracting Corporation, docketed at No. 89-494-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

Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 24, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Kurt J. Weist, Esq.
Central Region
For Appellant:
Peter R. Swistock, Jr.,
President, Mustang Coal
and Contracting Corp.
Houtzdale, PA

rm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

WILLIAM RAMAGOSA, SR., et al.	:	
	:	
v.	:	**EHB Docket No. 89-097-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 28, 1991**

OPINION AND ORDER
SUR
MOTION FOR RECONSIDERATION AND,
ALTERNATIVELY, FOR CERTIFICATION

Robert D. Myers, Member

Synopsis

Reconsideration of an order imposing sanctions for failure to obey a discovery order is denied because the order is interlocutory and there are no exceptional circumstances present. Certification of the order for appeal to Commonwealth Court is denied because it was not requested in a timely manner.

OPINION

Appellants have filed a Motion requesting the Board *en banc* to reconsider the Order sur Motion for Sanctions issued on August 23, 1991, by Administrative Law Judge Robert D. Myers or, in the alternative, to certify the matter for interlocutory appeal to Commonwealth Court. The Order in question imposed sanctions on Appellants for failure to comply with a Board Order of June 4, 1991 directing them to provide written answers to DER's interrogatories. The sanctions (1) established for the purposes of these proceedings certain factual allegations contained in DER's March 10, 1989 Compliance Order and (2) prohibited Appellants from offering evidence on

certain other matters: see Pa. R.C.P. 4019(c)(1) and (2) and 25 Pa. Code §21.124.

In their Motion Appellants challenge Judge Myers' legal conclusion on waiver of objections and his choice of sanctions. The Board's Rules of Practice and Procedure provide for reconsideration when "compelling and persuasive reasons" exist: 25 Pa. Code §21.122(a). Generally, it is granted only in instances where the decision rests on (1) a legal ground the parties have not had an opportunity to brief or (2) erroneous facts: 25 Pa. Code §21.122(a)(1) and (2). Reconsideration of interlocutory orders is granted only in exceptional circumstances: *Luzerne Coal Corporation et al. v. DER*, 1990 EHB 23.

An order imposing sanctions is interlocutory when it does not make a final disposition of an appeal. The August 23, 1991 Order clearly is interlocutory and Appellants have presented no exceptional circumstances to merit reconsideration. Nor are the instances recited in 25 Pa. Code §21.122(a)(1) and (2) present. Appellants simply disagree with the resolution of a discovery dispute fully briefed by both parties. This is never a sufficient basis for reconsideration.

Appellants request, in the alternative, that we certify the Order for interlocutory appeal to Commonwealth Court on the premise that it involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the case. While Appellants do not cite 42 Pa. C.S.A. §702(b), our statutory authority to certify interlocutory orders is derived from that section and is dependent upon the premise stated.

We are unable to entertain Appellants' request because it was filed beyond the 10-day period specified in the General Rules of Administrative

practice and Procedure: 1 Pa. Code §35.225(a). See *In re: Texas Eastern Gas Pipeline Company Litigation*, 1989 EHB 281. Even without this constraint, we would be forced to deny certification with respect to this discovery sanction. Conceding the possibility of a difference of opinion, we fail to see how the issue could possibly be considered a controlling question, the resolution of which would materially advance the ultimate termination of the proceedings. Accordingly, we enter the following:

ORDER

AND NOW, this 28th day of October, 1991, it is ordered that Appellants' Motion for Reconsideration and, Alternatively, for Certification is denied.

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: October 28, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Mary Martha Truschel, Esq.
Central Region
M. Dukes Pepper, Jr., Esq.
Regulatory Counsel
For the Appellants:
Richard B. Ashenfelter, Jr., Esq.
King of Prussia, PA
and
Joseph P. Green, Jr., Esq.
West Chester, PA

sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAI

PARKER TOWNSHIP BOARD OF SUPERVISORS	:	
v.	:	**EHB Docket No. 91-184-MJ**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 28, 1991**

OPINION AND ORDER SUR PETITION TO ORDER INTERVENTION

By Joseph N. Mack, Member

Synopsis

A petition filed by the appellant Parker Township Board of Supervisors seeking to join additional parties is dismissed. The Board has no authority to order or compel the intervention or joinder of additional parties.

OPINION

This matter involves a Petition to Order Intervention filed by Parker Township Board of Supervisors, appellant herein (Parker Twp.) in its appeal docketed at EHB Docket No. 91-184-MJ. The appeal challenges an April 4th, 1991 order of the Department of Environmental Resources (the Department) requiring Parker Twp. to abate the nuisance created by the installation of a sewage absorption area over a water supply line as permitted by Township permit No. F13329.

On September 27th, 1991 Parker Twp. filed with the Board a Petition to Order Intervention of the recipient of the permit in contention herein, as well as other parties who are contesting certain easement rights which may be in conflict with the permit.

Parker Twp.'s petition alleges that the permit was issued to a property owner to place a sewage absorption area on property of the permittee and that the conflict arises from the fact that the adjoining property owner claims to have a right of way or easement across the permittee's premises for a water supply line already in place and in conflict with the pertinent regulations of the Sewage Facilities Act and specifically 25 Pa. Code §72.42(13). Parker Twp. goes on to allege that the matter of the easement or right of way has been before the Common Pleas Court of Butler County and is now on appeal which could take from two to four years in the normal appellate process and that as a result, the permittee and his opposing party should be made parties to this proceeding.

The Department, on October 7th, 1991, filed a Response to Petition to Order Intervention asserting that the Board does not have authority to order compulsory joinder or intervention of additional parties. The Department additionally and correctly pointed out that neither of the outside parties had petitioned to intervene nor have they otherwise consented to be joined as parties in this appeal.

The Department cites us to Section 4 of the Environmental Hearing Board Act (35 P.S. §7514) which sets forth the powers

of the Board and points out that there is nothing contained therein which would permit the Board to issue citations to property owners or to exercise compulsory joinder of additional parties in actions before it. The Department further cites us to our own cases, and specifically Al Hamilton Contracting Co. v. DER, 1989 EHB 383, 386; New Hanover Township v. DER, 1988 EHB 812, 814 as well as McKees Rocks Forging, Inc. v. DER, EHB Docket No. 90-310-MJ (Opinion and Order sur Third Party Claim, issued March 15, 1991).

The only legal citation found in appellant's petition is found in the preoration to the petition which alleges that the petition is filed pursuant to Rule 21.76 of the Environmental Hearing Board Rules and Regulations. We do not find this pertinent in that the section cited refers only to supersedeas and the rules governing supersedeas before the Board. The petition itself does not constitute an application for a supersedeas nor is there any relief which could be granted thereunder which would or could apply here.

Since the Board does not possess the authority to join, or force the joinder or intervention of any party to this appeal, the Petition to Order Intervention is dismissed as being beyond the Board's jurisdiction.

ORDER

AND NOW, this 28th day of October, 1991, it is ordered that the Petition to Order Intervention, is dismissed.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 28, 1991

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
Theresa Grencik, Esq.
Western Region
For Appellant:
Robert Alton Wilson, Esq.
CAULEY AND CONFLENTI
Pittsburgh, PA

ar

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

U.S.P.C.I. OF PENNSYLVANIA, INC.	:	
	:	
v.	:	**EHB Docket No. 91-392-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 30, 1991**

OPINION IN SUPPORT OF ORDER SUR
MOTION TO DISMISS
PETITION FOR SUPERSEDEAS

By Terrance J. Fitzpatrick, Member

Synopsis

The Board grants the Department of Environmental Resources' (DER) motion to dismiss a petition for supersedeas filed by the Appellant. The DER action at issue here is a denial of the Appellant's Phase I application for siting approval for a hazardous waste treatment and disposal facility. The Board cannot supersede DER's denial of the application, thereby requiring DER to reinstitute its review of the application.

OPINION

This proceeding involves an appeal by U.S.P.C.I. of Pennsylvania, Inc. (USPCI) from a letter of DER dated August 22, 1991. In this letter, DER denied USPCI's Phase I siting application for a hazardous waste incinerator, ash mono-fill, and resource recovery facility on a 110 acre site in Gregg Township, Union County. DER's denial of the application was based upon 25 Pa. Code §269.28, which provides that hazardous waste treatment and disposal facilities may not be sited in farmlands identified as Class I agricultural

land by the Soil Conservation Service. DER's letter stated that the U.S. Soil Conservation Service had recently decided that approximately 20 acres of soils on the site constituted Class I agricultural land.

USPCI filed a notice of appeal with the Board from DER's letter. In its appeal, USPCI contends, among other things, that the soils were improperly classified by the Soil Conservation Service, that DER erred by denying the entire application where the incinerator and the resource recovery facility are not proposed to be located on the soils in dispute, that DER should have given USPCI an opportunity to modify its application, that DER misinterpreted certain of its regulations, and that certain of the regulations are invalid.

USPCI filed a petition for supersedeas shortly after it filed its appeal. In its petition, USPCI requested that the Board stay the effect of DER's denial of the application, and require DER to continue and complete its review of the siting application within the time frames required by law.[1] DER filed a response to the petition and also filed a motion to dismiss the petition. USPCI then filed an answer and a memorandum of law opposing DER's motion. On October 18, 1991, the Board - per the undersigned - issued an Order granting DER's motion and dismissing the petition for supersedeas. This Opinion explains the reasoning behind the Order.

The fundamental question presented by DER's motion is whether its denial of USPCI's application is the type of decision which the Board can supersede. DER argues its decision cannot be superseded, citing Board precedents which state that the Board cannot supersede permit denials because to do so would alter the status quo and by allowing the person whose

---

[1] Section 309(c) of the Hazardous Sites Cleanup Act (HSCA), 35 P.S. §6020.309(c), compels DER to complete its review of a Phase I application within five months of receiving the application.

application was denied to conduct activities which the Department has refused to authorize. See Joseph Amity, t/d/b/a Amity Sanitary Landfill v. DER, 1988 EHB 766, Raymark Industries, Inc. v. DER, 1986 EHB 176, Fiore v. DER, 1985 EHB 113. DER also contends that the petition for supersedeas must be dismissed because it seeks to compel DER to resume its review of the application, and that the Board lacks the powers of a court-of-law, acting in equity, to compel such action, citing Marinari v. Commonwealth, DER, 129 Pa. Commw. 569, 566 A.2d 385 (1989).

USPCI contends that a supersedeas of DER's permit denial may be entered here because a supersedeas would restore, not alter, the status quo. USPCI explains that a supersedeas of the permit denial would require DER to resume its review of USPCI's Phase I application, because Section 309(c) of HSCA, 35 P.S. §6020.309(c), requires DER to issue decisions on Phase I applications within five months of receipt of the application. In addition, USPCI argues that its petition does not require the Board to exercise the powers of a court-of-law acting in equity; because, once the Board stays the effect of the denial, USPCI is only requesting the Board to issue a "clarification of DER's obligations under applicable laws." (USPCI memorandum of law dated October 15, 1991, p. 10.)

We agree with DER that its denial of USPCI's application is not the type of decision which is amenable to a supersedeas. The Board has refused to supersede permit denials in the past. See Amity, Raymark, Fiore, supra. Moreover, USPCI's argument that the instant permit denial can be superseded, because of the peculiar circumstances present here, is unpersuasive. USPCI argues that it is not seeking a supersedeas of the permit denial to allow it to engage in treatment and disposal activities, it is only seeking the supersedeas to require DER to continue its review of the Phase I application.

We disagree with the central premise of USPCI's argument - that DER would be obligated by the regulations to resume its review of the application by a supersedeas of the permit denial. This would be contrary to the procedure set out in the regulations, which calls for DER to terminate its review of the application when it finds that the proposed facility will be located in a prohibited area. 25 Pa. Code §269.12. In our view, nothing short of a complete reversal of DER's decision by the Board or by an appellate court - or, perhaps, entry of an equitable writ by a court-of-law - could require DER to resume its consideration of the application.

The fact that DER is required to complete its review of Phase I applications within five months does not authorize the Board to "supersede" DER's decision to deny the application based upon one factor, and - by implication, at least[2] - require DER to evaluate the application in light of other factors. As DER points out, if USPCI's argument is accepted, it would be possible to have multiple contemporaneous appeals to the Board from DER's actions on a single application. This is certainly a result to be avoided. In addition, we believe that the logic of USPCI's argument would require the Board to consider petitions for supersedeas from all permit denials, not only those permit denials where DER is acting within mandatory time frames. DER, no doubt, has an obligation to process all permit applications pending before

---

[2] USPCI's arguments have been disingenuous regarding whether it is only asking the Board to supersede DER's permit denial, or whether it is asking the Board to take some further action to require DER to resume its review of the application. In its petition for supersedeas, the proposed order drafted by USPCI states, in relevant part: "It is further hereby ORDERED that the Department shall continue and complete its review of the Siting Application ... in accordance with applicable requirements (including the time frames specified in 35 P.S. §6020.309)." After DER criticized this in its motion to dismiss (arguing that it invited the Board to exceed its authority by exercising equitable powers), USPCI shifted course and argued in its answering memorandum of law (p. 10) that it was merely seeking a "clarification of DER's obligations under applicable laws."

it; the only difference between the application involved here and other applications is that, here, the law requires action within a set time period - five months. The principle that "time is money" is not restricted to this type of application, however, and we can envision other permit applicants asking the Board to supersede permit denials in an effort to compel DER to resume its review of the permit application. If DER did not complete this review within a reasonable time, the applicant might week a writ of mandamus from Commonwealth Court. Therefore, acceptance of USPCI's argument would create a precedent which could apply to all permit denial cases, not only those involving limited review periods.

Nothing stated above suggests that USPCI does not have a legitimate concern over how quickly this dispute will be resolved, and how long it will take to get the application process back on track in the event DER's decision is reversed. However, a petition for supersedeas is not the proper vehicle for addressing these concerns.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: October 30, 1991

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
Martin H. Sokolow, Esq.
David Wersan, Esq.
Richard P. Mather, Esq.
Central Region
For Appellant:
Michael M. Meloy, Esq.
Joseph M. Manko, Esq.
Jonathan E. Rinde, Esq.
MANKO, GOLD & KATCHER
Bala Cynwyd, PA

For Petitioning Intervenors:
Gregory H. Knight, Esq.
HETRICK, ZALESKI, ENRICO & PIERCE
Harrisburg, PA

John M. Humphrey, Esq.
RIEDERS, TRAVIS, MUSSINA,
HUMPHREY & HARRIS
Williamsport, PA

Paul W. Brann, Esq.
BRANN & LIGHT
Lewisburg, PA

jm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

FRY COMMUNICATIONS, INC.	:	
	:	**EHB Docket No. 87-450-W**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 6, 1991

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

By Maxine Woelfling, Chairman

Synopsis

An appeal of an order is sustained in part and dismissed in part. Although only operators of residual waste processing and disposal facilities are required to have permits under §301 of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (SWMA), §302(b)(3) of the statute imposes a requirement that residual waste not be stored, treated, or disposed in a manner which adversely affects the environment. Therefore, the Department of Environmental Resources (Department) did not abuse its discretion in issuing an order to appellant where residual wastes were spilled on the surface of the ground. However, the Department abused its discretion in requiring appellant to perform additional soil sampling and install a groundwater monitoring well where soil remediation work performed subsequent to the issuance of the order was satisfactory to the Department and evidence did not otherwise support the imposition of the requirements. Owners or operators of hazardous waste treatment, storage, and disposal sites are subject to the Preparedness, Prevention, and Contingency

(PPC) plan requirements of 25 Pa. Code §264.51. Where the Department withdrew its allegations concerning appellant's hazardous waste management violations, it was an abuse of discretion to require appellant to submit a PPC plan.

INTRODUCTION

This matter was initiated with the October 20, 1987, filing of a notice of appeal by Fry Communications, Inc. (Fry) seeking review of a September 24, 1987, order from the Department. The order, which was issued pursuant to the SWMA; the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (the Clean Streams Law); §1917-A of the Administrative Code, the Act of April 29, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code); and the rules and regulations promulgated thereunder, alleged that Fry had disposed of both hazardous and residual wastes without a permit in violation of the SWMA and that this disposal onto the surface of the ground constituted a public nuisance. The order directed Fry to, *inter alia*, install a groundwater monitoring well, conduct additional soil sampling, and prepare a PPC plan.

The Board conducted a hearing on the merits on May 16-17, 1990.

The Department withdrew its allegations regarding illegal hazardous waste disposal in its October 1, 1990, post-hearing brief. It went on to contend that it had established that Fry had illegally disposed of residual waste and that the remedial measures prescribed in the order were not an abuse of discretion. On the other hand, Fry argued in its November 1, 1990, post-hearing brief that the Department's order was predicated on illegal hazardous waste disposal activities and, therefore, the remedial measures in the order were wholly disproportionate to the violations of residual waste management requirements alleged by the Department, assuming the violations

were proven by the Department.[1] The Department also filed a reply brief on November 15, 1990. Any issues not raised by the parties in their post-hearing briefs are deemed waived. Lucky Strike Coal Company and Louis J. Beltrami v. Department of Environmental Resources, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988).

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

FINDINGS OF FACT

1. Appellant is Fry, a Pennsylvania corporation engaged in the printing business with offices and production facilities located at 800 West Church Road, Mechanicsburg, Cumberland County (Church Road Facility). (Stip. Fact No. 2)[2]

2. Appellee is the Department, the agency of the Commonwealth with the authority to administer and enforce the Clean Streams Law, the SWMA, §1917-A of the Administrative Code, and the rules and regulations promulgated thereunder.

3. In December, 1986, the Church Road Facility consisted of two buildings, an older building located on the eastern part of the property

---

[1] During the course of these proceedings an issue arose regarding the identity of the complainant who twice contacted the Department to alert it as to possible contamination at the Church Road Facility. In an order dated May 3, 1990, the Board denied Fry's motion to compel the disclosure of the complainant's identity. Fry contended that this disclosure was necessary for it to prosecute its appeal. The Board stated that Fry's arguments were not sufficient to overcome the strong public policy reasons for protecting the identity of complainants, citing SmithKline Chemicals v. DER, 1986 EHB 346, 349. That issue arose again at the hearing and the presiding Board Member reiterated her earlier ruling. We affirm that ruling.

[2] References to the parties' stipulation of facts will be denoted "Stip. Fact No. ___," while references to the transcript and the Department's exhibits will be denoted "N.T. ___," and "Ex. C-___," respectively.

(Building No. 1) and a newer building on the western portion of the property (Building No. 2). (N.T. 14, 35-36, 271)

4. Fry generates residual wastes in the course of its operations. (Stip. Fact No. 3)

5. Fry uses Tower solvent, a substance within the family of petroleum hydrocarbons and propylene glycol ethers, to clean its printing presses. (N.T. 23-24, 53-54, 68, 279, 284-285; Ex. C-11)

6. Tower solvent dissolves printing ink. (N.T. 284-285)

7. Fry selected Tower solvent because it has a high flash point and evaporates quickly. (N.T. 285-286)

8. On July 25, 1986, Robert Conrad, then the Department's hazardous waste coordinator for the Harrisburg Region, and Mary Golab, a solid waste specialist, conducted an inspection of Fry's Church Road Facility in response to a complaint. (N.T. 13, 16, 22, 204)

9. Conrad and Golab spoke to Hermann Karl, the plant manager, and Dan Hiltz, a consulting engineer, during the course of their inspection. (N.T. 16, 270, 282)

10. The Department confirmed the results of its July 25, 1986, inspection and summarized its discussions with Fry regarding its waste disposal practices in an August 18, 1986, letter. (Ex. C-6)

11. Fry advised the Department in an August 25, 1986, letter that it was implementing measures to recycle waste ink, properly dispose of waste ink that could not be recycled, and properly store used, reconditioned, and empty solvent drums. (Ex. C-7)

12. In response to another complaint, Conrad and Golab returned to Fry's Church Road Facility on December 15, 1986, to conduct another inspection. (N.T. 29, 209-210)

13. On both occasions the Department refused to identify the complainant to Fry. (N.T. 13-14, 63).

14. The Department found no evidence of dumping around the area of Building No. 1, the drums which were overturned and draining in the July, 1986, inspection were turned upright, and materials were segregated. (N.T. 30)

15. Conrad and Golab then discovered a second building, Building No. 2, and there, outside of the rear north side of the building, they observed visible signs of staining that appeared black-blue in color. (N.T. 32, 34, 36, 40-45, 48, 210; Ex. C-13(d)-(j))

16. Although construction of Building No. 2 was completed in July, 1986, it was not operational until August or September of that year. (N.T. 271-172)

17. In the area where staining was observed, Conrad and Golab found full 55-gallon drums which were part of a pallet arrangement next to a flat, metal door into the building. The drums were sealed and attached to a grounding strap, and one drum had a hand-activated siphon on top. (N.T. 32-33, 40-45, 236; Ex. C-13(d)-(i))

18. The drums contained Tower solvent. (N.T. 279, 286)

19. Printing presses are located just inside the metal door where the drums were placed. (N.T. 287)

20. The staining was visible on the cement stoop outside the door, the surrounding ground and down the slope of soil to the trees behind Building No. 2. (N.T. 33-34, 36-37, 40-45, 210; Ex. C-4, p.1, C-3(d)-(j))

21. The area had trampled vegetation and/or bare earth. (N.T. 74)

22. Although the north side of Building No. 2 was newly seeded, the grass did not take because of shading created by the trees and the height of the building. (N.T. 272)

23. In the same area where the drums and staining were observed, an individual was smoking a cigarette, and there was a bucket containing cigarette butts and various trash items. (N.T. 37, 44)

24. The area behind Building No. 2 was a smoking area for employees. (N.T. 239)

25. The Department did not perform any testing to determine whether Tower solvent causes soil to discolor. (N.T. 71-72, 239)

26. The Department took three soil samples from the area behind Building No. 2; one was taken near the concrete pad, one midway between the north wall of Building No. 2 and the tree line, and one in the tree line. (N.T. 38-39)

27. The drums on the cement slab behind Building No. 2 were removed to a flammable shed by Fry on that same day after the Department's second inspection. (N.T. 273)

28. There was black discoloration on the floors and walkways of Building No. 2 as a result of ink on the soles of the pressmen's shoes. (N.T. 273-274)

29. As a result of the Department's December 15, 1986, inspection, a notice of violation (NOV), dated January 8, 1987, was sent to Fry. (Stip. Fact No. 5; N.T. 212-213; Ex. C-9)

30. The NOV alleged that Fry had disposed of/discharged hazardous waste in violation of the SWMA and directed it to submit a report detailing the extent of the contamination and proposed remedial measures. (Ex. C-9)

31. The Department conducted another inspection of the Church Road Facility on January 16, 1987, and collected samples of the Tower solvent. (N.T. 52-55)

32. During the course of the inspection the Department observed visible staining on the door which opened onto the concrete pad area behind Building No. 2 where the Department had observed staining during the December 15, 1986, inspection. (N.T. 52)

33. The Department also observed that wastes generated by the printing machine in Building No. 2 were placed in a small container and transported to Building No. 1. (N.T. 54-55)

34. Fry replied to the Department in a January 27, 1987, letter which detailed alterations to its operations to prevent spillage - *e.g.*, the removal of the drums stored outside and placement of used fountain solution in containers - and advised the Department that Wright Labs Services, Inc. (Wright Labs) had been retained for consulting and remediation services. (Ex. C-10)

35. Fry attempted to recover solvent from the rags used to clean the presses by placing them on sieves above an open barrel. (N.T. 65-66)

36. In July, 1987, Wright Labs submitted a report concerning soil contamination at the Church Road Facility. (Ex. C-4)

37. Wright Labs took soil samples on January 20, 1987, and the analyses of those samples showed no significant amounts of C_6 through C_{10} aromatic compounds.[3] (Ex. C-4, p.1, Att.I)

38. At the Department's request, Wright Labs sampled the area again on February 20, 1987, and found significant amounts of isopropyl benzene, propyl benzene, xylene isomers, ethyl toluene isomers, trimethyl benzene isomers, and $C_{10}H_{14}$ aromatic isomers. (Ex. C-4, p.2, Att.II)

---

[3] Aromatics are organic compounds which contain at least one 6-carbon benzene ring structure. C. E. Lee, Environmental Engineering Dictionary (Rockville: Government Institutes, Inc., 1989), p.34.

39. Again at the Department's request, Wright Labs did additional sampling on June 5, 1987, and, based on the results, diagrammed the zone of contamination below the concrete slab (including a depression below the slab) and pallets next to the door of Building No. 2 down the slope towards the tree line. (C-4, p.4, Figure 3)

40. Fry also retained the University of Pittsburgh's Center for Hazardous Materials Research (CHMR) to advise it on its waste handling practices. (N.T. 275)

41. Francis Fair, then the Department's Harrisburg Region, Bureau of Waste Management monitoring and compliance manager, visited the Church Road Facility with Ms. Golab in July, 1987. (N.T. 91)

42. Fair and Golab observed several small diameter pipes emerging from the side of Building No. 2; the soil beneath the pipes was rust-colored, with a petroleum-like sheen on the surface. (N.T. 94)

43. The pipes carried air conditioner condensate. (N.T. 95)

44. Fair and Golab also observed stained limestone chips in an area between Buildings No. 1 and 2 where drums were stored. (N.T. 93)

45. After Fry and the Department were unable to reach agreement on the clean-up plan, the Department issued the order which is the subject of this appeal. (Stip. Fact No. 7)

46. The order directed Fry to cease all waste disposal at the Church Road Facility; perform additional soil assessments, including in the area of the air conditioner condensate discharge and the stained area between the two buildings; install groundwater monitoring wells; submit a groundwater study and remediation plan if the monitoring wells showed groundwater contamination; and prepare and submit a PPC plan.

47. In September, 1987, Wright Labs prepared a second assessment report to provide supplemental data in determining the extent and degree of contamination at the Church Road Facility. The report confirmed the original zone of contamination delineated by Wright Labs in its July, 1987, report. (Ex. C-5)

48. The Department favored removal and disposal of the contaminated soil behind Building No. 2, while Fry advocated removing the soil, aerating it, and putting it back on the area from which it was excavated. (N.T. 109-110)

49. At the time of the hearing on the merits, Fry had excavated, assessed, aerated, and replaced the soil in the area of the cement slab north of Building No. 2, and the Department was satisfied with this remediation. (Stip. Fact No. 8)

50. The pipes discharging the air conditioner condensate have been labeled and identified, and the condensation is now discharged into the Mechanicsburg sewer system. (N.T. 240, 261-262)

51. The groundwater monitoring wells were required by the Department because it was standard procedure in the Harrisburg Regional Office. (N.T. 97-98)

52. Despite a *de minimis* amount of contamination in the excavated soil, the Department insists on the installation of monitoring wells; in fact, the Department would insist on the installation of monitoring wells even if there had been no contamination in the excavated soil. (N.T. 123-124)

53. Ms. Golab's July and December, 1986, inspections of the Church Road Facility were prompted by a complaint of waste dumping; she found nothing to substantiate the complaints. (N.T. 232, 234)

54. The only spill observed by the Department at the Church Road Facility was the air conditioner condensate. (N.T. 120-121, 239-240)

55. Neither the air conditioner condensate nor the ink used by Fry were sampled by the Department. (N.T. 131, 238)

56. Mr. Fair believed that a PPC plan was necessary because Fry's employees were confused about its storage, handling, and disposal practices; he also assumed that since Fry's housekeeping practices were sloppy, its past housekeeping practices were likely to have been sloppy. (N.T. 103-104, 111, 116)

57. Mr. Fair's conclusion that Fry's employees were confused was based on his conversations with two employees. (N.T. 116-117)

58. Fry's premises were generally neat and clean. (N.T. 238)

59. The Department conducted another inspection of the Church Road Facility on December 14, 1988, and did not cite Fry for any violations. (N.T. 262)

60. As of the date of the hearing on the merits, the Department had not been to the Church Road Facility since December, 1988. (N.T. 262)

DISCUSSION

Under 25 Pa. Code §21.101(b)(3), the Department bears the burden of proving by a preponderance of the evidence that its order to Fry was not an abuse of discretion. Max L. Starr v. DER, EHB Docket No. 87-203-W (Adjudication issued April 1, 1991). Because the Department has withdrawn all of its allegations regarding illegal disposal of hazardous waste, our task is to determine whether Fry illegally disposed of residual waste at its Church Road Facility and, if so, whether the remedial measures prescribed by the Department in its order were arbitrary, capricious, or unreasonable.

Authority for Issuance of the Order

The Department argues that Fry disposed of residual waste[4] without a permit in violation of the SWMA and 25 Pa. Code §75.21(a). Such an assertion is, we believe, an overbroad interpretation of the SWMA. Article III of the SWMA relates to residual waste; a permit is not required unless one operates or owns a "residual waste processing or disposal facility." §301 of the SWMA (emphasis added). All other storage, transportation, processing, or disposal of residual waste must either be "consistent with...or authorized by the rules and regulations of the department...."[5] These provisions are also mirrored in 25 Pa. Code §75.21(a).

While the SWMA does not contain a specific definition of a processing or disposal facility, the statutory scheme does distinguish between "establishments"[6] which generate and store wastes, and facilities[7] which process, treat, and dispose of the wastes. Fry clearly falls within the former category and, therefore, does not require a permit under §301 of the SWMA.

---

[4] "Residual waste" is defined in §103 of the SWMA to include "Any garbage, refuse, other discarded material or other waste including...liquid...materials resulting from industrial...operations...." There is no dispute here that Fry is generating residual wastes at its Church Road Facility.

[5] In its post-hearing brief the Department cites to a non-existent §301(a) of the SWMA as support for its argument that Fry was required to have a permit to dispose of residual waste at its facility. We assume that the Department's citation should have been to §302(a) of the SWMA. In any event, that section does not impose a permitting requirement independent of that in §301; it, like §610 of the SWMA, merely defines unlawful conduct.

[6] These include commercial, industrial, municipal, residential and institutional establishments, as well as mining and "normal" farming operations.

[7] In the case of municipal and residual wastes, these include transfer, composting, resource recovery, treatment, and disposal facilities.

While Fry did not violate the SWMA by disposing of residual wastes without a permit, it is still subject to the requirements of §302(b) of the SWMA.[8] That section provides in pertinent part that:

> It shall be unlawful for any person...who stores, processes, or disposes of residual waste to fail to:
>
> (1) Use such methods...as are necessary to control leachate, runoff, discharges and emissions from residual waste in accordance with department regulations.
>
> * * * * *
>
> (3) ...operate and maintain...areas in a manner which shall not adversely affect or endanger public health, safety and welfare or the environment or cause a public nuisance.

Although admittedly largely circumstantial, there is evidence in the record that residual waste in the form of spent Tower solvent and waste inks from the printing presses were either stored or disposed in a manner which affected the environment.

There were visible signs of staining on the north side of Building No. 2 in the area where 55-gallon drums of Tower solvent[9] were stored (Findings of Fact 15, 17). The staining extended from the cement stoop outside the rear door down to the tree line behind the building (Finding of Fact No. 22). Fry makes much of the fact that the Department did not determine whether Tower solvent stains soil, that the floors and walkways

---

[8] The Department also alleged in its order that Fry had violated this section of the SWMA.

[9] While the term "solvent" is broadly defined as a liquid which dissolves other substances, the term usually refers to an organic liquid. Varieties of solvents include alcohols, esters (*e.g.* ethyl acetate), aromatic hydrocarbons (*e.g.* benzene, toluene, and xylene), petroleum hydrocarbons (*e.g.* kerosene and mineral spirits), and ketones (*e.g.* acetone). C. E. Lee, Environmental Engineering Dictionary (Rockville: Government Institutes, Inc., 1989), pp.487-488.

leading to this rear door were stained from ink on the pressmen's shoes, and that the Fry employees used this area behind Building No. 2 to smoke on breaks (Findings of Fact No. 23, 24, and 28). What we find to be more telling is Fry's admission that a small amount of solvent was spilled in the area (Fry post-hearing brief, p.2) and the soil sampling by Wright Labs, Fry's consultant. The sampling conducted by Wright Labs found elevated levels of organic compounds such as isopropyl benzene, propyl benzene, and isomers of xylene, ethylene toluene, trimethyl benzene and $C_{10}H_{14}$ aromatics in this area (Finding of Fact 38). There was no evidence that these chemical substances were naturally occurring in the soils, so it is logical to conclude that either these chemical compounds were placed in the soil or that some other chemical substance which broke down into these compounds was placed in the soil.[10] Given Fry's admission and Wright Labs' sampling, we conclude that Tower solvent was spilled on the ground.

Since Fry was operating and maintaining this area in a manner which adversely affected the environment, it was in violation of §302(a)(3) of the SWMA, and the Department was empowered by §602 of the SWMA to order Fry to take appropriate action to remediate the problem caused by its practices. However, because the Department had the legal authority to issue the order does not mean that the remedial measures prescribed in the order were not an abuse of discretion. We will now turn to these remedial measures.

---

[10] When organic compounds are placed on land they will degrade, volatilize, run-off, leach, or be absorbed by plants. Brown, Evans, and Frentreys (ed.), Hazardous Waste Land Treatment (Boston: Butterworth Publishers, 1983), p.330. The Board takes official notice of this scientific fact, Vale Chemical Co. v. Hartford Accident and Indemnity Co., 340 Pa. Super. 510, 490 A.2d 896 (1985), rev'd on other grounds, 512 Pa. 290, 516 A.2d 684 (1986), and 25 Pa. Code §21.109.

Remedial Measures

The remedial measures in the Department's order which are at issue are the requirement for Fry to perform additional soil sampling, to install a monitoring well, and to submit a PPC plan.

Soil Sampling

Fry was required to perform additional soil sampling along the macadam road in the back of the Fry property and along the rear of Building No. 2 where the drainage pipes were located near the compressors (Order, paragraphs 2-3, Letter attached to Notice of Appeal, p.2). These requests were the result of the Department's July, 1987, observations of a stained concrete pad where drums had been stored, an area covered with stained limestone chips where drums had been stored, and liquid on the ground beneath drainage pipes emerging from Building No. 2 (N.T. 93-95).

The Department argues that additional soil sampling is warranted to determine the nature and extent of any contamination and contends that the burden on Fry will be minimal. Fry, on the other hand, asserts that such sampling is not justified where the Department has no evidence concerning any substances in the soil.

As for the liquid below the drainage pipes, there is unchallenged evidence that it was condensation from an air conditioner (Finding of Fact 43). The condensate is now piped directly into the Mechanicsburg sewer system pursuant to a permit (N.T. 240) and the pipes have now been labeled and identified (N.T. 262). Given these circumstances and absent any evidence from the Department as to the nature of the condensate, requiring soil sampling in this area is an abuse of discretion.

A similar conclusion must be reached for the stained concrete pad and the stained limestone chips. The only evidence relating to the area is visual

observations of staining; the Department's witness, Frank Fair, explained that sampling was necessary because surface manifestations of spills or releases in that area indicated there was contamination in the area (N.T. 100). We have no evidence as to what was stored in these areas, so we have no idea what, if anything, contaminated the soil. Although the Department has broad powers to order investigative work, Ernest C. and Grace Barkman v. DER, 1988 EHB 454, there must be some evidence of actual or potential contamination. Furthermore, the appearance of this area was of no concern to the Department at the next inspection in December, 1988, for Fry was not cited for any violations (N.T. 262). Requiring Fry to perform any more soil sampling is an abuse of discretion.

Installation of Groundwater Monitoring Well

The Department argues that while it has no evidence of actual dumping at the Fry facility, it has strong circumstantial evidence that such dumping of residual waste did occur, and, accordingly, it was justified in requiring Fry to examine whether any contamination entered the groundwater. The Department maintains it was not burdensome to require a single monitoring well, arguing it would have been irresponsible for it to do otherwise. Fry contends that because the soil at the site was removed, aerated and tested showing only small amounts of residual waste, and the hazardous waste violations have been withdrawn, a monitoring well is not justified. We agree.

The Department's reason for requiring the monitoring well was its concern for the impact of hazardous waste on groundwater. Since the hearing, the Department has withdrawn all hazardous waste violations, thereby eliminating the very rationale for requiring Fry to install a monitoring well.

The soil in this area was excavated, aerated, and put back in place (Finding of Fact No. 48). The parties stipulated that the remediation was

adequate (Finding of Fact No. 49). The Department did not visit the site between December, 1988, and May, 1990, the date of the hearing on the merits (Finding of Fact No. 60). There was no evidence as to surface streams or groundwater wells in the area.

The Department's insistence on this requirement was motivated by a desire for bureaucratic consistency, as was apparent from Mr. Fair's testimony. Mr. Fair testified that the wells were required because it was the standard procedure of the Harrisburg Regional Office (Finding of Fact No. 51) and that the monitoring wells would have been required even if there had been no contamination in the excavated soil (Finding of Fact No. 52). This is arbitrary action and, therefore, an abuse of discretion.

PPC Plan

The Department's order required Fry to hire a consultant to prepare a PPC plan to examine Fry's waste generation, handling, and disposal practices. The Department claims this plan is necessary as a result of Fry's continued inability to identify its waste streams, handle its wastes, and understand its responsibilities under the law, including whether or not it was a small quantity generator and its necessity to obtain a hazardous waste identification number. The plan, the Department argues, would require the company to think about its waste practices, prepare a written manual to inform employees of their responsibilities, and submit an emergency response plan (N.T. 101-103). Fry disputes the necessity for the plan and contends that the work already performed by the CHMR is sufficient.

Owners or operators of hazardous waste treatment, storage, and disposal sites are required to develop and implement PPC plans. 25 Pa. Code §264.51. There is no analogous requirement in the regulations governing residual waste. Since the Department has withdrawn all of its allegations

regarding Fry's violations of hazardous waste management requirements and all of the reasons the Department advances to support this requirement relate to hazardous waste management concerns, it is an abuse of discretion for the Department to insist upon this remedial measure.[11]

CONCLUSIONS OF LAW

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

2. The Department, in accordance with 25 Pa. Code §21.101(b)(3), bears the burden of proof in an appeal of an order and must establish by a preponderance of the evidence that the order was not arbitrary, capricious, or otherwise an abuse of discretion.

3. Fry was not required to have a permit under §301 of the SWMA, as it did not own or operate a residual waste processing or disposal facility.

4. Fry was required by §302(b)(3) of the SWMA to handle residual waste so as not to adversely affect or endanger the environment.

5. Fry's handling of residual waste adversely affected the environment and the Department was authorized by §602 of the SWMA to issue an order to Fry to bring it into compliance with §302(b)(3) of the SWMA.

6. The Board may substitute its discretion for that of the Department if it finds the Department abused its discretion.

7. The requirement for Fry to perform additional soil sampling and install monitoring wells is an abuse of discretion where the Department and

---

[11] Although the Department's order was also issued pursuant to the Clean Streams Law and regulations adopted pursuant to that statute at 25 Pa. Code §101.3(b) authorize the Department to require one utilizing a polluting substance to prepare a plan to prevent the discharge of such substances into the waters of the Commonwealth, the Department did not request such a plan from Fry.

Fry have agreed that the soil remediation performed by Fry is adequate and there is no evidence otherwise to support the imposition of such measures.

8. Owners or operators of hazardous waste treatment, storage, and disposal sites are required to develop and implement PPC plans. 25 Pa. Code §264.51.

9. The Department's requirement that Fry prepare a PPC plan is an abuse of discretion where the Department has withdrawn all of its contentions regarding violations of hazardous waste management requirements.

O R D E R

AND NOW, this 6th day of November, 1991, it is ordered that the appeal of Fry Communications, Inc. is dismissed with regard to the Department's authority to issue the September 24, 1987, order and sustained with regard to the remedial measures mandated by the order.

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

DATED: November 6, 1991

cc: **DER, Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Dennis A. Whitaker, Esq.
Central Region
For Appellant:
Robert A. Swift, Esq.
KOHN, SAVETT, KLEIN & GRAF
Philadelphia, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

RICHARD SMITH T/A ACME DRILLING COMPANY	:	
v.	:	**EHB Docket No. 91-364-MJ** (Consolidated at No. 91-266-MJ)
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 6, 1991

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

By Joseph N. Mack, Member

Synopsis

A petition for supersedeas is denied where the evidence fails to establish that the petitioner is likely to prevail on the merits.

OPINION

Richard Smith t/a Acme Drilling Company (Acme or Appellant) filed a notice of appeal on July 3, 1991 from a denial of his application for a Stage II bond release under Surface Mine Permit No. 32823035. The denial specifically notified Acme that there had been a degradation of an on-permit and an off-permit pre-existing discharge. This appeal was docketed at EHB Docket No. 91-266-MJ. On August 28, 1991 the Commonwealth of Pennsylvania, Department of Environmental Resources (DER or the Department) issued a Compliance Order directing the appellant to submit a plan for permanent treatment or abatement of the pollutional discharges at background sampling

point 15 (BS-15) and monitoring point 11 (MP-11) and to begin interim treatment of the same discharges within 72 hours. This order was appealed by Acme on September 4, 1991 at which time Acme also filed a petition for supersedeas. Both the appeal and the Petition for Supersedeas were docketed at EHB Docket No. 91-364-MJ. The Board issued an order on September 10, 1991 consolidating the appeals at Docket No. 91-266-MJ, directing the Department to file an answer to the petition, allowing limited discovery and setting a supersedeas hearing for October 7 and 8, 1991. The hearing took place as scheduled; both parties were represented by counsel. Six witnesses testified: two for the petitioner Acme and four for the Department. The petitioner/appellant introduced nine exhibits, and the Department introduced ten. The transcript totaled 408 pages.

The parties agreed at the outset of the hearing that the only question for the Board with regard to the discharges was the hydrologic connection of BS-15 to the Acme permit and that MP-11 was not at issue. In the opening statement of counsel for the petitioner/appellant it was admitted that there had in fact been degradation of the BS-15 discharge with regard to the elevated or higher metallic content of the water.

The elements of a supersedeas before the Environmental Hearing Board are contained in 25 Pa. Code §21.76 et seq. At this point, after the filing of the petition for supersedeas and hearing thereon, we must examine §21.78 which deals with the grant or denial of the petition. That section sets out three factors which must be considered in determining whether to grant or deny the petition for supersedeas. Specifically, these are as follows:

1) Irreparable harm to the petitioner
2) The likelihood of the petitioner prevailing on the merits
3) The likelihood of injury to the public

See also Westinghouse Electric Corporation v. DER, 1988 EHB 857, 858. We will focus on the second of these.

The Department, through its Exhibit No. 7, a study prepared by its hydrogeologist, Timothy Kania, established the hydrogeologic history of BS-15 from January 6, 1982 to April 3, 1991. It is clear from this study that the discharge has been polluted for the entire period and that the discharge has had and continues to carry the marks of acid mine drainage (AMD), in that its pH level has been hovering around 3.0 with 0 alkalinity and acidity as high as 900 mg/l. For purposes of this hearing the parties agreed at the outset that discharge BS-15 had in fact been degraded with respect to the metal contents of the water during the period of Acme's mining and backfilling. Between 1982 and 1991 the manganese had increased by a factor of 6± (from 6 or 7 mg/l to 30 or 40 mg/l). In the same period the iron increased by a factor of 25± (11 mg/l to 250 mg/l). In the same manner the sulfates rose from 260 mg/l to 1100 mg/l or more.

The foundation question then is whether the change in the discharge is the result of Acme's mining. Two witnesses testified on this issue: William B. Wright, an engineer for the petitioner, and Timothy Kania, a hydrogeologist for the Department. Mr. Wright testified that he had no evidence that the Acme mining had contributed to the elevation of the metals. (T-50).[1] He testified further that he "did not feel" that Acme's mining had contributed to the elevation. (T-50). He did not give any reason in support of his testimony except to say that other things or happenings may have had such an effect, such as a haul road built during the same period from local

---

[1] "T-___" is a reference to a page in the transcript of the supersedeas hearing.

material or spoil. He also mentioned the extensive mining south and southeast of Acme's mining, all of which appears on Appellant's Exhibit "A". His testimony, however, clearly indicates that he did not do any "specific investigation" of the discharge at BS-15 and its recharge area other than to review the DER permit data. (T-80)

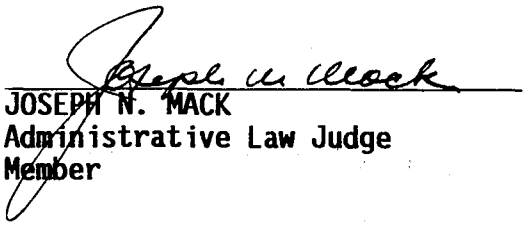
The Department, on the other hand, through Timothy Kania did a comprehensive study of the various pollutional discharges on or adjacent to both the Acme permit site and the Blairsville Associates permit site which encompasses all of the Acme permit area as well as a substantial area to the south and southeast of the Acme area. Blairsville Associates conducted mining during most of the period of Acme's mining. Mr. Kania's report looks at one of the pre-existing discharges, BS-13, which pre-dated both Acme's and Blairsville Associates's mining, as showing no degradation due to the later mining (in this case by Blairsville Associates). The report further recommends exoneration of Blairsville for any responsibility therefor. However, in the case of BS-15, the report details the amount of degradation which has taken place. In Mr. Kania's specific analysis of BS-15, he points out that the discharge is a pre-existing discharge that has degraded substantially during and after Acme's mining. In addition, the geologic and hydrologic section of the report details the recharge areas for several of the discharges. Mr. Kania's report states that the "only physically possible recharge area for BS-15 would include several acres of the topographically higher area to the south and southwest of the discharge." Such a recharge area, he goes on to say, "would include much of the eastern and central part of the areas affected by Acme."

As has been previously set out, the petitioner/appellant Acme must demonstrate (1) irreparable harm, (2) the likelihood of prevailing on the merits, as well as (3) the unlikelihood of injury or pollution to the public health, safety or welfare. Because we believe that Acme has presented no evidence showing a likelihood that it will prevail on the merits, we need not proceed to the other two requirements expressed above.

O R D E R

AND NOW, this 6th day of November, 1991, it is ordered that Appellant's petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 6, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Dennis A. Whitaker, Esq.
Central Region
For Appellant:
Vincent J. Barbera, Esq.
Somerset, PA

rm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

LARRY D. HEASLEY, et al.	:	
	:	
v.	:	EHB Docket No. 90-311-MJ
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
COUNTY LANDFILL, INC., Permittee	:	Issued: November 7, 1991

OPINION AND ORDER SUR
PERMITTEE'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

Partial summary judgment is entered for the permittee and against appellants on certain issues raised in the notice of appeal where the pleadings, interrogatories, deemed admissions, and affidavits on file show there is no genuine issue of material fact and the permittee is entitled to judgment as a matter of law. However, where the permittee has failed to adequately support the contentions in its motion, as required by Pa.R.C.P. 1035, summary judgment will not be granted.

OPINION

This matter arose on July 27, 1990 when Larry D. Heasley, et al. ("Appellants") appealed the Department of Environmental Resources' ("DER's") issuance of a solid waste permit and water obstruction permit to County

Landfill, Inc. ("County Landfill") for the construction and operation of an expansion to County Landfill's waste disposal and/or processing facility in Farmington Township, Clarion County. Appellants subsequently appealed DER's issuance of a gas collection permit in connection with the aforesaid waste disposal facility, incorporating all of the legal and factual issues raised in their prior appeal. On December 26, 1990, the two appeals were consolidated at the above-captioned docket number.[1] (The solid waste, water obstruction, and gas collection permits are sometimes herein collectively referred to as "the permit.")

The matter now before the Board is a motion for partial summary judgment filed by County Landfill on May 3, 1991. County Landfill moves that summary judgment be granted in its favor with respect to the issues raised in paragraphs 1-4, 8-10, 12-15, 17-20, 23-25, 27-28, 30-36, 38-48 of section 3(a) of Appellants' notice of appeal[2] and section 3(b)(2) of the notice of appeal. (Hereinafter, the arguments set forth under section 3(a) will simply be referred to by their paragraph number without any reference to section 3(a)). On June 28, 1991, Appellants filed a brief in opposition to County Landfill's motion.

Before examining County Landfill's motion, we note that summary judgment may be rendered where "the pleadings, depositions, answers to

---

[1]A related appeal was filed by Appellants challenging a settlement agreement reached between County Landfill and DER with respect to an amendment to the solid waste permit. The appeal was dismissed for lack of standing in an Opinion and Order issued May 13, 1991 at Docket No. 91-031-MJ, which is now on appeal before the Commonwealth Court at No. 1337 C.D. 1991.

[2]A reference to Appellants' "notice of appeal" is a reference to the notices of appeal filed in both of the appeals consolidated herein since the second appeal merely incorporated all of the arguments of the first.

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035(b); Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978). 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. Turning to County Landfill's motion, we will address each argument individually.

Residual Waste and Special Handling Waste

Throughout their appeal, Appellants argue that the permit does not place adequate restrictions and limitations on the disposal of residual waste or special handling waste at the facility. In its motion, County Landfill asserts that the permit does not allow the disposal of residual or special handling waste at the present time, and that before County Landfill may accept such waste it must apply for and obtain separate module approval from DER. Therefore, County Landfill contends, Appellants have no standing to raise this issue because there is no immediate or direct harm to their interests. County Landfill further argues that if and when it applies for separate module approval to dispose of residual and/or special handling waste, Appellants may raise their challenge at that time. In response, Appellants argue that consideration should be given to this issue at the outset of operation of the landfill and that to do otherwise places on them the burden of having to object every time approval for a new waste stream is sought and granted.

In order for Appellants to have standing to raise this issue, they must be able to demonstrate that they have a substantial interest which has been directly and immediately impacted. William Penn Parking Garage, Inc. v.

City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 280 (1975); Roger Wirth v. DER, 1990 EHB 1643. We have already examined the issue of whether Appellants have standing to raise any challenges regarding residual waste which may be accepted at the landfill. In Larry D. Heasley, et al. v. DER and County Landfill, Inc., EHB Docket No. 91-031-MJ, Appellants appealed a settlement agreement reached between DER and County Landfill which amended a paragraph of its solid waste permit. Appellants argued, inter alia, that the amendment did not place a sufficient limitation on the amount of residual waste to be accepted at the facility. The Board determined that the solid waste permit issued to County Landfill did not authorize the disposal of any residual waste at its facility, and that before County Landfill could accept any residual waste it would be required to apply for and receive Module I approval. We held that because Appellants could show no direct or immediate harm to their interests, they lacked standing to bring the appeal. See Larry D. Heasley, et al. v. DER, EHB Docket No. 91-031-MJ (Opinion and Order Sur Motion to Dismiss or for Summary Judgment, issued May 13, 1991).

As in the aforesaid appeal at No. 91-031, County Landfill has again provided us with the affidavits of Arthur F. Provost, Acting Regional Solid Waste Manager for DER's Bureau of Waste Management's Meadville Office, and Mark C. Tondra, Vice President of County Landfill. Both confirm that under the current terms of its permit County Landfill is not authorized to dispose of any residual or special handling waste, and that before it may do so it must apply for and obtain separate module approval from DER. As in the appeal at No. 91-031, we find that the harm of which Appellants complain is remote and speculative since we cannot anticipate when or even if County Landfill may apply for and receive module approval for the disposal of residual and/or

special handling waste at its facility. Because there is no direct and immediate impact upon Appellants' interests, they have no standing to raise this challenge at this time. Therefore, summary judgment is granted to County Landfill on the issue of disposal of residual and special handling waste.

Effect on Tourism

In paragraphs 1, 14, and 25 of their appeal, Appellants argue that the area where the facility is to be constructed is a recreational area, and that construction of a waste disposal facility in that area will have a disastrous effect on the tourist industry. Appellants assert that DER did not properly take this into consideration in issuing the permit.

County Landfill argues, first of all, that there is no requirement in the Solid Waste Management Act ("SWMA") , Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., that DER must consider the potential impact a solid waste processing and/or disposal facility will have on tourism, and, secondly, that even if DER were required to conduct such a review, Appellants have no standing to raise this issue because none of them represent the tourism industry in their capacity as appellants.

On pages 3-5 of their brief, Appellants respond that County Landfill has misinterpreted their argument to be one of economic effect on the tourism industry of the area, when, in fact, Appellants are claiming that the placement of a landfill within such close proximity to recreational areas will cause the users of these recreational areas to discontinue their use and enjoyment of them. Appellants assert that DER failed to make a determination under Article I, Section 27 of the Pennsylvania Constitution as to whether the

need for the landfill outweighs the harm to the environment, and that this may be gauged by the extent to which residents of and visitors to the area discontinue their use and enjoyment thereof.

Each of the Appellants has brought this appeal as either adjoining landowners or landowners whose water supply or mineral rights may be affected or as individuals who live, work, and enjoy recreational activities in the area in question. None has demonstrated a direct and substantial interest in the tourist industry. We note that a claim is made in the notice of appeal that expansion of the solid waste disposal/processing facility will affect Mr. Heasley's business interest, i.e. a restaurant which he owns. However, in their response to the motion for partial summary judgment, Appellants state that Mr. Heasley's concern is primarily with the effect of the solid waste facility on the water supply for his restaurant; no reference is made to the amount of his business which may be generated by tourism. Moreover, as noted above, Appellants have stated in their response that they are not asserting a claim with respect to the economic effect on the tourist industry but, rather, with respect to use and enjoyment of the area.

To the extent Appellants are contending that expansion of the processing/disposal facility will directly interfere with their water supply and with their use and recreational enjoyment of the area, and that DER failed to assess the environmental impact of the permit issuance, they have standing to make this challenge. As landowners and individuals who live, work, and enjoy recreational activities in the area and who use groundwater in close proximity to the landfill, Appellants have a direct, immediate, and substantial interest sufficient to confer standing to bring these claims.

Therefore, we conclude that Appellants do have standing to assert that expansion of the solid waste facility will interfere with their water supply and use of the area. With respect to the issue of economic effect on the tourism industry of the area, Appellants have stated that they are not making this claim and, therefore, this issue may be dismissed.

25 Pa.Code Chapter 131

Paragraph 17 of Appellants' notice of appeal states that the permit fails to comply with the requirements of 25 Pa.Code Chapter 131, particularly with respect to control of road dust. Chapter 131 deals with ambient air quality standards. In its motion for partial summary judgment, County Landfill contends that pursuant to an order of the Board, Appellants have been deemed to admit that the requirements of Chapter 131 have been met. Appellants do not address this argument in their response.

In an Opinion and Order dated March 25, 1991 at the above-captioned docket number, the undersigned Board member ruled that due to Appellants' failure to file timely responses to DER's request for admissions, all matters contained therein were deemed to be admitted. See Heasley v. DER and County Landfill, EHB Docket No. 90-311-MJ (Opinion and Order issued March 25, 1991). Numbers 12 and 13 of the request for admissions dealt with ambient air quality standards for eleven contaminants, including total suspended particulates and settled particulates. Through their deemed admissions, Appellants have admitted that the ambient air quality standards for the eleven contaminants are presently being attained and that expansion of the landfill will not cause them to be exceeded. Since Appellants have admitted that the ambient air quality standards of Chapter 131 are currently being met for the listed contaminants, including suspended and settled particulates, and that the

standards will not be exceeded by expansion of the landfill, they may not argue that the permit fails to comply with 25 Pa.Code Chapter 131. Thus, County Landfill is granted summary judgment on this issue.

Governor's Executive Order 1989-8

The Governor's Executive Order 1989-8 ("Executive Order"), which was adopted October 17, 1989, requires DER to implement a state Municipal Waste Management Plan. Section 1(a)(1) of the Executive Order prohibits DER from approving landfill expansions unless the applicant can demonstrate a need for additional capacity and can show that at least 70% of the municipal waste proposed to be received at the facility is generated within Pennsylvania.

Paragraphs 9 and 32 of Appellants' notice of appeal argue that the permit does not place a 30% cap on residual or special handling waste generated outside of Pennsylvania. In its motion, County Landfill argues that Appellants' contentions regarding the Executive Order are incorrect as a matter of law, and that summary judgment should, therefore, be granted to County Landfill.

As noted previously herein, County Landfill's permit does not authorize it to accept <u>any</u> residual or special handling waste, much less limit the amount it may receive from out-of-state. Therefore, there is no basis for Appellants' argument that the permit does not sufficiently limit the amount of out-of-state residual and special handling waste which may be accepted by County Landfill. Moreover, the 70%/30% limitation of the Executive Order refers only to municipal waste, and there is no indication that it was meant to apply to other types of waste as well.

Paragraph 32 of the appeal also complains that the permit application contained no proof that at least 70% of the municipal waste to be accepted at

the landfill will originate in Pennsylvania. However, County Landfill's permit, as amended, specifies that at least 70% of the municipal waste to be accepted at the landfill must originate within Pennsylvania. Therefore, County Landfill is required by its permit to comply with the 70%/30% limitation regardless of what was contained in its application.[3] Any failure on the part of County Landfill to comply with that restriction would subject it to a separate enforcement action outside the scope of this appeal.

In conclusion, summary judgment is granted to County Landfill with respect to Appellants' challenge under the Executive Order that the permit does not place an adequate limit on out-of-state residual or special handling waste, since no such waste may be accepted at the landfill whether generated out-of-state or intrastate. Summary judgment is also granted to County Landfill with respect to Appellants' argument that the permit application failed to show that at least 70% of the municipal waste to be accepted at the landfill will originate in Pennsylvania.

Property Values

Paragraph 46 of the notice of appeal asserts that in granting the permit, DER "casually dismiss[ed] the diminution of property values of surrounding properties." County Landfill argues that DER has no duty to consider the effect of a permit issuance on individual property values, and, therefore, Appellants' allegation is irrelevant. In response, Appellants assert that County Landfill and DER are confused as to Appellants' argument. Unfortunately, Appellants' response is itself confusing. While Appellants'

---

[3]However, the constitutionality of the 70%/30% limitation of the Executive Order has been called into question as being an impermissible restriction on interstate commerce. See Empire Sanitary Landfill, Inc. v. DER, EHB Docket No. 90-467-W (Opinion and Order issued January 30, 1991).

notice of appeal states that they are concerned with the effect of the permit issuance on surrounding property values, their response couches this argument not in terms of economics but, rather, the properties' value with respect to public use, enjoyment, and recreation. It is difficult to decipher exactly what Appellants are arguing. However, to the extent Appellants have made the argument that issuance of the permit will cause a decrease in the monetary value of their properties and that DER improperly failed to consider this, that evidence is not relevant. This issue was examined in Robert Kwalwasser v. DER, 1986 EHB 24, which held that DER had no duty to consider the possible diminution in surrounding property values when issuing a permit. Id. at 41. Although that case was decided under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., and the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., likewise there is nothing in the SWMA or the regulations thereunder which would require DER to examine the effect of a permit issuance on the value of surrounding properties. Therefore, to the extent Appellants are arguing that DER failed to consider the economic effect on their property values of the issuance of the permit to County Landfill, this argument is without merit and summary judgment thereon is granted in favor of County Landfill.

Zoning

Paragraph 47 of the notice of appeal argues that the permit completely ignores the fact that the permitted site is not zoned for the use in question unless a variance is granted. County Landfill, in its motion for partial summary judgment, counters that zoning matters are outside the Board's jurisdiction. In their reply, Appellants ignore this argument and simply

state that County Landfill has obtained no variance from the municipality for use of the property as a landfill.

The process for obtaining local zoning approval and the permitting process under SWMA are two separate and distinct procedures. While a municipality may regulate the location of a solid waste disposal/processing facility through its zoning ordinances, that is not a matter which is before DER in determining whether to grant or deny a permit. DER is not required by SWMA to ensure that local zoning ordinances have been complied with before it may issue a permit. Hilltown Township Board of Supervisors v. DER, 1988 EHB 1009, 1012; Township of Washington V. DER, 1988 EHB 325, 327-328.

Since DER's issuance of the permit was not dependent on compliance with local zoning ordinances, there is no basis for Appellant's argument and summary judgment is granted to County Landfill on the issue of zoning.

Testing of Cover Soils

In paragraph 39 of the appeal, Appellants argue that cover soils should be tested more frequently than once per quarter, as required by the permit. Appellants also argue that testing should be conducted on old fill material to be moved into the new liner. County Landfill argues that there is no statutory or regulatory requirement as to the frequency with which cover soils must be tested and that Appellants have provided no support for their contention. In their reply, Appellants state that they intend to prove that in a lined facility such as the one in question the integrity of the liner depends heavily on the types of materials placed on the liner, including the cover soils, and that if the cover soils are not adequately tested, soils may

be placed thereon which can harm the liner. Appellants contend this is a factual issue which may be determined only after all expert testimony is weighed.

There is no provision in either SWMA or the regulations at 25 Pa.Code Chapter 273 which specifies the frequency at which cover soil must be tested. Appellants, however, are not claiming that the permit does not comply with the statute or regulations with respect to cover soil testing. Rather, they are contending that, based on expert opinion, more frequent testing of the cover soil must be done to preserve the integrity of the liner, and that DER abused its discretion by not requiring stricter testing. Since this question remains open, summary judgment is not appropriate on the issue of cover soil testing. Summerhill Borough, supra.

Other Permits

In paragraphs 10, 20, and 28 of the appeal, Appellants make the argument that it was an abuse of discretion for DER to issue the solid waste permit before the applications for air and water quality permits were completely submitted. County Landfill argues, first of all, that Appellants are factually incorrect in their assertion, inasmuch as County Landfill submitted applications for Air Pollution Control Plan Approval on or about April 5, 1990 and for its NPDES permit in or about February 1989, prior to the solid waste permit having been issued on June 27, 1990. Moreover, County Landfill argues, DER is under no statutory or regulatory obligation to withhold action on a solid waste permit until other permit applications have been submitted. Appellants do not respond to this argument in their reply brief.

As to whether the applications for Air Pollution Control Plan Approval and the NPDES permit were submitted before or after the solid waste permit was approved, neither party presented affidavits or other supporting documentation showing when the said applications were submitted to DER. A copy of the NPDES permit, however, is included with County Landfill's consolidated pre-hearing memorandum as Exhibit C, and it is clear that the permit was issued prior to the issuance of the solid waste permit. Therefore, Appellants' argument with respect to the issue of the NPDES permit application is without merit, and we grant summary judgment to County Landfill on this issue.

With respect to the Air Pollution Control Plan, we note that the Plan was approved on September 11, 1990, after issuance of the solid waste permit. (Exhibit D to County Landfill's consolidated pre-hearing memorandum). As to when the application for approval was sent to the Department, County Landfill states in its motion that the application was submitted "on or about April 5, 1990," prior to the issuance of the solid waste permit. However, County Landfill provides nothing to verify the date of submission, such as a date-stamped copy of the application or an affidavit confirming the date of receipt by the Department. Nor does an inspection of the Pennsylvania Bulletin from February 1990 through June 1990 produce any further information regarding the application. In passing on a motion for summary judgment, we must view any disputed facts in the light most favorable to the non-moving party. Penoyer, supra. Because we do not have sufficient information before us on the question of when County Landfill's application for Air Pollution Control Plan approval was submitted to the Department, we must deny summary judgment on this issue. We do wish to note, however, that any objections

Appellants may have to the Air Pollution Control Plan should have been raised at the time of its approval and may not now be used as a basis for challenging the solid waste permit in question.

In conclusion, we grant summary judgment with respect to the issue of submission of the NPDES permit application but deny summary judgment with respect to the issue of submission of the application for Air Pollution Control Plan approval.

Traffic Safety

Appellants' notice of appeal contains numerous assertions that DER abused its discretion in failing to consider adequately the issue of traffic safety. In its motion, County Landfill asserts that the Pennsylvania Department of Transportation ("PennDOT"), not DER, has primary responsibility for traffic safety, and that in this case PennDOT had advised DER that it anticipated the facility would not have a significant impact on traffic safety. A copy of PennDOT's letter is attached to County Landfill's motion. County Landfill contends that whether PennDOT made the correct decision is not the issue before the Board, but, rather, the issue is whether DER was within its discretion in deferring to PennDOT. To this, Appellants respond that DER abused its discretion in relying on a one-page letter from PennDOT, whereas they can produce a videotape and the testimony of the Superintendent of Cook Forest State Park as to traffic congestion caused by the landfill.

In Township of Indiana v. DER, 1984 EHB 1, the Board held that it was not an abuse of discretion for DER to gather information on the potential effect on traffic, refer the information to PennDOT for evaluation, and defer to PennDOT's analysis. Id. at 38; See also Charles Bichler v. DER, 1989 EHB 36, 41. However, in issuing a permit under SWMA, the ultimate authority for

reaching a determination on traffic safety lies with DER. T.R.A.S.H., Ltd. v. DER, 1989 EHB 487, 552. Moreover, the Board has previously held that the issue of traffic safety is to be reviewed by DER under Article I, Section 27 of the Pennsylvania Constitution. Pennsylvania Environmental Management Services v. DER, 1984 EHB 94, 148, rev'd on other grounds, 94 Pa. Cmwlth. 182, 503 A.2d 477 (1986); Korgeski v. DER, EHB Docket No. 86-562-W (Adjudication issued June 13, 1991), at p. 15.

In the present case, DER contacted PennDOT regarding County Landfill's application for a solid waste facility; submitted a project summary, location map, and traffic information; and requested that PennDOT review the documentation to determine if the expected increase in traffic generated by the landfill would have a significant impact on traffic safety. PennDOT's response was that the increase in traffic should not have a significant impact on traffic safety. (Exhibit C to County Landfill's Brief in Support of Motion for Partial Summary Judgment. Hereinafter, exhibits to County Landfill's Brief in Support of Motion for Partial Summary Judgment shall be referred to as "Exhibit ___ to motion".)

Appellants contend that DER acted improperly by simply relying on PennDOT's one-page letter when they can produce 12 hours of videotape showing traffic congestion and the testimony of the Superintendent of Cook Forest State Park regarding the deleterious effect of the landfill on traffic in the area.

Because we have only the one-page letter from PennDOT simply indicating that it did not anticipate any traffic problems as a result of the landfill expansion, we have no opportunity to review the reasonableness of DER's deference to PennDOT's conclusion. Given this lack of further

information, combined with the evidence which Appellants seek to present on the issue of traffic safety, summary judgment on this issue is denied.

Insurance

Paragraph 2 of the notice of appeal states that the certificates of insurance provided by County Landfill do not comply with the regulations at 25 Pa.Code §§271.371-271.376, in that they 1) exclude pollution from public and general liability coverage, 2) do not set forth the required amounts of coverage, and 3) are cancellable on less than 120 days' notice.

In response, County Landfill asserts that it has in fact complied with the insurance requirements and provides a copy of its insurance policies as well as two affidavits in support thereof.

Section 271.371 of the municipal waste regulations requires that an applicant for a permit to conduct municipal waste disposal or processing must obtain and submit proof of liability insurance coverage. Section 271.372(6) provides that the policy may not be cancellable on less than 120 days' written notice to DER. The minimum amount of coverage required under a policy for combined property damage and personal injury, exclusive of legal defense costs, is $1,500,000 per occurrence and $3 million annual aggregate. 25 Pa.Code §271.373(b)(1).

A review of County Landfill's certificate of insurance reveals that it may not be cancelled or terminated except on 120 days' prior written notice to DER. (Exhibit D to motion). Moreover, the policy limits are $5 million per occurrence and $5 million aggregate, well above the minimum limits required by the regulations. An affidavit signed by Steven Russell, Vice

President of Marsh & McLennan, Inc., agent to the insurer which issued the policy in question, affirms that the aforesaid requirements have been included in the policy. (Exhibit D to motion)

Appellants complain that the policy does not provide for pollution coverage. However, Exhibit D to County Landfill's motion contains a policy for "Pollution Legal Liability" with limits of $4 million per loss and $8 million aggregate.

In addition, County Landfill has provided the affidavit of George Knoll, Manager of Financial Responsibility with DER's Management & Technical Services office. Mr. Knoll states that he has reviewed the current information on file regarding County Landfill's general liability insurance policy and that it meets the criteria required by 25 Pa.Code §§271.371 - 271.376.

In their brief filed in opposition to the motion, Appellants challenge an endorsement to the policy which excludes bodily injury or property damage arising out of any liability due to underground storage tanks. However, this argument was not raised in Appellants' notice of appeal. Therefore, it is deemed to have been waived and is not subject to our review. Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd 521 Pa. 121, 555 A.2d 812 (1989). Moreover, even if this argument were before us, we find nothing in the regulations which would prevent this exclusion in the policy, insofar as it was approved by DER.

Appellants imply in their brief that although County Landfill may now be in compliance with the insurance requirements, they did not meet all the requirements when the appeal was filed. Since Appellants have provided

nothing in support of this argument and since the policy we have before us shows compliance with the regulations, we can find no merit in Appellants' assertion. Therefore, on the issue of insurance coverage, we enter summary judgment in favor of County Landfill.

Property Ownership

Paragraph 31 of the appeal challenges the lease entered into by County Landfill for certain property located within the permit area, known as the "Weiser property." Appellants assert that the provisions of the lease do not provide assurance that the operator or DER will have access to the land for a sufficient period of time in which to properly operate or close the landfill. Paragraph 42 of the appeal states that the permit application incorrectly listed Paul and Vivian Weiser as surface owners of the property when, in fact, their children are the owners.

Whether or not this argument had any merit, the issue has now become moot by virtue of the fact that during the pendency of this appeal, County Landfill purchased all of the property within the permitted area which it did not previously own, including the Weiser property. (Exhibits B, C, F to motion). This fact is acknowledged by Appellants in their brief. Therefore, any alleged deficiencies in the lease for the Weiser property, the application's identification of the prior owners, or consent of the landowners are now moot, and summary judgment on these issues is granted to County Landfill.

Appellants add, however, that they are not relinquishing their argument questioning whether, as to land formerly owned by Municipal and Private Services, Inc. ("Municipal Services"), County Landfill has proper interest in the underlying coal as to be able to include that tract of land in

the permit area. This matter also is moot because, according to the affidavit of Brian Mummert, Facilities Specialist for DER's Bureau of Waste Management's Meadville office, the property previously owned by Municipal Services is not within the permitted area. Therefore, summary judgment is also granted to County Landfill on this issue.

Compliance History

Paragraphs 27 and 36 of the appeal complain that DER, prior to issuing the permit, did not adequately investigate the compliance history of Aardvark, Inc. ("Aardvark") and Envirite, Inc. ("Envirite"), with whom Appellants contend County Landfill is associated.

As to Envirite, the affidavit of Mark Tondra, County Landfill's vice president, states that the stock of County Landfill was purchased by County Environmental Services Corporation, a wholly-owned subsidiary of Envirite, on November 1, 1990, more than four months after the permit was issued by DER to County Landfill on June 27, 1990. (Exhibit B to motion). Thus, Envirite did not become a related party to County Landfill until after the permit had already been issued. Because Envirite was not an entity related to County Landfill at the time the permit was issued, there was no requirement that DER review Envirite's compliance history. Nor have Appellants demonstrated any other relationship between County Landfill and Envirite which would have required an investigation of Envirite's compliance history. Therefore, summary judgment is entered in favor of County Landfill on this issue.

As to Aardvark, County Landfill states that, although at the time the permit application was submitted Aardvark was an entity related to County Landfill, it is no longer related. Therefore, County Landfill contends, any alleged failure on the part of DER to adequately consider the compliance

history of Aardvark is now moot. Appellants, on the other hand, maintain that any interrelationship between County Landfill and Aardvark at the time of the permit application affects the integrity on which the permit is based, and a failure to inquire into that relationship is grounds for appeal.

Pursuant to §503(d) of SWMA, 35 P.S. §6018.503(d), DER shall deny a permit where the applicant or its parent or subsidiary corporation or associate has engaged in unlawful conduct under that act unless it can demonstrate to the satisfaction of DER that the unlawful conduct has been corrected. In reviewing actions taken by DER, such as issuance of a solid waste permit, the Board's role is to determine whether DER committed an abuse of discretion or error of law. Warren Sand & Gravel Co. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). In considering DER's action, the Board conducts its review de novo, that is, upon the record developed before the Board. Id.; City of Harrisburg v. DER, EHB Docket No. 88-120-F (Opinion and Order Sur Joint Motion for Reconsideration, issued January 30, 1991).

As County Landfill notes in its motion, Aardvark is no longer a related entity and, therefore, to scrutinize its compliance history at this time would be a moot point. Because this issue is moot, there is no effective relief which we can grant. Therefore, summary judgment is granted to County Landfill with respect to the issue of Aardvark's compliance history.

Term of Permit

Paragraph 38 of Appellants' appeal states there is no explanation in the permit as to why the site is permitted for more than ten years. A review of the permit shows that the term is for exactly ten years, from June 27, 1990

to June 27, 2000. Appellants do not respond to this in their brief in opposition, and we fail to see any merit to their argument. Summary judgment on this issue is granted to County Landfill.

Measurement of Waste

Paragraph 35 of the appeal states that the permit fails to establish an adequate formula for measuring volumes of waste accepted at the landfill. In response, County Landfill asserts that Condition No. 1 of the permit incorporates the method for measuring the volume or weight of solid waste which was set forth in Form 1 of County Landfill's permit application. County Landfill contends that the measurement formula complies with the requirements of 25 Pa.Code §273.214, which deals with measurement of waste at municipal waste landfills. Appellants have not responded to this argument, nor have they defined why they feel the measurement formula in the permit is not "adequate." However, because we do not have the permit application before us, we cannot review the measurement criteria described in Form 1 in order to determine whether it meets the requirements of 25 Pa.Code §273.214. Although County Landfill discusses the measurement criteria in its brief, there is no affidavit or other supporting documentation on which we may rely. Therefore, we are unable to grant summary judgment on this issue.

Replacement Water Supply

In paragraph 30 of the appeal, Appellants assert that DER, in issuing the permit to County Landfill, failed to address the concerns of surrounding property owners regarding a replacement water supply. In the brief in support of its motion, County Landfill states that it provided information in its application on replacement water supplies. Moreover, County Landfill asserts that it is required by Condition No. 44 of its permit to provide replacement

water in accordance with DER regulations. Appellants have not responded to this assertion, except to state that their primary concern is with the water supply of Margreth Ward, one of the appellants herein, whose source of water is a spring allegedly located on the permitted site.

Condition No. 44 of the permit provides in relevant part as follows:

> Within 24 hours after the permittee affects the quality or quantity of any water supply, it shall replace the supply with a temporary source of water of at least equal quality and quantity...The permittee shall continue to provide the temporary supply until the quantity and quality of the original supply is restored or a permanent alternate water supply is provided.
>
> Within 15 days after the permittee affects the quality or quantity of any water supply, the permittee shall submit a remedial plan to the Department for its approval. The plan shall set forth the means by which the permittee will either provide a permanent alternate water source of a[t] least equal quality, quantity, and convenience of use, or restore the original source and shall include a schedule of implementation...

The aforesaid condition complies with 25 Pa.Code §273.245 which requires any operator of a municipal waste landfill which affects a water supply to restore or replace the affected supply with an alternate source that is of like quality and quantity.

In their reply brief, Appellants appear to argue that simply meeting the regulations is not enough to protect Ms. Ward's supply. If Appellants are attempting to bring a challenge against the regulations themselves, this argument was not raised in the notice of appeal and is, therefore, waived. Game Commission, supra. If Appellants are not contesting the regulations but are simply arguing that County Landfill and DER had some duty to go above and beyond the requirements of the regulations with respect to Ms. Ward's water

supply, they have not given any basis therefor. Accordingly, summary judgment on this issue is entered in favor of County Landfill.

U.S. Army Corps of Engineers Permit

In paragraphs 34 and b.2 of the appeal, Appellants make the assertion that the solid waste permit and water obstructions permit issued to County Landfill should have required a permit from the U.S. Army Corps of Engineers ("Corps of Engineers") under section 404[4] of the Federal Clean Water Act ("Clean Water Act"), 33 U.S.C. §1344, and failed to do so. Section 404 of the Clean Water Act deals with permits for dredged and fill material.

In its supporting Brief, County Landfill states that a permit under §404 of the Clean Water Act was, in fact, issued to it, effective June 29, 1990. County Landfill refers to Exhibit F to its Pre-Hearing Memorandum, a July 17, 1989 letter from the Corps of Engineers, Pittsburgh District Office stating that County Landfill qualified for a permit effective upon obtaining Pennsylvania Water Quality Certification. This Certification was granted in Condition 17 of the water obstructions permit on June 29, 1990.

In their reply, Appellants do not contest that County Landfill did, in fact, obtain a permit from the Corps of Engineers. Rather, Appellants now assert that the §404 permit should not have been issued because whereas the §404 permit was granted based on the understanding that less than one acre of wetlands was to be filled, in fact, nearly 2 1/2 acres of wetlands are to be filled, which would make County Landfill ineligible for such a permit. Once again, Appellants provide no support for their assertion. On the other hand, the July 17, 1989 letter from the Corps of Engineers indicates that the

---

[4]Although Appellants refer to "§4.04" of the Clean Water Act in their appeal, we believe that this should, in fact, read "§404" of the Act.

landfill site was inspected, and that based on the Corps' review the proposed expansion would require that approximately 1/2 acre of wetlands be filled. Appellants have provided no basis for finding any abuse of discretion by DER with respect to this matter. Moreover, we have no authority for reviewing whether the Corps of Engineers properly issued the permit since our jurisdiction is limited to reviewing actions of DER. §4(a) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 et seq., at §7514(a). Accordingly, summary judgment on the issue of the Corps of Engineers' permit is entered in favor of County Landfill.

Notification of Maximum Tonnage Exceedance

Paragraph 48 of the appeal asserts there is no requirement in the permit that DER be notified if daily or maximum tonnage is exceeded.

As County Landfill points out, Condition No. 23 of the permit sets a daily limit of 1500 tons on the amount of solid waste which may be received at the facility and imposes a mandatory civil penalty of $100 per ton in the event the limit is exceeded. Moreover, Condition No. 19 of the permit requires County Landfill to maintain daily operational records, in accordance with 25 Pa.Code §273.311, noting, inter alia, the weight or volume of solid waste received. In addition, County Landfill is required under 25 Pa.Code §§273.312 and 273.313 to submit quarterly and annual reports to DER, containing data on the weight or volume of waste received over the reporting period.

Appellants do not address this issue in their reply and we can see no basis for their assertion. The permit conditions limiting the amount of waste which may be accepted at the facility are in line with the regulations. Furthermore, contrary to Appellants' assertion, County Landfill is required to

report to DER the amount of waste being accepted at its facility. Because there is no factual basis for Appellants' argument, summary judgment is granted to County Landfill on this issue.

Elevations

Paragraph 33 of the notice of appeal challenges "final permitted elevations." Appellants do not elaborate other than to say that "[t]he permit fails to establish reasonable requirements for final permitted elevations."

County Landfill contends that the permit, in Condition 1(f), incorporates the elevation requirements of the Daily Operations Plan provided by County Landfill with Form 23 of its application, as well as the Slope Stability Analysis. County Landfill asserts that this complies with the requirements of 25 Pa.Code §273.234. Section 273.234 sets forth the requirements for final cover and grading.

Since Appellants did not address this issue in their brief in opposition, we have no way of knowing the basis for their assertion that the permit did not establish reasonable elevation requirements. However, despite the little information provided to us by Appellants, we do not have sufficient basis for granting summary judgment. All we have before us is a copy of the permit and County Landfill's argument in its brief that the permit incorporates the elevation criteria of Form 23 and the Slope Stability Analysis in compliance with 25 Pa.Code §273.234. The permit does, in fact, make reference to Form 23. However, we have no information, other than what County Landfill argues in its brief, as to what Form 23 contains and whether it meets the criteria set forth by the regulations. We do not even have an affidavit verifying the elevation requirements imposed on County Landfill. Pa.R.C.P. 1035(b) requires that, before summary judgment may be granted, the

pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, must show that there is no genuine issue remaining as to any material fact. That cannot be said with respect to this issue because we have nothing in the record showing or verifying the elevation criteria incorporated into the permit other than the general discussion thereof in County Landfill's brief. Therefore, summary judgment may not be entered on the issue of final elevation requirements.

Cemetery

In paragraph 41 of their appeal, Appellants contend that the application and permit do not take into consideration a cemetery that is on the permitted site. In response, County Landfill asserts that the cemetery is not located within the permitted area. In support thereof, County Landfill refers to the affidavit of Brian Mummert, Facilities Specialist for the DER Bureau of Waste Management's Meadville Regional Office (Exhibit C to motion), and answer No. 33 of DER's response to County Landfill's interrogatories. A review of these items reveals that the cemetery is not located within the permit area, as asserted by Appellants. Appellants do not address this issue in their reply.

Because we find that the cemetery in question is not located on the permit site as contended by Appellants, we enter summary judgment on this issue in favor of County Landfill.

Mineral Rights

In paragraph 3 of the notice of appeal, Appellants complain that the permit violates 25 Pa.Code §273.120, dealing with information on mineral deposits, because first, no maps and plans showing previous mining operations were submitted in compliance with §273.120(a)(1) and secondly, County Landfill

had no written plan showing that minerals allegedly owned by appellants Theodore Ochs and Janet Ochs would not be mined as long as municipal waste remains on the site in compliance with §273.120(b). In paragraph 4, Appellants contend that the permit violates 25 Pa.Code §273.202 because property belonging to Municipal Services is in a coal-bearing area and County Landfill has no agreement with the Ochs, the alleged owners of the mineral rights thereunder, to provide support. Section 273.202 prohibits operation of a municipal waste landfill in coal-bearing areas underlain by recoverable or minerable coals unless the operator has entered into an agreement with the owner of the coal to provide support.

County Landfill asserts that pursuant to the Board's Order of March 25, 1991, Appellants have been deemed to admit all matters contained in the Request for Admissions served upon them by DER. In accordance with the Order, County Landfill asserts, Appellants have admitted that the Ochs are not the owners of the tract of land belonging to Municipal Services (Admission No. 1) and, moreover, that the Municipal Services property is not located within the permit boundary of the landfill (Admission No. 2). County Landfill also points to DER's responses to numbers 18 and 19 of County Landfill's interrogatories, which state that the Municipal Services property is not within the permitted area, nor is it adjacent to the permitted area. Moreover, the affidavit of Brian Mummert also confirms that the Municipal Services property is not located within the permit area and that no landfill waste can be placed on the property. (Exhibit C to motion)

Appellants argue that this involves an interpretation of the regulations, i.e. whether §273.202(a)(3) refers to all land included within the permitted area or only that portion on which waste will actually be

disposed. However, it is clear from Appellants' deemed admissions, DER's responses to County Landfill's interrogatories and Mr. Mummert's affidavit that the property in question is not within the permit area and, therefore, whether or not the Ochs own mineral rights on that tract and whether or not County Landfill entered into an agreement with the Ochs to provide for support is irrelevant since the property in question is not in the permit area. Therefore, summary judgment is entered in favor of County Landfill with respect to the issue of compliance with 25 Pa.Code §273.202.

As to whether a written plan is required under 25 Pa.Code §273.120(b) showing that minerals providing support will not be mined as long as municipal waste remains on the site, County Landfill contends that no written plan is required because the permit area does not overlie extractable mineral deposits. In support of this contention, County Landfill points to a report entitled Mineral Resource Potential of the Proposed Envirite Corporation Landfill Site Properties, Farmington Township, Clarion County, Pennsylvania, included with its Pre-Hearing Memorandum as Exhibit J. Although the report states it was prepared by William E. Edmunds, it does not state who Mr. Edmunds is or in what capacity he prepared the report. Nor is the report in anyway verified. Because of these deficiencies, the report, by itself, cannot provide sufficient basis for the granting of summary judgment. Therefore, summary judgment is denied with respect to the issue of compliance with 25 Pa.Code §273.120(b)

As to Appellants' allegation that County Landfill submitted no maps or plans showing previous mining operations as required by 25 Pa.Code §273.120(a)(1), County Landfill asserts that its Phase I application did in fact show the extent of mining activities, based on aerial photographs and a

geological study. County Landfill references its Phase I application, Form D, Narrative Section E, Figures 5-8. Since we do not have this information in the record before us, we cannot make a determination as to what may have been submitted. Therefore, summary judgment on the issue of compliance with 25 Pa.Code §273.120(a)(1) is not appropriate.

Air Quality

Paragraphs 18, 19, and 24 of the appeal complain that the permit application did not contain sufficient ambient air modeling to determine the impact of road dust, off-gases, and vehicle emissions; that the permit fails to adequately state how air toxics, including methane, will be tested and controlled; and that the permit fails to incorporate adequate background testing to prevent degradation of ambient air quality and a plan for prevention or containment of malodors.

County Landfill argues that pursuant to the Board's Order of March 23, 1991, deeming admitted the material contained in DER's Request for Admissions, Appellants have admitted to the following: methane is not an air toxic pollutant (Admission No. 6), methane gas concentrations in the atmosphere within the permit boundary will not exceed the lower explosive limit ("LEL") and will not exceed 25% of the LEL in adjacent areas outside the permit boundary (Admissions Nos. 7-9), malodors are not detectable at the landfill property boundary (Admission No. 12), ambient air quality standards of 25 Pa.Code Chapter 131 are presently being attained (Admission No. 13), and expansion of the landfill will not cause or contribute to an exceedance of the ambient air quality standards (Admission No. 14). Appellants do not respond to this matter in their brief in opposition.

We agree with County Landfill that summary judgment is appropriate here where Appellants have admitted that ambient air quality at the landfill presently meets the standards set by the regulations, that expansion of the landfill will not cause an exceedance of these standards, and that methane gas concentrations do not exceed the LEL. Therefore, summary judgment is granted to County Landfill with respect to air quality and ambient air testing.

Conclusion

In conclusion, County Landfill is granted partial summary judgment as set forth above.

O R D E R

AND NOW, this 7th day of November, 1991, upon consideration of County Landfill's Motion for Partial Summary Judgment and Appellants' Brief in Opposition thereto, it is ordered that the Motion is granted in part and denied in part. Summary judgment is granted to County Landfill on the following issues raised in the Appellants' notice of appeal:

1) Disposal of and limitations on acceptance of residual and special handling waste. (See paragraphs 8, 9, 40 of notice of appeal)[5]

2) Limitation on the amount of municipal waste which may be accepted at the facility. (paragragh 32)

3) Compliance with 25 Pa. Code Chapter 131. (paragraph 17)

4) Economic effect on property values. (paragraph 46)

5) Zoning. (paragraph 47)

6) Withholding of solid waste permit pending submission of application for NPDES permit. (paragraphs 10, 20, 25, 28)

---

[5]All paragraph numbers refer to section 3(a) of Appellants' notice of appeal, unless otherwise designated.

7) Economic effect on the tourism industry. (paragraph 1)

8) Insurance coverage. (paragraph 2)

9) Ownership of property within the permitted area. (paragraphs 31, 42)

10) Compliance history of Aardvark and Envirite. (paragraphs 27, 36)

11) Length of term of the permit. (paragraph 38)

12) Replacement of water supplies. (paragraph 30)

13) U. S. Army Corps of Engineers permit. (paragraphs 34 and 3(b)(2))

14) Notification of maximum tonnage exceedance. (paragraph 48)

15) Location of cemetery. (paragraph 41)

16) Compliance with 25 Pa. Code §273.202. (paragraph 4)

17) Air quality and ambient air testing. (paragraphs 18, 19, 24)

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

EHB Docket No. 90-311-MJ

JOSEPH N. MACK
Administrative Law Judge
Member

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

DATED: November 7, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Kenneth T. Bowman, Esq.
Western Region
For Appellants:
Virginia I. Cook, Esq.
Pittsburgh, PA
For Permittee:
M. Joel Bolstein, Esq.
Lois Reznick, Esq.
Thomas H. Lee, Esq.
DECHERT PRICE & RHOADS
Philadelphia, PA

rm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

PENNSYLVANIA MINES CORPORATION	:	
	:	
v.	:	**EHB Docket No. 91-247-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 12, 1991**

OPINION AND ORDER
SUR DEPARTMENT OF ENVIRONMENTAL RESOURCES'
MOTION TO COMPEL

By Richard S. Ehmann, Member

Synopsis

Where through issuance of an Order the Department of Environmental Resources ("DER") imposes conditions on the use of new underground mining technology by Pennsylvania Mines Corporation ("PMC") requiring additional air monitoring by certified mine officials when the equipment is used, and on appeal PMC challenges the reasonableness of such restrictions, the Board will compel answers to DER interrogatories as to the numbers of certified officials hired to comply with identical air monitoring requirements for such equipment at other PMC mines. The Board will also require answers to interrogatories dealing with the numbers of certified officials which PMC contends would need to be hired to comply with such requirements at the underground coal mine involved with the Orders before the Board in the instant appeal.

The Board will not require PMC to answer interrogatories as to costs of employment of additional certified officials or of compliance with DER's orders when, in response to DER's Motion, PMC indicates it raised the cost of compliance only in relation to its unsuccessful attempt to seek supersedeas and that costs are not a PMC issue for the merits hearing.

OPINION

This is a consolidated appeal from DER Compliance Orders Nos. 00000001 and 00000002 ("Order 1" and "Order 2"). Order 1 required PMC to amend its plan for use of scrubber-miners at the Greenwich Collieries No. 2 Mine to include a condition requiring additional air monitoring during use of this equipment. Order 2 revoked DER's approval of this technology's use in this mine because of PMC's refusal to add this condition to its plan for use of this new continuous mining technology. PMC's Notices of Appeal say DER lacked authority to require a plan for use of this equipment by PMC, DER lacked authority to issue its orders, DER had no authority to prohibit use of the equipment absent compliance with DER's conditions in its plan approval and DER's action is contrary to law or an abuse of discretion.

By an Opinion and Order dated August 2, 1991, PMC's Petitions for Supersedeas of these two orders were denied because PMC failed to demonstrate a likelihood it would prevail on the merits. After the petitions were filed but before the Opinion was written, the two appeals were consolidated by Board Order.

In this consolidated appeal, DER undertook discovery via interrogatories directed to PMC. In response to Interrogatories 15(d), 19, 23, and 29 PMC objected, stating the responses thereto were irrelevant and would not lead to relevant or admissible evidence.

DER's Motion to Compel which is now before us says these interrogatories will produce relevant information because PMC attacks the reasonableness of DER's guidelines for use of this equipment. In response PMC says it raised cost of compliance and burdensomeness of the DER guidelines only in relation to the issue of irreparable harm for purposes of supersedeas where they were relevant and not for the merits hearing where they have no relevancy. PMC says all that it argues now is that DER abused its discretion by creating requirements without authority or, if DER had authority to issue the guidelines and to mandate compliance therewith, DER's orders made PMC's mine less safe, so the Orders were an abuse of discretion.

As stated in Kerry Coal Company v. DER, 1990 EHB 98, before this Board discovery is guided by the Pennsylvania Rules of Civil Procedure. As stated in Willowbrook Mining Company v. DER, EHB Docket No. 90-346-E (Opinion and Order dated January 8, 1991), we give a broad meaning to relevancy during discovery.

Looking at DER's Interrogatory 15, we see it seeks information on additional employees which PMC hired, if any, to comply with DER's monitoring requirements imposed in conjunction with use of this technology at other PMC mines. Interrogatory 29 seeks information as to the numbers of certified mine officials (the only ones authorized by DER to conduct the additional monitoring) employed at the Greenwich Collieries No. 2 Mine. Interrogatory No. 23(a), (b) and (d) seeks information on the numbers of additional certified mine officials PMC contends it will need to employ at this mine if compelled to comply with Order 1. While it appears answers to these three interrogatories themselves may not be relevant admissible evidence relating to the issues which PMC says are the sole issues raised by its appeal, we cannot

say that answers thereto will not lead to such evidence. Moreover, PMC contends Order 1 and Order 2 make its mines less safe because now it may not use this new technology in its mines and thus DER abused its discretion by issuing the orders. If PMC complied with Order 1, then DER would not have issued Order 2 (barring use of this equipment based upon PMC's refusal to comply with Order 1). It appears that answers to these interrogatories could produce information leading to relevant evidence about whether the mine is unsafe because of DER's orders or PMC's intransigence based upon its assertion that DER lacks authority to issue Order 1. From the hearing on the Petition for Supersedeas it is obvious this is an issue before us. Accordingly, we will direct PMC to answer these interrogatories as set forth below.

Interrogatory 19 seeks a list of all costs PMC would incur in complying with Order 1. Interrogatory 23(c) seeks the costs to PMC of employment of any certified mine officials needed to comply with Order 1. Not only is Interrogatory 23(c) thus redundant with Interrogatory 19 and therefore burdensome but also we do not see any conceivable likelihood answers to either Interrogatory 19 or Interrogatory 23(c) will produce relevant information for DER, in light of the issues raised by PMC's Notices of Appeal as limited through PMC's response to DER's Motion.

Accordingly, we enter the following order.

O R D E R

AND NOW, this 12th day of November, 1991, it is ordered that DER's Motion is granted in part and denied in part. PMC is ordered to answer DER's Interrogatories 15(d), 23(a), (b) and (d), and 29 by December 3, 1991. It is ordered that DER's Motion is denied as to Interrogatories 19 and 23(c).

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 12, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
L. Jane Charlton, Esq.
Western Region
For Appellant:
Joseph A. Yuhas, Esq.
Ebensburg, PA

rm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BC

LEHIGH TOWNSHIP, WAYNE COUNTY	:	
	:	
v.	:	**EHB Docket No. 91-090-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 13, 1991

OPINION AND ORDER SUR
REQUEST TO APPEAL NUNC PRO TUNC

By Maxine Woelfling, Chairman

Synopsis

A request for leave to appeal nunc pro tunc is denied where petitioner's only reason in support of its request is that the Department failed to notify it that the Department's decision was final and appealable to the Board. The Department had no duty to provide this information to the petitioner.

OPINION

This matter was initiated with the March 7, 1991, filing of a notice of appeal by Lehigh Township, Wayne County (Township), seeking review of letters from the Department of Environmental Resources (Department) dated January 14, 1991 and February 8, 1991. The letters concerned grants to the Township for reimbursement of expenses incurred in administering 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 Board, in an opinion dated

September 6, 1991, dismissed the Township's appeal of the January 14, 1991, letter as untimely.

By letter dated September 25, 1991, the Township requested that it be allowed to file an appeal of the January 14, 1991, letter nunc pro tunc. It argued that there is good cause to allow its appeal nunc pro tunc because the Department did not indicate that its January 14, 1991, letter was a final action or that the Township, if dissatisfied, could appeal the letter to the Board. The Department responded to the Township's request on October 15, 1991, alleging that the Township failed to satisfy the requirements for allowance of an appeal nunc pro tunc and disputing that it had an obligation to advise the Township of its appeal rights.

The Board's rules of practice and procedure provide that the Board may allow the filing of an appeal nunc pro tunc upon the showing of good cause. 25 Pa. Code §21.53(d). "Good cause" includes instances in which fraud or breakdown in the operation of the Board led to the untimely filing or where non-negligent happenstance precluded a timely filing. C & K Coal Company v. Department of Environmental Resources, 112 Pa. Cmwlth 505, 535 A.2d 745 (1988); allocatur denied, ____ Pa. ____, 546 A.2d 60 (1988).

The Township has alleged neither of these reasons as grounds for allowing its appeal nunc pro tunc; instead, it contends that the Department's failure to advise it that the January 14, 1991, letter was a final action and could be appealed to the Board is grounds for allowing the appeal. The Commonwealth Court soundly rejected such an argument in Quaker State Oil Refining v. Department of Environmental Resources, 108 Pa. Cmwlth 610, 530

A.2d 942 (1987), holding that where appeal rights and procedures are clearly set forth in law or regulations, an agency has no obligation to apprise a party of its appeal rights.

In this case, as in Quaker State, the procedures for appeal of Department actions are clearly set forth in statute and regulations. Accordingly, the Township's petition for leave to appeal nunc pro tunc must be denied.

ORDER

AND NOW, this 13th day of November, 1991, it is ordered that Lehigh Township's petition for leave to appeal the Department's January 14, 1991, letter nunc pro tunc is denied.

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: November 13, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Barbara L. Smith, Esq.
Northeastern Region
For Appellant:
Timothy B. Fisher, Esq.
Gouldsboro, PA

rm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

AL HAMILTON CONTRACTING COMPANY	:	
	:	
v.	:	**EHB Docket No. 85-392-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 14, 1991**

OPINION AND ORDER SUR
MOTION TO STRIKE EXPERT OPINIONS

By Maxine Woelfling, Chairman

Synopsis

A motion to strike is denied. A party waives any objections to the admission of evidence when it fails to make a timely and specific objection. Furthermore, the certainty requirement does not apply to expert testimony where the proponent of the testimony does not bear the burden of proof.

OPINION

This matter was initiated by the September 24, 1985, filing of a notice of appeal by Al Hamilton Contracting Company (Hamilton), seeking review of the Department of Environmental Resources' (Department) August 30, 1985, denial of a surface mining permit under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* (Surface Mining Act) and 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). Hamilton sought to mine property on the Lansberry site, in Bradford Township, Clearfield County. The denial letter identified three reasons for

the Department's decision: (1) Hamilton failed to demonstrate that there was no presumptive evidence of potential pollution of Commonwealth waters; (2) Hamilton failed to demonstrate that it would prevent damage to the hydrologic balance, both within and outside the permit area; and, (3) the proposed activity would present an unacceptable risk to adjacent water supplies.

This Board conducted a hearing on the merits on June 9, 10, 11, and 12, 1987, and August 27 and 28, 1987. During the hearing, the Department called Joseph J. Lee, Jr., (Lee) a Department hydrogeologist, as an expert witness. Among other things, Lee testified as to the efficacy of Hamilton's proposal to reduce the formation of acid mine drainage by alkaline addition and rendered opinions concerning groundwater flow at the site and the impact of mining the site on water supplies. On August 28, 1987, Hamilton moved the Board to strike Lee's opinions regarding these topics. Both parties submitted briefs on the motion to strike. Hamilton filed its brief in support on September 21, 1987; the Department filed its brief in opposition on November 19, 1987; and, Hamilton filed its reply brief on December 8, 1987.

The alkaline addition and groundwater components of Hamilton's motion will be addressed separately below.

I. Lee's Opinion Concerning the Efficacy of Alkaline Addition.

Hamilton argues that the Board should strike Lee's opinion on the efficacy of Hamilton's proposal to add alkaline materials to reduce acid mine drainage. The Department adduced the testimony on June 12, 1987; it proceeded as follows:

> MR. LABUSKES (Counsel for the Department, on direct examination): Mr. Lee, based on what you've just testified to, about the on-going study of the alkaline addition procedure, the complex hydrogeology of the backfill environments, the fact that the theory is based on the uncertain principles of acid base accounting, the temporal problems involved with the procedure, do you have an opinion whether

> the plan proposed by Al Hamilton in this permit application will prevent this site from producing acid mine drainage?
>
> MR. LEE: Yes, I do.
>
> MR. LABUSKES: Do you hold that opinion to a reasonable degree of scientific certainty?
>
> MR. LEE: Yes, I do.
>
> MR. LABUSKES: What is that opinion?
>
> MR. LEE: The opinion is that given the plans do not demonstrate that the waters of the Commonwealth would be protected, basically the problem is there is such an excess of MPA that to use an innovative technique as unproven and unsubstantiated as to apply it to a mine site as it applies to a mine site, the minimum we would end up with is an alkaline mine drainage discharge.
>
> (N.T. 793-94)

Counsel for Hamilton did not object to the testimony, and direct examination continued, moving onto other issues. (N.T. 794-807) Counsel for Hamilton cross-examined Lee on the next scheduled day of the hearing, August 27, 1987, asking, among other things, whether Lee relied upon any additional facts when he came to his conclusion on the alkaline addition proposal. (N.T. 1002) Lee offered none, and counsel for Hamilton continued cross-examining Lee on other issues. (N.T. 1002-1010) On the next day of the hearing, August 28, 1987, before the Department conducted re-direct examination, Hamilton made the motion to strike considered here.

In its brief in support of the motion, Hamilton contends that the Board should strike this testimony because it is an expert opinion based on facts not in evidence. The Department, meanwhile, argues that Lee reviewed the facts behind his determination earlier in his testimony.

The Board will not strike Lee's testimony regarding the efficacy of alkaline addition because Hamilton failed to make a timely objection. A party

waives an objection to the form of a question or admissibility of evidence unless it makes a timely and specific objection. Bell v. Philadelphia, 341 Pa. Super. 534, 491 A.2d 1836 (1985). The ground for the objection is oftentimes apparent from the question itself, in which case, to be timely, the objection should be made before the answer. Packel and Poulin, Pennsylvania Evidence, §103.1 (1987). In certain circumstances, however, it is not feasible to object to a question before the witness answers, and counsel must resort instead to a motion to strike.

The Supreme Court enunciated the approach to motions to strike in Jones v. Spidle, 446 Pa. 103, 107, 286 A.2d 366, 368 (1971):

> Where either party to a proceeding discovers at any time that improper testimony has been inadvertently admitted, he may have the error corrected by applying to the court to have the evidence stricken . . . . As a rule, such motion will be allowed only in cases where the ground of the objection was unknown and could not have been known with ordinary diligence at the time the evidence was received.
>
> (Emphasis in the original)

In U. S. v. Bamberger, 456 F.2d 1119 (1972), the Third Circuit Court of Appeals summarized the policy behind the rule for prompt objections where, as here, counsel sought to have expert testimony stricken because no adequate foundation was laid:

> [Here] . . . the attack is directed simply to the formalities of laying proper foundation for the . . . reception [of the evidence]. The experiences of any practitioner at the trial bench or bar, criminal or civil, attest to the prevailing practice of receiving routine evidence without the necessity of laying the proper foundation, e.g., medical and hospital bills, business records, x-ray films, [etcetera]. Ordinarily in such cases, it is only when an objection is lodged that foundation proof becomes an issue. As a matter of trial strategy, often the adverse party does not desire an imposing foundation to introduce the substantive testimony. . . .

(456 F.2d 1119, 1130-1131.)

Hamilton failed to object in a timely manner to the testimony it seeks to strike. Even were we to assume, as Hamilton asserts, that the Department failed to lay an adequate foundation for Lee's testimony, Hamilton had reason to know the question was objectionable at the time the Department asked it. Hamilton, however, did not object after the question was asked or even immediately after it was answered. Instead, in the interval between the Department's question and Hamilton's motion, the Department concluded direct examination and Hamilton conducted a full day's worth of cross-examination. In the direct examination following the question, Lee did not testify further about the bases of his opinion. (N.T. 793-809) Nor, on cross-examination, did Lee change his testimony regarding the bases for his opinion. (N.T. 1000-1003) Hamilton, therefore, had no more reason to suspect the bases of the question at the time it filed the motion than at the time the question was asked. The motion to strike is untimely because counsel for Hamilton knew or should have known the ground for the objection at the time the evidence was received. Furthermore, the Pennsylvania Superior Court has held that a counsel's cross-examination of a witness who has given incompetent evidence in chief without objection waives counsel's right to have that evidence subsequently stricken out, particularly where the same or similar evidence is elicited on cross-examination. See LaFuria v. New Jersey Insurance Company of Newark, 131 Pa. Super. 413, 200 A. 167 (1938).

Finally, even if the motion to strike were timely with regard to this issue, it would not be appropriate here. The facts Lee relied upon when he rendered his opinion are in evidence.

As noted in the testimony quoted earlier in this opinion, Lee provided his opinion when asked to give his conclusion based on:

(1) the ongoing study of the alkaline addition procedure;

(2) the complex hydrogeology of the backfill environments;

(3) the difficulty of maintaining oxidizing environments;

(4) the fact that the theory of alkaline addition is based on the uncertain principles of acid-base accounting; and

(5) temporal problems involved with the alkaline addition procedure.

(N.T. 793-794)

Hamilton contends that the factors above are not facts in evidence, and, since expert opinions must be based on facts in evidence, the Board should strike Lee's testimony.

We disagree. The factors listed above are the scientific principles, not the facts, Lee relied upon when rendering his opinion. Virtually every scientific principle arises from observations or "facts." Scientists then derive theories to explain the observed phenomena. When scientists give an expert opinion, they are not required to detail every one of these facts; instead, it is enough that the principle is generally accepted in the particular field. See Galante v. West Penn Power Co., 349 Pa. 616, 37 A.2d 548 (1944). The only facts which must be admitted in evidence are those particular facts of the case to which the witness applies his expertise in order to reach his expert opinion.

Here, the record contains the specific facts which served as the foundation for Lee's opinion. Lee was the lead reviewer of the Lansberry permit application. (N.T. 687) As part of the review process he evaluated the geological reports, water quality data, the erosion control plan, the overburden analysis, the coal analyses, and other materials submitted as part

of the permit application process. (N.T. 688-690, 745, 771; Ex. AH-1) Lee visited the Lansberry site, observed the stratigraphy of the highwall on an adjacent site and reviewed water quality data for the vicinity[1]; he detailed the stratigraphy and the water quality data in his testimony. (N.T. 696, 700-740) Based upon his scientific knowledge regarding the shortcomings of acid-base accounting (N.T. 750-769, Ex. DER-8), taken in tandem with the data obtained from the overburden analysis, the coal analyses, the water quality in the vicinity of the mine site, and the stratigraphy, Lee concluded that there was a strong likelihood of acid mine drainage if the Lansberry site is mined. (N.T. 780)

The path from Lee's decision on acid mine drainage to his decision on the effectiveness of the alkaline addition plan is relatively straightforward. Lee, as lead reviewer, had personal knowledge of the details of Hamilton's proposed mining operation and its alkaline addition plan; both were part of the permit and, therefore, part of the record. Having determined that mining would cause acid mine drainage, the question of the efficacy of Hamilton's plan was simply an application of Lee's scientific expertise: Lee merely had to decide based on scientific principles whether the alkaline addition plan Hamilton proposed was sufficient to remedy any acid mine drainage problems created by Hamilton's proposed mining operation. (N.T. 1000-1002)

As noted earlier in this opinion, objections to the admissibility of evidence must be timely and specific or else the objection is waived. Bell v. Philadelphia, *supra*. Where counsel specifies his ground for objection, he is deemed to have waived other unspecified grounds. Commonwealth v. Raymond, 412

---

[1] This highwall was noted in Module 7 of Hamilton's permit application (Ex. AH-1). Water quality data was also included in the permit application (N.T. 701, Ex. AH-1(b)) and the Department sampled both the Lansberry site and the adjacent E. M. Brown site (Ex. DER-1).

Pa. 194, 194 A.2d 150 (1963), cert. denied, 377 U.S. 999 (1964); Stulz v. Boswell, 307 Pa. Super. 515, 453 A.2d 1006 (1982).

II. Lee's Opinions Concerning Groundwater.

Hamilton also contends that this Board should strike two of Lee's opinions pertaining to groundwater because Lee failed to testify with the amount of certainty required under Pennsylvania evidence law. (N.T. 1016-1018)

The first opinion relates to the direction of groundwater flow:

> MR. LABUSKES (Counsel for the Department, on direct examination): Do you have an opinion based on all the bases that we've discussed about the direction of groundwater flow on and around the Lansberry site:
>
> MR. LEE: Yes, I do.
>
> MR. LABUSKES: Do you hold that opinion to a reasonable degree of scientific certainty?
>
> MR. LEE: Yes, I do.
>
> MR. LABUSKES: And what is that opinion?
>
> MR. LEE: That opinion is that the Lansberry site and the coals they propose to mine are in the recharge area for the aquifers that are in the lower unit.
>
> * * *
>
> (N.T. 801-802)

Lee then testified that he based his conclusion on the distribution of wells affected by acid mine drainage. (N.T. 802-803)

The second opinion pertains to whether local water supplies will be affected:

> MR. LABUSKES: ... Do you have an opinion [as to whether local water supplies will be affected]?
>
> MR. LEE: Yes, I do.
>
> MR. LABUSKES: Do you hold that opinion to a reasonable degree of scientific certainty?

MR. LEE: Yes.

MR. LABUSKES: Would you please state the opinion?

MR. LEE: The opinion is that, given the data as I've just described it, we have these various flow patterns occurring and the recharge area is going to impact any water quality developed in that recharge area will impact that lower aquifer. Groundwater components in that direction would affect those lower aquifers.

MR. LABUSKES: How will that, in turn, affect the water supplies?

MR. LEE: They are drawing water from the aquifers below the Lower Kittanning formation and just as these were responded to effects in the recharge area by the Lower Kittanning so these water supplies would as well and the other wells are all subject to potential impacts.

(N.T. 804)

According to Hamilton, the opinions are equivocal and, taken together with the testimony elicited on cross-examination, demonstrate that Lee lacked the requisite degree of certainty. On cross-examination, Lee testified, among other things, that a plume of water contaminated by acid mine drainage "could, in fact, be affecting ... [the] water supplies;" that "flow conditions indicated by past mining could be to the northeast;" and, that there is an avenue by which contaminated water "could arrive at those wells." (N.T. 879, 1009) Specifically, Hamilton contends that the "coulds" in Lee's testimony violate the "rule of certainty" as enunciated in Patrick B. Kozak et al. v. Wayne Struth et al., 515 Pa. 554, 531 A.2d 420 (1987); Kravinsky v. Glover, 263 Pa. Super. 8, 396 A.2d 1349 (1979); Niggel v. Sears Roebuck and Company, 219 Pa. Super 353, 281 A.2d 718 (1971); Menarde v. Philadelphia Transit Company, 376 Pa. 497, 103 A.2d 681 (1954); and, Albert v. Alter, 252 Pa. Super 203, 381 A.2d 459 (1977).

This Board will not strike either of Lee's opinions; both are

admissible despite the certainty requirement.

The Pennsylvania Supreme Court first applied the "certainty" test in Fink v. Sheldon Axle and Spring Company, 270 Pa. 476, 479 (1921), where it held that, under the Workmen's Compensation Act, a doctor must more than merely testify that an ailment "might" be the result of work experience. In McCrosson v. Philadelphia Rapid Transit Co., 283 Pa. 492, 129 A. 568 (1925), the Pennsylvania Supreme Court held that the certainty requirement applies as well to cases outside the field of workmen's compensation, noting that the certainty requirement was "based on the essential rule of law that no one can be held liable to answer in damages for that which is not proved to be caused by him." 283 Pa. 492, 496; 129 A. 568, 569.

The Supreme Court elaborated further on the rationale for the certainty requirement in McMahon v. Young, 442 Pa. 484, 276 A.2d 534 (1971). In McMahon, a doctor was asked whether plaintiff's condition was caused by the automobile accident which was the subject of the action. The doctor testified that the accident was "consistent with the injury," and that "there is probably a cause and effect relationship." The Supreme Court held that this testimony was not admissible to prove causation, explaining its reasoning as follows:

> The issue is not merely one of semantics. There is a logical reason for the rule. The opinion of a medical expert is evidence. If the fact finder chooses to believe it, he can find as fact what the expert gave as an opinion. For a fact finder to award damages for a particular condition to a plaintiff, it must find as a fact that that condition was legally caused by the defendant's conduct. Here, the only evidence offered was that it was "probably" caused, and that is not enough. Perhaps in the world of medicine nothing is absolutely certain. Nevertheless, doctors must make decisions in their own profession every day based on their own expert opinions. Physicians must understand that it is the intent of our law that if the plaintiff's medical expert

> cannot form an opinion with sufficient certainty so as to make a medical judgment, there is nothing on the record with which a jury can make a decision with sufficient certainty so as to make a legal judgment.
>
> Because Mrs. McMahon's doctor's testimony was not made with sufficient certainty, it was not legally competent evidence and a new trial must be granted.
>
> (442 Pa. 484, 486; 276 A.2d 534, 535)

The certainty requirement does not apply to Lee's opinions regarding the direction of groundwater flow and whether local water supplies will be affected. As the language in MacMahon, quoted above, makes clear, the courts have merely taken the standard of proof required to prove causation (or future events) and made it into a rule of evidence: expert testimony is not admissible unless it is sufficient to prove the issue in question. Packel and Poulin, Pennsylvania Evidence, §706 (1987). The rationale for the rule breaks down where, as here, expert testimony need not be certain to prove the issue in question. The Department need not show that discharge of pollution will result; it will prevail if it shows that the potential for pollution exists. Section 3 of the Clean Streams Law prohibits the discharge of any substance into the waters of the Commonwealth if it "causes or contributes to pollution . . . or creates a danger of pollution . . . ." Reflecting this statutory declaration, the pertinent Department regulation governing surface mining permits prohibits the issuance of a permit under §315 of the Clean Streams Law if there is "presumptive evidence of potential pollution of the waters of the Commonwealth." 25 Pa. Code §86.37(a). (Emphasis added) The "waters of the Commonwealth" include groundwater. 35 P.S. §691.1. Applicants for surface mining permits, therefore, must carry the burden to prove that these operations are not likely to cause pollution. Harman Coal Company v. DER, 1977 EHB 1, aff'd, 34 Pa. Cmwlth. 610, 384 A.2d 289 (1978).

Furthermore, even in conventional causation cases, courts will not require an expert to render an opinion as to causation with certainty where the proponent of that evidence does not bear the burden of proof. In Neal by Neal v. Lu, 365 Pa. Super. 464, 530 A.2d 103 (1987), the Superior Court held that a defense expert, in refuting plaintiff's expert with regard to causation, need not testify with reasonable medical certainty. The court held that the defense expert would be permitted to testify to other "possible" causes for the injury. The court reasoned that reasonable medical certainty was not required because the defendant does not have the burden of proof with regard to causation. As noted earlier in this opinion, Hamilton bears the burden of proof, not the Department. Lee's opinions, therefore, need not meet the certainty requirement to be admissible.

ORDER

AND NOW, this 14th day of November, 1991, it is ordered that Hamilton's motion to strike is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 14, 1991

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
Martin Sokolow, Jr., Esq.
Central Region
For Appellant:
William C. Kriner, Esq.
KRINER & KOERBER
Clearfield, PA

nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAF

HRIVNAK MOTOR COMPANY	:	
	:	
v.	:	**EHB Docket No. 88-473-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 18, 1991**

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

By Terrance J. Fitzpatrick, Member

Synopsis

An Order of the Department of Environmental Resources (DER) requiring the Appellant to take various steps to abate groundwater contamination is reversed and remanded to DER. Although the evidence indicates that the Appellant was responsible for the contamination found in 1987, test results from water samples taken in 1990 showed no contamination off-site and greatly diminished contamination on the Appellant's property. Further test results must be analyzed before DER may order abatement.

INTRODUCTION

This is an appeal by Hrivnak Motor Company (Hrivnak), East Pikeland Township, Chester County, from an Order of the Department of Environmental Resources (DER) dated October 18, 1988. In this Order, DER found that Hrivnak was responsible for contamination of the groundwater with gasoline-type hydrocarbons which were found in the Hrivnak well and in other private wells in the area. As a result, DER ordered Hrivnak to precision test all

underground storage tanks on the property, to provide potable water to affected well-owners, to submit a work plan aimed at abating the groundwater contamination, and to implement the work plan after approval by DER.

Hearings on this matter were held on July 23 and 24, 1990. DER presented testimony from four witnesses, and Hrivnak presented testimony from two witnesses. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. The Appellant is Hrivnak Motor Company (Hrivnak), East Pikeland Township, Chester County. Hrivnak's activities on the site include automobile sales, retail petroleum sales (including gasoline, diesel fuel, and home heating oil), and a car-wash. In addition, Hrivnak maintains a small automobile junkyard on the premises. (Stipulation 1, Transcript -"T"-21, 40, 84-85.)

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which is the Commonwealth agency responsible for administering and enforcing the Clean Streams Law, 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 regulations promulgated under these laws.

3. Hrivnak has conducted business at its current location since late 1954, when the filling station operation was moved to the site (T. 154). The automobile dealership opened at the site in January, 1955 (*Id.*).

4. In 1953, prior to placement of any underground storage tanks on the premises, a well was dug at the site to provide water for construction purposes (T. 153-154). The well driller was instructed to only dig deep enough to supply 50-55 gallons of water per minute (T. 154). The water from

this well had an unpleasant odor which has not changed to the present time (T. 155).

5. The unpleasant odor of the water from the Hrivnak well is most likely attributable to sulfur which is present in the geology underneath the site (T. 99, 101).

6. In October, 1980, DER inspected the Hrivnak property and noted oil-soaked soils in the junkyard behind the shop. (Commonwealth Exhibit 1 - "Exh. C-1".) A later inspection that same month revealed that the saturated soil had been removed, but that some of it had been stockpiled at the site (Exh. C-3, T. 23). An inspection in May, 1981, revealed the existence of a 300 gallon waste oil tank within a concrete pit with a drain, that oil-contaminated soil was still piled on the site, and that there was some recent spillage on the site (Exh. C-4, T. 24-25).

7. A water sample taken from the Hrivnak well in October, 1981, revealed a benzene concentration of .85 parts per million (850 parts per billion - "ppb"[1]) (Exh. C-6(a), T. 26-27, 38). Benzene is a constituent of gasoline (T. 38).[2]

8. In 1987, after being contacted by the Chester County Health Department, DER took samples from several wells in homes and businesses in the

---

[1] To lend some perspective on this sample result, as well as the other sample results in this decision, the "maximum contaminant level" (MCL) for benzene under the national revised primary drinking water regulations is 5 ppb. 40 C.F.R. §141.61. These are the standards which govern public water supplies.

[2] Although DER witness Robert D. Bauer, Jr. specifically characterized benzene as a "gasoline constituent" (T. 38), we do not read his testimony as saying that benzene is not also a constituent of other petroleum products, such as diesel fuel or home heating oil. Benzene belongs to a family of compounds known as "hydrocarbons" which are found in fossil fuels. C. C. Lee, Ph.D., Environmental Engineering Dictionary, p. 273 (Government Institute, Inc., 1989).

vicinity (Exhs. C-6(b) through C-6(j). The location of these homes and businesses is shown on Exh. C-14 (attached as an appendix to this Adjudication).

9. The 1987 sample results detected benzene in the following concentrations at the following locations: Hrivnak well - 830 ppb (Exh. C-6(d)); Kulp residence well - 22 ppb (Exh. C-6(c)); Shoe store well - 2 ppb (Exh. C-6(e)); Tom Manny's (former) Arco station well - trace amounts estimated at 0.7 ppb (Exh. C-6(f))[3]; Gappa residence well - trace amounts estimated at .08 ppb (Exh. C-6(g)); Bakker residence well - none detected (Exh. C-6(h)); and the former Amoco station well - none detected (Exh. C-6(i)).

10. In January, 1990, DER took two water samples from the Hrivnak well. The laboratory analysis of the samples showed that the benzene levels had declined to 9.4 ppb and 10 ppb (Exh. C-6(k), C-6(l)).[4]

11. In January, 1990, DER took water samples from various other wells in the vicinity, including wells at the Kulp residence and Tom Manny's (former) Arco station. None of these samples showed detectable levels of benzene (Appellant's Exhibits 2 through 10, "Exh. A-2 through A-10").

12. Groundwater flow in the vicinity is most likely toward the northeast, because the bedrock in the vicinity dips toward the northeast (T. 98, 99, 109).

13. At present, there are 14 underground storage tanks on the Hrivnak property (Exh. C-13, T. 189-190). All of these tanks were used, at some

---

[3] Although the location is not apparent on the face of C-6(f), DER witness Donald Bauer confirmed that this sample was taken from Manny's Arco (T. 37-38).

[4] These two samples were taken from the same well, even though the face of C-6(k) indicates it was taken from well "A" and C-6(l) indicates well "B" (T. 45).

point, to store either gasoline, diesel fuel, or home heating oil (Exh. C-13, T. 170-171).

14. Not all of the larger tanks behind the building (those identified as "F" through "N" on Exh. C-13) are currently in use; some of them have not held any type of product since approximately 1985 or 1986 (T. 170, 173-174). Mr. Hrivnak was uncertain exactly which tanks were in use and which were not (T. 173).

15. Over the years, Hrivnak guarded against lost product in the gasoline tanks by "sticking" the tanks every day (measuring the amount of product with a stick), and by reconciling the figures with the meter readings on the gas pumps (T. 158-162).

16. Hrivnak's records of gasoline and diesel fuel sales are audited by the Commonwealth, Department of Revenue, because Hrivnak pays tax on these products as he sells them, not as he buys them (T. 160-161, 173). The Department of Revenue has never found a discrepancy in Hrivnak's records (T. 164).

17. The reconciliation process referred to in Findings of Fact 15 and 16 does not apply to the home heating oil stored on the Hrivnak property (T. 173).

18. In 1977, Hrivnak removed some gasoline tanks because of customer complaints about water in the gasoline and because "they [the tanks] were getting near that time to be taken out" (T. 178, 180, 183). After the tanks were excavated, a water line - or what could have been a water line - was discovered on the cross-over pipe between the tanks (T. 179, 181-182).

19. In the past (over 8-10 years ago), Hrivnak occasionally discovered water in the bottom of the gasoline tanks. Mr. Hrivnak believes this water came from "sweating" in the tanks (T. 195-199). A pump was used to

remove this water, but Mr. Hrivnak does not know how his maintenance people disposed of this water (T. 200).

20. The decline in the benzene levels in the Hrivnak well and the other wells from 1987 to 1990 could be due to dilution from recharge of the aquifer, pumpage of the groundwater in the area, or naturally occurring bioremediation (T. 107).

21. Hrivnak is currently operating a car wash at the site (T. 81). It is possible that the car wash is responsible, to some extent, for the reduced levels of benzene in the groundwater, because as the groundwater is pumped out and sprayed into a mist, the benzene is dissolved into the atmosphere (T. 84-86).

22. In light of the number of underground storage tanks on the Hrivnak property, the other evidence indicating opportunities for petroleum products to enter the environment, the water sample data which consistently showed the highest concentration of benzene in the Hrivnak well, and the direction of groundwater flow in the area, it is probable that the groundwater contamination in the vicinity - as shown in the 1987 sample results - resulted from activities on the Hrivnak property.

DISCUSSION

This is an appeal by Hrivnak from a DER Order requiring Hrivnak to take various actions to abate alleged groundwater pollution on and around Hrivnak's property. DER bears the burden of proof in this appeal. 25 Pa. Code §21.101(b)(3).

DER argues that it has met its burden of proof and that its Order should be affirmed. DER contends that the testimony of its witnesses established that there is pollution on the Hrivnak property as a result of Hrivnak's activities, and that this pollution is the most likely source of the

contaminants found in nearby wells. DER contends that this subjects Hrivnak to liability under Section 316 of the CSL, 35 P.S. §691.316. In addition, DER contends that Hrivnak may be held liable under the Storage Tank and Spill Prevention Act (Storage Tank Act), Act of July 19, 1989, P.L. 169, No. 32, 35 P.S. §6021.101 *et. seq.* Section 1311 of the Storage Tank Act, 35 P.S. §6021.1311, establishes a rebuttable presumption that the owner of a storage tank is liable (without proof of fault, negligence, or causation) for all pollution within 2,500 feet of the perimeter of the site (providing the pollution involves the same type of substance stored in the tank). DER argues that all of the polluted wells in this proceeding fall within the 2,500 radius of Hrivnak's property (Exh. C-14, C-15). Finally, DER contends that although the 1990 water samples showed diminished levels of benzene in the Hrivnak well, and no benzene in the other wells, that the requirement that Hrivnak supply potable water to affected well owners should not be waived until confirming sample results are supplied by Hrivnak.[5]

Hrivnak argues that there is no factual or scientific basis for concluding that it is the source of the water pollution at issue here. Hrivnak contends that DER failed to prove that it is "the most probable source" of the pollution, citing A. H. Grove v. Commonwealth, DER, 70 Pa. Commw. 34, 452 A.2d 586 (1982). Hrivnak claims that the courts limit the most probable source doctrine to situations where the evidence is of such a compelling nature that "no other conclusion [as to the source] was logically possible." Grove 452 A.2d at 590. Hrivnak contends that, according to DER witness Robert E. Day-Lewis, the former Arco service station owned by

---

[5] DER's Order did not spell-out who the affected well owners were. We presume DER was referring to the Kulps, because the 1987 sample from the Kulp well (showing 22 ppb of benzene) was the only sample (other than samples from the Hrivnak well) which exceeded the MCL of 5 ppb (see FOF 9).

Tom Manny is the most probable source of the contamination found in the Kulp well, because the Manny property is closer to the Kulp property. Finally, Hrivnak contends that the 1990 test results show no contamination in the Kulp well; therefore, there is no basis for requiring Hrivnak to provide a replacement water supply to the Kulps.[6]

DER's Order was based upon Section 316 of the CSL, 35 P.S. §691.316, which empowers DER to order a landowner to correct a condition on the landowner's property whenever DER finds that the condition is creating pollution or a danger of pollution.[7] Under this section, DER is not required to show that the landowner was negligent or that it caused the condition to exist. National Wood Preserver's Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980), appeal dismissed 449 U.S. 803, Western Pennsylvania Water Co. v. Commonwealth, DER, 127 Pa. Commw. 26, 560 A.2d 905 (1989), affirmed, __ Pa. ___, 586 A.2d 1372 (1991). With regard to pollution found off the landowner's property, DER must prove that a condition on the landowner's property was the "most probable source" of the off-site pollution. A. H. Grove v. Commonwealth, DER, 70 Pa. Commw. 34, 452 A.2d 586 (1982).

Evaluating the evidence, we find that DER has established by a preponderance of the evidence that Hrivnak was responsible for the groundwater contamination shown in the 1987 sample results. This conclusion is based upon the fact that the direction of groundwater flow is from the Hrivnak property toward the other affected wells, that Hrivnak has had numerous underground

---

[6] Hrivnak stated various arguments in its notice of appeal which it did not repeat in its post-hearing brief. These arguments are deemed waived. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Commw. 440, 547 A.2d 447 (1988).

[7] DER's Order was issued before the Storage Tank Act was enacted, and DER has not amended its Order to rely on the Storage Tank Act. Therefore, we will not consider the Act in addressing the liability question.

storage tanks in use over the past several decades,[8] that DER has observed practices at the Hrivnak site which create a danger of groundwater pollution, and that the highest concentration of pollutants has consistently been found in the well on the Hrivnak property. (See FOF 22.) While Hrivnak contends that the former Arco station owned by Tom Manny is the most likely source of the pollutants, the evidence does not support this conclusion. The 1987 water sample taken from the Manny well showed only trace amounts of benzene, and the 1990 sample did not detect any benzene. (See FOFs 9, 11.) In contrast, the samples from the Hrivnak well showed benzene at 830 ppb in 1987, and at 9.4 and 10 ppb. in 1990. (See FOFs 9, 10.) Thus, the conclusion that Manny's was the source of the pollutants runs counter to DER witness Robert Bauer's uncontradicted testimony that higher concentrations of a pollutant are likely to be found near its source[9] (T. 38).

In addition, the testimony that Hrivnak's well water has given-off an unpleasant odor ever since the well was dug in 1953 does not lead us to believe that the groundwater contamination was present when Hrivnak began activities at the site. It is more likely that this odor is due to the sulfur which is naturally present in the geology below the site (FOF 5). This conclusion is consistent with Mr. Kulp's testimony that his well water was still giving-off a "rotten egg" odor at the time of the hearing (T. 223), even

---

[8] Hrivnak's evidence regarding the reconciliation process for the gasoline and diesel fuel tanks (see FOF 15-16) does not establish that Hrivnak's activities were not the source of the groundwater contamination. First, the reconciliation process did not apply to the home heating oil tanks (FOF 17). Second, there were other activities on the site which posed a danger of pollution (FOF 6).

[9] In addition, DER witness Robert E. Day-Lewis did not, as Hrivnak contends, testify that Manny's was the most likely source of the pollutants; he stated only that in investigating the source of pollution, the closest possible source (in this case, Manny's) should be investigated to determine whether it is the probable source (T. 114-115).

though the sample taken from his well seven months earlier did not find detectable levels of benzene (FOF 11).

We disagree with Hrivnak that, under Grove, the evidence as to the source of the pollution must be of such a compelling nature that "no other conclusion [is] logically possible." Grove, 452 A.2d at 590. The language quoted by Hrivnak is dicta. Earlier in the Opinion, Commonwealth Court stated: "We decide only that in the case before us the Department demonstrated with sufficient probability that Grove was the source of the pollution to authorize the issuance of the order as modified by the Board." 452 A.2d at 589. This statement is consistent with the "preponderance of the evidence" standard applied by the Board. See 25 Pa. Code §21.101(a). Under the preponderance test, the Board determines whether a fact is probable, not whether it is certain. See generally, McCormick, Law of Evidence, §319 (1954), Packel and Poulin, Pennsylvania Evidence, §303.1 (1987). Hrivnak's argument would require DER to prove its case "beyond a reasonable doubt," a standard which is applied in criminal cases, but which is not appropriate in cases before the Board.

Having found that Hrivnak was responsible for the groundwater contamination found in the vicinity of its property in 1987, we turn our attention to the remedial measures imposed by DER. Deciding upon the propriety of these remedies involves the exercise of discretion; therefore, we must determine whether the remedies imposed by DER constitute an abuse of discretion.[10] As stated above, DER ordered Hrivnak to precision test the

---

[10] The law is clear that the Board may substitute its discretion for that of DER - it is not required to give great deference to DER's discretionary decisions. Warren Sand and Gravel v. Commonwealth, DER, 20 Pa. Commw. 186, 341 A.2d 556 (1975). However, when the Board decides not to substitute its footnote continued

underground storage tanks on the property, to provide potable water to affected well-owners, to submit a work plan aimed at defining the extent of the contamination and abating the contamination, and to implement the work plan after approval of the plan by DER. We will examine these requirements individually.

With regard to DER's requirement that Hrivnak precision test all of its storage tanks, we believe that this requirement must be reexamined in light of the requirements - which have arisen since DER issued its order - imposed by the Storage Tank Act. Section 502(c) of the Act, 35 P.S. §6021.502(c), requires that underground tanks which are no longer in use must be either sealed or removed. As stated above, not all of the tanks on the property are still in use, so this requirement would appear to apply to these abandoned tanks. If these tanks must be sealed or removed, we see no purpose in testing them. On the other hand, it may be advisable to test those tanks which are still in use. DER has authority to order such testing under the storage tank regulations. See 25 Pa. Code §245.21 (21 Pa. Bulletin 4345, 4354, September 21, 1991). Therefore, we believe it is appropriate to remand this requirement to DER for reexamination in light of the Storage Tank Act and regulations.[11]

We next turn to the requirement that Hrivnak provide potable water

---

continued footnote
discretion for that of DER, the Board may simply say that DER has not "abused its discretion." Western Hickory Coal Co. v. Commonwealth, DER, 86 Pa. Commw. 562, 485 A.2d 877 (1984).

[11] Our reasoning here does not conflict with our earlier statement that we would not consider the Storage Tank Act in determining Hrivnak's liability (footnote 7 supra). The liability provisions of the Act only take effect if DER asserts them in an Order, which DER has not done here. The requirements of the Act regarding the sealing or removal of tanks, however, exist independently of whether DER states them in an Order, and we are merely recognizing the existence of these requirements.

supplies to affected well owners. At the time DER issued its order, the Kulp well was "affected" because the 1987 water sample from the well contained 22 ppb of benzene. (See FOF 9.) The 1990 sample results, however, failed to detect any benzene in the Kulp well or other wells (not counting Hrivnak's) in the area. (See FOF 11.) This raises the question whether this requirement, which appears to have been appropriate in light of the 1987 data, is still appropriate in light of the 1990 data. Since the Board's review of DER's decisions is de novo, the Board may consider evidence which was not before DER when it made its decision. Pennsylvania Game Commission v. DER, 1985 EHB 1, 19.

In its Brief, DER makes the following statements regarding the 1990 data:

> The portion of the Order which requires the provision of replacement water supplies to affected well owners was clearly justified by the 1987 data. There may be reason to conclude that such action is no longer necessary, given the results of the 1990 round of sampling. However, such a determination should await confirming sample results, in order to avoid possibly premature declarations that the well water is now safe for human consumption ... . [I]f additional sampling confirms the non-detectable results from the January 1990 samples, there may be nothing to be gained by requiring that replacement water be provided at this stage. However, this decision must be based on additional testing, which should be performed by Hrivnak Motors, with results reviewed by the Department.

DER Brief at pp. 15-16. We agree with DER that further sample results are needed, and that Hrivnak should be responsible for conducting this testing. Thus, we will remand this issue so that DER may formulate and issue to Hrivnak a testing requirement for the wells in the area.

Finally, we turn to the requirements, in paragraphs 3 and 4 of DER's Order, that Hrivnak submit a work plan aimed at defining the extent of and abating the contamination, and that Hrivnak implement this plan upon approval

by the Department. We find that these requirements must also be suspended pending receipt of further sample results from testing to be conducted by Hrivnak. At the time DER imposed these requirements, the most recent sample results (those taken in 1987) showed benzene in the Hrivnak well at 830 ppb, and in the Kulp well at 22 ppb. (See FOF 9.) Both of these results reveal benzene levels above the MCL for benzene of 5 ppb (see footnote 1, above). But the 1990 data showed benzene in the Hrivnak well at 9.4 ppb and 10 ppb, and failed to detect benzene in the Kulp well or other private wells. Due to these dramatic reductions in the benzene levels, we believe it is appropriate that further sample results be analyzed before DER orders Hrivnak to submit and implement a work plan.

We recognize that the benzene levels found in the Hrivnak well in 1990 - 9.4 ppb and 10 ppb - are still roughly twice the MCL for benzene. We do not mean to say that DER may never order abatement of pollution when it finds a contaminant present at twice the MCL for that contaminant. The apparent trend in the sample results is critical here - the benzene levels in the Hrivnak well plummeted from 830 ppb in 1987 to 10 ppb in 1990. If this trend were to continue, there would very likely be no pollution to abate by the time the abatement plan could be implemented - which underscores why further sample results are appropriate here to determine whether the trend is continuing.[12]

To summarize, we find that DER met its burden of proving that Hrivnak

---

[12] We recognize that DER witness Robert E. Day-Lewis testified that the work plan required by DER's order was still appropriate in light of the 1990 data (T. 107-108). We do not accept Mr. Day-Lewis's testimony on this point because the 1990 sample results from the Kulp well and other private wells, which are down-dip from the Hrivnak property, did not show any contamination as of 1990. In combination with the greatly reduced benzene levels in the Hrivnak well, this convinces us that further sample results are needed before a work plan is required.

was responsible for the elevated benzene levels found in the Hrivnak and Kulp wells in 1987. However, we find that the remedial measures ordered by DER constitute an abuse of discretion. Therefore, we will remand this matter to DER with the instructions stated in the following Order.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this proceeding.

2. DER has the burden of proof when it orders a person to take measures to abate pollution. 25 Pa. Code §21.101(b)(3).

3. Under Section 316 of the Clean Streams Law, 35 P.S. §691.316, DER may order a landowner to correct a condition on the landowner's property which is creating pollution or the danger of pollution. DER is not required to show that the landowner was negligent or that the landowner caused the condition to exist. Western Pennsylvania Water Co. v. Commonwealth, DER, 127 Pa. Commw. 26, 560 A.2d 905 (1989).

4. With regard to pollution found off the landowner's property, DER must prove under Section 316 of the Clean Streams Law, 35 P.S. §691.316, that a condition on the landowner's property is the "most probable source" of the off-site pollution. A. H. Grove v. Commonwealth, DER, 70 Pa. Commw. 34, 452 A.2d 586 (1982).

5. In exercising its *de novo* review powers, the Board may consider evidence which was not before DER when it made its decision. Pennsylvania Game Commission v. DER, 1985 EHB 1.

6. DER proved that Hrivnak's site was the most probable source of the contamination found off-site in 1987.

7. The remedial requirements in DER's Order constitute an abuse of discretion in light of the 1990 water sample data showing no contamination off-site and greatly reduced contamination on the Hrivnak property.

ORDER

AND NOW, this 18th day of November, 1991, it is ordered that:

1) DER's order dated October 18, 1988 is reversed and remanded.

2) Upon remand, DER shall reevaluate its requirement that Hrivnak precision test all underground storage tanks on the property in light of the provisions of the Storage Tank Act and regulations.

3) Upon remand, DER shall order Hrivnak to collect and test additional water samples from the Hrivnak well and other wells (including, specifically, the Kulp well) in the area. DER shall review the results of such tests.

4) After conducting the reevaluation required by paragraph two and reviewing the test results as provided in paragraph three, DER may impose such additional requirements upon Hrivnak as warranted by the law and the evidence.

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: November 18, 1991

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
Wm. Stanley Sneath, Esq.
Southeast Region
For Appellant:
James Dunworth, Esq.
Phoenixville, PA
jm


23
LR 1116
C-14
Amoco
23
Fisherman Restaurant
Villa Pizza
Bakker
Kulps
Shoe Store
Tom Manny's (old Arco)
Hrivnak's
Allred
Gappa
Stan
Correction on location of Allred property — JoAnn Dolchak verified when in the field Today 7/3
Thanks
RDB

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

CRONER, INC.	:	
	:	
v.	:	**EHB Docket No. 87-206-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 20, 1991**

OPINION AND ORDER SUR
CROSS MOTIONS FOR SUMMARY JUDGMENT

By: The Board

Synopsis

In an appeal challenging the Department of Environmental Resources' ("DER") regulations on blasting found at 25 Pa. Code §87.127, we grant appellant's motion for summary judgment and deny DER's cross motion for summary judgment. Even though appellant's motion contends these regulations violate the statutory right of dwelling owners to waive the prohibition imposed by §1396.4b(c) of the Surface Mining Conservation and Reclamation Act, ("SMCRA") Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4b(c), on surface mining operations within 300 feet of their occupied dwelling rather than a violation of its own right, appellant has standing to raise this issue under the standard set forth in William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). The regulations, which were promulgated pursuant to SMCRA among other acts, go beyond the legislative authorization found at §1396.4b(a) of that Act to promulgate regulations, and DER has not shown they are reasonable and necessary for the protection of miners or the general public.

OPINION

On May 28, 1987, Croner, Inc. ("Croner") filed an appeal with this Board from a letter dated April 28, 1987 from DER's District Mining Manager, Michael C. Welch, which approved by modification a revised Blast Plan for the area covered by Croner's Surface Mining Permit ("SMP") No. 56663094, a surface bituminous coal mine located in Brothers Valley Township, Somerset County. As submitted to DER for approval, Croner's Blast Plan included a notarized statement signed by John H. Hartman and Evelyn Hartman ("Hartmans") which granted Croner permission to conduct overburden blasting operations within the 300 foot barrier surrounding the buildings on their farm ("300 foot barrier") and granted Croner the right to exceed one inch per second particle velocity and 132 dBl air over pressure during blasting. DER's approval of the Blast Plan was, however, subject to the following provisions:

> 1. When the Scale Distance falls below sixty (60) at the Hartman residence or any dwelling, a peak particle velocity of one (1) inch per second and an air over pressure of 132 dBl must be maintained.
>
> 2. John and Evelyn Hartman cannot release the vibration limit of one (1) inch per second and 132 dBl air over pressure when blasting occurs closer than 300 feet to their dwelling.

DER and Croner have stipulated that DER included these provisions within its approval because 25 Pa. Code §87.127(e) and (i) limit waivers for vibration and air over pressure in blasting activities at any dwelling to those given by affected landowners who are coal mine operators or lessees of coal mine operators. The parties have also stipulated that the Hartmans are not coal mine operators or lessees of coal mine operators.

By letter dated September 16, 1987, counsel for Croner informed the Board that the parties' counsel had stipulated that they would file cross motions for summary judgment. On October 30, 1987, we received Croner's

Motion Seeking Relief In The Nature of Summary Judgment and supporting brief asserting the limitations imposed by DER on its Blast Plan violate a statutory right of the Hartmans and violate Croner's right to equal protection of the laws under both the Pennsylvania and United States Constitutions. Included with Croner's motion was the affidavit of the Hartmans. DER filed its Answer to Croner's motion on December 28, 1987 and subsequently, on February 8, 1988, filed its Motion to Dismiss, Or In The Alternative, Motion For Summary Judgment and an accompanying memorandum of law. We received Croner's Answer to DER's motion and its supporting brief on October 13, 1988. This appeal was then reassigned to Board Member Richard S. Ehmann on October 30, 1989, after the resignation of former Board Member William A. Roth. After indicating that the parties' prior briefs were inadequate, on January 22, 1990, we ordered the parties to submit further briefs on the issues raised by their motions. Croner filed its brief in response to our Order on February 16, 1990 and DER filed its brief on March 5, 1990.

On July 26, 1990, we issued an Opinion and Order granting DER's Motion To Dismiss because we decided we lacked jurisdiction over Croner's issues. Therein, we noted that Croner's notice of appeal had not raised the question set forth in its motion of whether a statutory right had been contravened by 25 Pa. Code §87.127 and therefore we could not consider it. See Croner, Inc. v. DER, 1990 EHB 846.

Thereafter, Croner filed a Petition for Review of our July 26, 1990 Order with the Commonwealth Court, which, upon consideration, reversed our decision and remanded the matter to us. See Croner, Inc. v. Commonwealth, DER, ___Pa. Cmwlth. __, 589 A.2d 1183 (1991). The Court ruled, *inter alia*, that Croner's notice of appeal does raise in general terms the issue of

whether 25 Pa. Code §87.127 violates a statutory right set forth in 52 P.S. §1396.4b(c) and it specifically directed us to rule on that issue on remand, as well as on whether 25 Pa. Code §87.127 creates a class distinction with no rational basis.

Upon remand, on June 25, 1991 we ordered the appeals at Docket Nos. 87-206-E, 88-214-E (consolidated), and Docket No. 91-067-E to be consolidated at Docket No. 87-206-E for purposes of further proceedings.[1] We also determined that the parties had failed to provide factual support for their cross motions for summary judgment, so, on June 26, 1991, with the agreement of both parties, we ordered the parties to file a joint stipulation of facts. On July 12, 1991, Croner filed an affidavit in support of its motion and DER filed a supplemental brief in support of its motion. The parties then filed their Joint Stipulation of Facts on July 31, 1991. Subsequently, Croner's appeal at Docket No. 91-368-E was consolidated herewith by our Order of September 24, 1991.

In ruling on these cross motions for summary judgment, we are guided by the principle that summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. Snyder v. Commonwealth,

---

[1]Croner's appeals at Docket Nos. 88-214-E (consolidated), 91-067-E, and 91-368-E challenge DER's issuance of compliance orders to Croner when it admittedly exceeded the blasting restrictions contained in its Blast Plan during blasting on the Hartman property and DER's assessment of civil penalties against Croner based upon these exceedances.

DER, __ Pa. Cmwlth. ___, 588 A.2d 1001 (1991). The Board must view a motion for summary judgment in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

We first examine Croner's argument that the restriction placed by DER on its Blast Plan based upon 25 Pa. Code §87.127(e), (h), and (i) violates the Hartmans' statutory right to waive these restrictions. The undisputed affidavit of the Hartmans attached to Croner's motion says they have leased their property to Croner to mine. Croner argues that Section 1396.4b(c) of the Surface Mining Conservation and Reclamation Act ("SMCRA"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4b(c), generally prohibits surface mining operations, which includes blasting, from being conducted within 300 feet of any occupied dwelling, but this section provides the dwelling owners, the Hartmans, with the authority to waive this prohibition ("300 foot waiver"). Croner and DER have stipulated that the Hartmans have given Croner a 300 foot waiver. Submitted as part of Croner's motion is the affidavit of its General Superintendent stating that the coal within the 300 foot barrier of the Hartman dwelling is inaccessible through Croner's surface mining operations without drilling and blasting with explosives because of the presence of hard limestone and hard shalely strata. Croner contends that the regulations in question effectively preclude its mining within the 300 foot barrier by directly regulating its blasting which results in an "indirect abrogation" of the Hartmans' statutory right to waive the 300 foot prohibition on mining. Croner argues that because the regulations are contrary to 52 P.S. §1396.4b(c) in that they abrogate the Hartmans' right of waiver, they are illegal and unenforceable.

In response to Croner's contentions, DER asserts that Croner lacks standing to raise this issue, since it is raising injury to a right of the Hartmans rather than to its own right. If Croner has standing, DER contends that 52 P.S. §1396.4b(c) does not give the Hartmans an unconditional right to allow mining within the 300 foot barrier. DER urges that blasting creates a risk of hazardous or dangerous condition and may be considered a public nuisance under 52 P.S. §1396.4b(a), and, as such, the regulations in question restrain the Hartmans' permitting of a public nuisance to exist on their property and should be upheld. Additionally, DER argues the regulations do not unconditionally prohibit mining within the barrier.

Because DER has challenged Croner's standing to raise this issue, we must examine this question at the threshold. As we have previously explained in Borough of Glendon v. DER, et al., 1990 EHB 1501, we scrutinize individual allegations within an appeal to determine whether the appellant may raise those issues, even though the appellant has overall standing to appeal the DER action, and every allegation must be related to the alleged injuries under the standard set forth in William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). The Supreme Court in William Penn stated that a person seeking to challenge an agency's action must show a direct and substantial interest which has an immediate causal connection to the challenged action. In Wirth v. DER, 1990 EHB 1643, we explained what is meant by the William Penn requirements. We said:

> A substantial interest is defined as one in which there is "some discernible adverse effect, some interest other than the abstract interest of all citizens in having others comply with the law. William Penn, [464 Pa. 168, 195, 346 A.2d 269, 282 (1975)]. "Direct" means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains. *Id.* "Immediate" means something other than a remote consequence of the judgment, focusing on and in the nature of and proximity of the

action and injury to the person challenging it. *Id.* at 197, 346 A.2d at 283.

Id. at 1645.

In William Penn, *supra*, our Supreme Court addressed the question of whether operators of commercial parking facilities had standing to challenge the imposition of a tax on their patrons by an ordinance adopted by the City of Pittsburgh. After finding that the parking operators' interest was direct and substantial, the Court concluded that the causal connection between the tax and the injury to the parking operators was sufficiently close to afford the operators standing because of the tax's effect on the operators' businesses. The Court emphasized that the injury caused by secondary effects of an action may sometimes be as great or greater than that caused by its primary effects, and it stressed the importance of examining whether the transaction between the person bringing the action and the person subject to the regulation is burdened.

Under the William Penn standard, it appears that Croner has a direct and substantial interest in this issue, since the regulations allegedly wrongfully prevent the Hartmans from waiving the limitations on Croner's blasting near their dwelling and Croner cannot blast in accordance with the waiver it secured from the Hartmans. Moreover, the regulations at issue limit Croner's blasting on the Hartmans' land, clearly imposing a burden on the transaction between Croner and the Hartmans under which Croner is to mine their land. We conclude Croner has an immediate interest and we therefore reject DER's standing argument.

We next turn to the merits of Croner's argument. Section 1396.4b(c) of SMCRA, 52 P.S. §1396.4b(c), provides in pertinent part: "no operator shall conduct surface mining operations ... within three hundred feet of any

occupied dwelling, unless released by the owner thereof." This section clearly prohibits surface mining operations from taking place within the 300 foot barrier surrounding the Hartmans' dwelling. There is no question that Croner's blasting is surface mining. See Kerry Coal Co. v. DER, 1984 EHB 161. The prohibition on Croner's mining within the 300 foot barrier is not absolute, however, since the statute allows for the Hartmans to waive the prohibition and provides no reservations, restrictions, or limitations on this waiver provision. We agree with DER that 52 P.S. §1396.4b(c) does not guarantee that Croner may conduct surface mining within the 300 foot barrier once it has obtained the Hartmans' waiver; Croner has only a right to mine in compliance with the terms and conditions of its permit and the applicable statutes and regulations. Section 1396.4b(b) of SMCRA, 52 P.S. §1396.4b(b), provides that the use of explosives for the purpose of blasting in connection with surface mining shall be done in accordance with DER's regulations.

DER's regulations at 25 Pa. Code §87.127, in turn, provide:

> (e) An airblast shall be controlled so that it does not exceed the noise level specified in this subsection at a dwelling, public building, school, church or commercial or institutional structure, unless the structure is owned by the person who conducts the surface mining activities and is not leased to another person. The lessee may sign a waiver relieving the operator from meeting the airblast limitations of this subsection.
>
> (h) In blasting operations, except as otherwise authorized in this section, the maximum peak particle velocity may not exceed 1 inch per second at the location of a dwelling, public building, school, church, commercial or institutional building or other structure designated by the Department ... .
>
> (i) The maximum peak particle velocity limitation of subsection (h) does not apply at the following locations:
>
> (1) At structures owned by the person conducting the mining activity, and not leased to another party.
>
> (2) At structures owned by the person conducting the mining activity, and leased to another party, if a

written waiver by the lessee is submitted to the Department prior to blasting.

These regulations' limitations on airblast and peak particle velocity appear to be applicable at the Hartman dwelling since both parties agree the Hartmans are not mine operators, and, since the Hartmans are not lessees of mine operators, the regulations absolutely bar their waiver of the limitations. The question, thus, is whether these regulations can restrict the Hartmans from exercising their right to waive the prohibition on mining in the barrier zone pursuant to the waiver provision of 52 P.S. §1396.4b(c).

Our Supreme Court has long stated that regulations must be consistent with the statute under which they are promulgated, and we are not bound by rules and regulations which are contrary to the governing statutes under which they are promulgated. Northampton, Bucks County Municipal Authority v. Commonwealth, DER, 521 Pa. 253, 555 A.2d 878 (1989); Department of Public Welfare v. Forbes Health System, 492 Pa. 77, 422 A.2d 480 (1980); Commonwealth v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 308 (1973), appeal dismissed, 415 U.S. 903, 94 S.Ct. 1395, 39 L.Ed.2d 460 (1974). The regulations at 25 Pa. Code §87.127(e),(h), and (i) were promulgated pursuant to SMCRA, as well as the Clean Streams Law ("CSL"), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.51 *et seq.*; the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §1406.1 *et seq.*; and Section 1920-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-1 *et seq.* Other than citing §1396.4b(a) as authority for these regulations, DER does not point to any provision of the governing statutes which would authorize it to promulgate regulations limiting the dwelling owners' statutory right to waive

the prohibition on mining in the barrier zone, nor does our review reveal any other authorizing provision.

Section §1396.4b(a) of SMCRA does not provide DER the unbridled discretion in adopting regulations which it would have us find, however. The section states that all surface mining operations shall be conducted in compliance with such reasonable rules and regulations as may be deemed necessary by DER for the fulfillment of the purposes and provisions of SMCRA, as well as certain other acts, for the health and safety of those persons engaged in the work and for the protection of the general public. DER makes no assertion that the challenged regulations are reasonable and necessary to protect the miners, nor do the facts stipulated to by the parties (as sufficient for us to pass on these Motions) show us how the regulations are reasonable and necessary to protect the general public. While protection of dwelling owners and their structures is consistent with the purposes of SMCRA, the legislature has clearly provided in 52 P.S. §1396.4b(c) for all owners of occupied dwellings to allow surface mining, including blasting, to be conducted near their homes (in conformance with the other DER regulations of blasting activities). Thus, insofar as DER might argue these regulations protect the general public, this argument cannot succeed where the legislature has given owners of occupied dwellings the option of deciding whether they want this protection from surface mining. Further, we find specious DER's argument that the regulations may restrict the Hartmans' use of their property because blasting is a public nuisance. Any and all blasting is not a public nuisance, as DER suggests. If it were, then even blasting carried on in accordance with DER's regulations would be a public nuisance. Only blasting creating a hazard to the public health or safety or which is contrary to DER's

general applicable blasting regulations is a nuisance pursuant to §1396.4b(a). Where the regulations at 25 Pa. Code §87.127(e) and (i) provide for a waiver of the blasting limitations by a lessee of the coal mining operator, DER cannot convince us that the fact that the Hartmans are neither such a lessee nor a coal miner means their use of their property must be restricted because this blasting is a public nuisance.

The Hartmans may not waive the general regulations governing blasting during the surface mining of coal. They cannot authorize Croner to blast in a fashion that endangers its miners or the general public. But, we agree with Croner that 52 P.S. §1396.4b(c) provides the Hartmans the ability to give a broad release of the prohibition on surface mining within the 300 foot barrier. This right of waiver is without legislative restriction on how much of a waiver the Hartmans can give and the 300 foot waiver is clearly broad enough to encompass the regulations imposing limitations on airblast and peak particle velocity within the 300 foot barrier. DER has not shown us that it is reasonable and necessary to the protection of miners or the general public for the regulations to bar the Hartmans from absolutely waiving the statutory prohibition on mining within the 300 foot barrier. The challenged regulations create a prohibition on mining beyond that contemplated by the legislature, which provided all owners of dwellings with the ability to release the prohibition on surface mining within the barrier. We accordingly find that 25 Pa. Code §87.127 (e), (h) and (i) are beyond the scope of DER's legislative authorization to promulgate regulations and are, thus, void as invalid. Since there are no disputes on material fact regarding this issue, we grant summary judgment in favor of Croner on this issue.

Having ruled that the restrictions placed on Croner's Blast Plan pursuant to 25 Pa. Code §87.127 (e), (h) and (i) are invalid and void, we need not examine Croner's second argument that these regulations violate Croner's right to equal protection under the Pennsylvania and United States Constitutions. For this same reason, we deny DER's motion.

In accordance with the foregoing discussion, we grant Croner's motion for summary judgment and we deny DER's cross motion for summary judgment. As we noted above, several appeals from DER compliance orders and civil penalty assessments to Croner have been taken by Croner and have been consolidated with this appeal because they are based upon Croner's blasting activities exceeding the restrictions on its DER modified Blast Plan. Since we have determined those restrictions to be invalid, we sustain Croner's appeals which were originally docketed as Nos. 88-214-E, 88-425-E, 89-498-E, 90-456-E, 90-070-E, 91-067-E, and 91-368-E.

ORDER

AND NOW, this 20th day of November, 1991, it is ordered that subsections (e), (h), and (i) of 25 Pa. Code §87.127 are invalidated to the extent that they prohibit a waiver of their requirements by the owner of a structure who is not conducting surface mining. Croner, Inc.'s Motion for Summary Judgment is granted and DER's cross motion for summary judgment is denied. The appeals by Croner, Inc. consolidated at Docket No. 87-206-E are sustained.

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

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 20, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
L. Jane Charlton, Esq.
Western Region
For Appellant:
Matthew G. Melvin, Esq.
Somerset, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

CRONER, INC.	:	
	:	
v.	:	**EHB Docket No. 87-206-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 20, 1991**

CONCURRING AND DISSENTING OPINION
OF BOARD MEMBER RICHARD S. EHMANN

While I fully understand how the majority has reached their decision in this matter and agree with them that Croner, Inc. has standing to raise the issue regarding the validity of 25 Pa. Code §87.127(e), (h), and (i), I would sustain Croner, Inc.'s appeal but not declare these subsections of this regulation invalid.

Although the Board ordinarily grants DER's interpretation of its regulations deference, this is not the case where its interpretation is clearly erroneous or inconsistent with the regulation interpreted and where it is inconsistent with the policy and objectives of the authorizing statute. Twining Village v. Commonwealth, DPW, 105 Pa. Cmwlth. 227, 523 A.2d 1199 (1987). DER's interpretation of §87.127(e), (h), and (i), endorsed by the majority, is that waivers of the airblast and vibration limitations may only be given by coal mine operators who own the affected dwelling (owner/operators) and their lessees, but similar waivers by dwelling owners who are not operators (owner/non-operators) are absolutely barred.

Regardless of what DER says is in §87.127 (e), (h), and (i), it does not address waivers by owner/operators. This Section says the limits do not apply to owner/operators, not that they apply but may be waived. Thus the majority takes a wrong turn by allowing DER to set the course for the majority opinion. DER interprets the regulation as "implicitly precluding" such a waiver by owner/non-operators because they are not capable of assessing the damage to their property and will be entirely dependent upon the operator, who may not be forthright in his assessment. DER concludes the regulations implicitly preclude waivers by owner/non-operators because they cannot make a knowing waiver in all cases. Other than pointing to 25 Pa. Code §87.127(e) and (i), DER offers us nothing in the regulations or governing statutes to support its interpretation of this regulation. In view of Section 1396.4 b(c) of SMCRA, 52 P.S. §1396.4b(c), and 25 Pa. Code §86.102(9), which regulation is unaddressed by the briefs of DER and Croner or by the majority's opinion, I would not defer to DER's interpretation of the regulations.

The legislature has clearly provided for all owners of occupied dwellings to allow surface mining, including blasting in conformance with DER's regulations on blasting activities, to be conducted near their homes. Regulation §86.102(9) requires only that the dwelling owner's waiver be knowingly made and separate from the lease or deed (unless the lease or deed contains an explicit waiver from the current owner.) Rather than providing that owner/operators can waive the limits on airblast, §87.127(e) provides that the airblast need not be controlled to meet the noise level required by that section where the structure is owned by the operator and is not leased to another person. In the event that the owner/operator has leased the

structure, §87.127(e) provides that the lessee may sign a waiver relieving the operator from meeting the airblast limits. Section 87.127(e) does not explicitly address owner/non-operators; however, it is clear that the airblast limits of the section apply to blasts at their dwellings since they do not fall within the section's owner/operator exclusion of the limits. DER's interpretation of §87.127(e) as precluding waivers of the airblast limits from being given by owner/non-operators because the section explicitly allows waivers by lessees of owner/operators is erroneous, however, as it is too narrow an interpretation of all the regulations. Consistent with legislative authority, the waiver of the prohibition on surface mining near their dwelling provided to dwelling owners by §86.102(9) is broad enough to encompass a waiver of the airblast limits imposed by §87.127(e). Contrary to the "implicit" preclusion suggestion, nothing in the language of §87.127(e) prevents owner/non-operators from waiving the airblast limits as long as the waiver meets the requirements of §86.102(9).

Likewise, §87.127(i) states that the maximum peak particle velocity set forth in subsection (h) does not apply at structures owned by the operator which are not leased to another person; it does not state that owner/operators have the right to waive the vibration limits. Where the owner/operator has leased the structure, §87.127(i) provides that his lessee may waive the vibration limits. Section 87.127(i) does not explicitly address owner/non-operators, but, as with subsection (e), it is clear that the vibration limits apply to their dwellings, since they are not within the exclusion of the limits set up by subsection (i). Subsection (i) does not

speak to whether owner/non-operators may waive the vibration limits, but, read in conjunction with §86.102(9), it is apparent that owner/non-operators may waive these requirements.

DER's interpretation of this regulation is inconsistent with the objective of SMCRA of protecting all dwelling owners from the adverse effects of mining and of recognizing that in some instances the dwelling owner will not desire such protection. It is inconsistent with the policy behind SMCRA, not to mention Section 86.102(9), for DER to interpret its regulations as affording protection from effects of airblast and vibration to owner/operators and their lessees and allowing these persons to waive the protection while at the same time absolutely prohibiting affected owner/non-operators from ever being able to knowingly forgo such protection simply because there might be an opportunity for misrepresentations to be made on the part of the coal mine operator. Certainly there could be times when a miner might take advantage of an affected but uninformed dwelling owner. But there are also owner/non-operators with enough knowledge of the effects of blasting to make informed decisions, yet DER's interpretation of the regulation would not permit such a knowledgeable owner/non-operator to give a waiver. Further, for this reason, DER's interpretation serves to bolster Croner's argument that §87.127 (e), (h), and (i) creates class distinctions with no rational basis, were it necessary for the Board to consider Croner's constitutional challenge.

In construing this regulation in a narrow fashion and only examining the language of §87.127(e) and (i), DER and the majority have ignored the waiver rights found in §86.102(9). The legislature has given owners of occupied

dwellings the option of deciding whether they want protection from surface mining, including blasting. Section 87.127(e) and (i), assuming that owner/operators will never desire such protection, extends their lessees the option of deciding whether they want protection from the effects of blasting, an option which is not available to lessees of owner/operators through any other section of the governing statutes or implementing regulations. Section 87.127(e), (h) and (i) is thus not contrary to §1396.4b(c) of SMCRA. Rather, it is DER's interpretation of this regulation which is erroneous and inconsistent with the objectives of the authorizing statute.

The Hartmans have submitted an affidavit stating that they knowingly waived the limits on airblast and vibration. DER has not attacked the validity of the Hartmans' affidavit and has stipulated that the Hartmans' waiver was a notarized statement. With their knowingly-made explicit waiver, the Hartmans have satisfied the requirements of §86.102(9) and Section 1346.4b(c). Accordingly, this Board should rule that DER erred by including the two restrictions in Croner's Blast Plan. Where the Board finds an abuse of DER's discretion, we may substitute our own discretion for that of DER. County of Schuylkill, et al. v. DER et al., 1989 EHB 1241. Rochez Bros., Inc. v. Commonwealth, DER, 18 Pa. Cmwlth. 137, 334 A.2d 790 (1975). Thus, the Board should strike the challenged conditions from Croner's Blast Plan. The majority's decision as reflected in the Order says the regulations are invalidated in part but leaves exactly what remains fog-shrouded and murky at best. Moreover, when regulation could be invalidated through one of our decisions, this Board should refrain from invalidation unless that result is

unavoidable. We should also refrain from opinions which answer, as does the majority's, but do not clarify. Here, we can avoid such a response to this appeal while simultaneously leaving all of the regulation in effect and untroubled by any "invalidation". This seems the wiser route to me. Accordingly, I dissent to the extent the majority invalidate §87.127 (e), (h), and (i).

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATE: November 20, 1991

cc: **Bureau of Litigation:**
Library, Brenda Houck
For the Commonwealth, DER:
L. Jane Charlton, Esq.
Western Region
For Appellant:
Matthew G. Melvin, Esq.
Somerset, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BC

KENNAMETAL, INC.	:	
	:	**EHB Docket No. 87-227-W**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 27, 1991

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

By Maxine Woelfling, Chairman

Synopsis

Where the Department of Environmental Resources (Department) has twice extended the deadline for compliance with a regulation requiring closure of a hazardous waste lagoon within 180 days, the Department's order setting a 60-day deadline for closure was reasonable, justified, and not an abuse of discretion.

INTRODUCTION

This matter was initiated with the June 15, 1987, filing of a notice of appeal by Kennametal, Inc. (Kennametal) seeking the Board's review of a May 14, 1987, order of the Department requiring Kennametal, in accordance with its June 27, 1985, modified closure plan, to close two surface impoundments (lagoons)[1] for the treatment of hazardous waste at its facility in Bedford Township, Bedford County, and to provide the Department with certification

[1] The order also concerned a third lagoon, but the parties stipulated prior to the hearing on the merits that the closure of that lagoon was not at issue (Stipulation No. 5).

that the lagoons had been closed. The order was issued 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), and the rules and regulations adopted thereunder.

Prior to the March 14, 1991, hearing on the merits the Department filed two motions for summary judgment. The first, which was denied at 1988 EHB 1089, is not germane to this adjudication. The second, which was captioned in the alternative as a motion to limit issues, was granted, as a motion to limit issues, at 1990 EHB 1453. The Department sought to preclude Kennametal from challenging the Department's June 27, 1985, modification of Kennametal's closure plan; that approval mandated Kennametal to initiate closure of the lagoons within two weeks and to complete closure within 180 days as provided by 25 Pa. Code §75.265(o)(8).[2] As a result of the Board's 1990 ruling, which we affirm and incorporate herein by reference, Kennametal was precluded from raising any issues relating to the necessity for submitting a closure plan or the manner of completing closure because of its failure to appeal either the Department's 1982 directive to submit a closure plan or the Department's 1985 approval of the modified closure plan. The only issues which it could raise were whether it completed closure of the lagoons in the manner specified in the modified closure plan and by the dates specified in the June 27, 1985, letter modifying the closure plan.

The Department argued in its April 25, 1991, post-hearing brief that Kennametal was precluded from attacking the compliance deadlines in the May 14, 1987, order by virtue of its failure to timely appeal the Department's June 27, 1985, approval of the modified closure plan and the Department's 1986

---

[2] This regulation has since been re-codified as 25 Pa. Code §265.113.

letters extending the deadlines for implementing the modified closure plan. The Department also asserted that the deadlines in the order were reasonable in light of the deadlines in the applicable regulations.

Kennametal's May 28, 1991, post-hearing brief attacked the Board's 1990 ruling limiting the issues, again contesting the necessity for a closure plan, and argued that the Department failed to prove that the lagoons had not been properly closed or that the deadlines in the order were feasible or reasonable.[3]

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

FINDINGS OF FACT

1. Appellant is Kennametal, a Pennsylvania corporation that, at all times material to this matter, has owned and operated a manufacturing facility located on Chalybeate Spring Road, Bedford Township, Bedford County (Bedford facility).

2. Appellee is the Department, the agency of the Commonwealth with the authority to administer and enforce the provisions of the Solid Waste Management Act and the rules and regulations promulgated thereunder.

3. On or about March 8, 1984, Kennametal submitted a plan for closure of lagoons and groundwater remediation to the Department (MB-LCGR Plan). The MB-LCGR Plan concerned, in part, impoundments at the Bedford facility known as Lagoons 1 and 2. (Stip. No. 3)[4]

4. By letter dated June 27, 1985, the Department modified and approved the MB-LCGR plan (modified closure plan), and directed Kennametal to

---

[3] The Department also filed a reply brief on June 13, 1991.

[4] References to the parties' stipulation are denoted by "Stip. No.___," to the transcript of the hearing on the merits by "N.T.___," and to the Department's exhibits by "Ex. C-___."

begin closure within two weeks and complete closure within 180 days as provided by 25 Pa. Code §75.265(o)(8). Kennametal was also required to certify closure of the lagoons within 15 days of completion of closure. (Ex. C-2)

5. Kennametal did not file an appeal from the June 27, 1985, letter, although it was a final, appealable action. Kennametal, Inc. v. DER, 1990 EHB 1453.

6. On April 30, 1986, the Department issued a notice of violation citing Kennametal for its failure to implement the modified closure plan in violation of the Solid Waste Management Act. (N.T. 10-12; Ex. C-4)

7. By letter dated May 20, 1986, Kennametal responded to the notice of violation by outlining the actions it intended to take and the dates by which they would be completed; Kennametal specifically referred to the modified closure plan in its letter. (N.T. 14-15; Ex. C-5)

8. Michael Steiner, the Regional Solid Waste Manager for the Department's Harrisburg Regional Office, responded to Kennametal in a letter dated May 30, 1986; he interpreted Kennametal's May 20, 1986, letter to be an agreement that Kennametal would implement the modified closure plan and directed it to initiate closure within two weeks of the date of the letter and complete closure within 180 days. (N.T. 13, 15-16; Ex. C-4 and C-6)

9. By letter dated June 4, 1986, Robert D. France, an environmental protection specialist with the Bureau of Waste Management's Harrisburg Regional Office, reiterated the deadlines in Steiner's May 30, 1986, letter. (N.T. 16-17; Ex. C-7)

10. Kennametal neither completed closure of Lagoons 1 and 2 by December 14, 1986, nor submitted certification of closure by December 29, 1986, as required by Steiner's May 30, 1986, letter. (N.T. 13-14)

11. On May 14, 1987, the Department ordered Kennametal to close Lagoons 1 and 2 in accordance with the modified closure plan by July 14, 1987, and to submit a certification by July 28, 1987, that the lagoons had been closed. (N.T. 19-20; Ex. C-3)

12. Kennametal is not contending that it has completed closure of Lagoons 1 and 2 in accordance with the modified closure plan or that it has submitted certification of closure to the Department. (Stip. No. 4)

DISCUSSION

Under 25 Pa. Code §21.101(b)(3), the Department bears the burden of proof in an appeal of an order. C&L Enterprises, Inc. and Carol Rodgers v. DER, EHB Docket No. 86-626-MJ (Adjudication issued April 2, 1991). In reviewing an action of the Department, the Board must determine whether the action is supported by a preponderance of the evidence and whether it is arbitrary, capricious or unreasonable. Warren Sand and Gravel Co., Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); Max L. Starr v. DER, EHB Docket No. 87-203-W (Adjudication issued April 1, 1991).

The issues here are simple and straightforward: was the Department justified in issuing an order directing Kennametal to implement the modified closure plan and were the deadlines imposed in the order an abuse of discretion? Kennametal attempts to cloud these issues by attacking the necessity for a closure plan in the first place. However, its failure to appeal the Department's 1985 approval of the modified closure plan removes that issue from our consideration, Kennametal v. DER, *supra*.

As was stated in Kennametal, *supra*:

> Owners or operators of hazardous waste management or disposal facilities are required to prepare and submit closure plans to the Department, 25 Pa. Code §§75.265(o)(3)-(6). The Department may modify the closure plan submitted, and, if it does so, the modified closure plan becomes the approved closure plan, 25 Pa. Code §75.265(o)(6). Closure must then be completed in accordance with both the specifications and the schedule in the approved closure plan, 25 Pa. Code §75.265(o)(7)-(8). Once closure has been completed, a certification must be submitted to the Department, 25 Pa. Code §75.265(o)(10). Thus, the Department's 1985 letter was prepared in response to Kennametal's submission of a closure plan. The letter provides that with regard to the closure plan Kennametal will begin closure within two weeks of the approval of the plan as stated on page 26 of the plan, and that closure will be completed within 180 days as provided by §75.265(o)(8). (Motion for Summary Judgment, Ex. D, p.2) Kennametal was also required by the approved modified closure plan to complete closure of its lagoons within 180 days and to certify closure of the lagoons within 15 days of completion of closure.
>
> 1990 EHB at 1456-1457
> (footnotes omitted).

The record clearly establishes that Kennametal did not implement the modified closure plan in accordance with either the deadlines specified in the Department's June 27, 1985, letter modifying the MB-LCGR Plan (Finding of Fact No. 6) or the extended deadlines in the May and June, 1986, letters (Finding of Fact No. 10). Because Kennametal violated 25 Pa. Code §§75.265(o)(7), 75.265(o)(8), and 75.265(o)(10), the Department's order was authorized by §602(a) of the Solid Waste Management Act.

The only remaining issue in this appeal is whether the Department abused its discretion in establishing the time frames contained in the May 14, 1987, order to implement the modified closure plan. The order required

Kennametal to complete closure within 60 days and submit certification of closure to the Department two weeks later (N.T. 19).

Kennametal argues that the Department has offered no testimony establishing that the time frames in the order were reasonable or feasible. However, the only testimony which would be relevant here has been offered - Kennametal, despite extensions well beyond the compliance deadlines, did not implement and complete closure of Lagoons 1 and 2 in accordance with the modified closure plan and the applicable regulations. The Department's allowing Kennametal 60 days to complete closure when it had already had nearly 18 months beyond the deadline in the regulations was hardly an abuse of discretion. Thus, we will sustain the issuance of the order and dismiss Kennametal's appeal. We will, because of the passage of time, modify the deadlines in the Department's order to be calculated from the date of our adjudication.

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 its order was not an abuse of discretion. 25 Pa. Code §21.101(b)(3).

3. Kennametal is precluded by the doctrine of administrative finality from challenging the necessity for a closure plan or the substance of the modified closure plan approved by the Department on June 27, 1985.

4. Kennametal was required to complete closure of Lagoons 1 and 2 within 180 days of the Department's approval of a modified closure plan. 25 Pa. Code §75.265(o)(8).

5. The Department was authorized by §602(a) of the Solid Waste Management Act to issue an order directing Kennametal to complete closure of Lagoons 1 and 2 when Kennametal had failed to do so either within the time mandated by 25 Pa. Code §75.265(o)(8) or by the deadlines subsequently extended by the Department.

6. The 60-day deadline for completion of closure set forth in the Department's May 14, 1987, order was not an abuse of discretion where Kennametal had not completed closure within the 180 days mandated by 25 Pa. Code §75.265(o)(8) or the deadlines extended twice subsequently by the Department.

O R D E R

AND NOW, this 27th day of November, 1991, it is ordered that:

1) The appeal of Kennametal, Inc. is dismissed; and

2) The Department's May 14, 1987, order is sustained and the deadlines modified as follows:

A) Kennametal shall close Lagoons 1 and 2 in accordance with the modified closure plan by January 27, 1992.

B) On or before February 20, 1992, Kennametal shall submit to the Department a certification by an independent registered engineer that Lagoons 1 and 2 have been closed in accordance with the modified closure plan.

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: November 27, 1991

cc: **DER, Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Kurt Weist, Esq.
Central Region
For Appellant:
Robert W. Thomson, Esq.
MEYER DARRAGH BUCKLER BEBENEK & ECK
Pittsburgh, PA
bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

GABIG'S SERVICE :
:
v. : EHB Docket No. 91-042-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: November 27, 1991

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

By Richard S. Ehmann, Member

Synopsis

The Department of Environmental Resources (DER) is authorized under Section 316 of the Clean Streams Law to order a landowner/occupier to hire a hydrogeologist to study the source and extent of gasoline contamination of the groundwater beneath the landowner/occupier's automotive service station. DER has shown by a preponderance of the evidence that gasoline contaminated groundwater exists beneath this service station and is leaking into an adjacent municipal storm sewer.

Where during the course of removal of three fiberglass underground storage tanks the service station owner unearths two leaking underground steel storage tanks, their presence at the service station does not by itself establish ownership or operation of those tanks by the station's owner/operator under the Storage Tank and Spill Prevention Act. Where the service station's owner/operator showed no purchase of these two steel tanks

when the other service station assets were purchased and testified to no use of these tanks since purchase, DER must offer evidence rebutting same or an alternative legal theory with evidence to support it before a case for liability under this statute is established.

The Board does not adjudicate the merit of the claim by the service station's owner/operator of financial impossibility of compliance with this order as raised in the hearing on the appeal's merits because it was not raised in Appellant's Post-Hearing Brief and is thus deemed abandoned. Lucky Strike Coal Company et al. v. DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

Background

On January 16, 1991, DER issued an administrative order to Gabig's Service (Gabig's) located in Mercer Borough, Mercer County, Pennsylvania. The order states that it is issued pursuant to the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, No. 32, 35 P.S. §6021.101 et seq. (Storage Tank Act); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (Clean Streams Law); and Section 1917-A of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code). It directs Gabig's to hire a consulting hydrogeologist, to submit to DER a proposal for investigation of subsurface contamination for its review and approval, and to submit to DER a report of that investigation's results within sixty days of DER's approval of the investigation proposal (with the report to include any recommendations for remediation and a schedule for their implementation).[1]

---

[1]The Order does not say what is to be investigated by this consultant as it should, but with reference to DER's findings of fact indicates the (footnote continued)

Gabig's filed a timely appeal from this Order and, after some discovery, the parties filed their respective pre-hearing memoranda. On July 18, 1991 we conducted the hearing on the merits of this appeal, taking the evidence offered by both sides. The transcript consists of 169 pages. In addition there is a Stipulation of Facts by the parties, seventeen exhibits admitted on behalf of DER and nine exhibits admitted on behalf of Gabig's.

Both parties also timely filed post-hearing briefs, with the last of these briefs being received by us on October 15, 1991.

After a thorough review of the entire record in this matter the Board makes the following Findings of Fact.

FINDINGS OF FACT

1. Appellant, Gabig's Service, is a sole proprietorship that conducts business in Pennsylvania as an automotive service station located at the corner of South Erie Street (Route 19) and Butler Street with a mailing address of 135 South Erie Street, Mercer, Pennsylvania 16137 ("Gabig's Service Station" or "site"). Terry Gabig is the owner of Gabig's Service Station and he and his wife Marilyn are responsible for its day-to-day operations. (B-1 and T-95 to 97)[2]

2. The Department is the agency of the Commonwealth empowered to administer and enforce the Storage Tank Act, the Clean Streams Law, the

---

(continued footnote)
investigation relates to groundwater contamination at and adjacent to the Gabig's property. DER would be well advised in the future to draft with greater clarity and specificity.

[2]The references to B-1 are references to Board Exhibit 1 which is the parties' Joint Pre-Hearing Stipulation in which they stipulate to certain facts. "T-___" is a reference to a transcript page. "C-___" references an exhibit offered by DER which was admitted into evidence. "A-___" references Gabig's exhibits .

Administrative Code, and the rules and regulations promulgated by the Environmental Quality Board pursuant to these acts (rules and regulations). (B-1)

3. In 1978 Terry Gabig and his mother and father (the Gabig Family) purchased the service station presently run as Gabig's Service from Gulf Oil Corporation (Gulf) (A-5, A-6, and T-118, T-126). Prior to the purchase the Gabig Family had leased the property from Gulf. (T-118)

4. Immediately prior to the Gabig Family's beginning to lease this property from Gulf, Gulf installed three underground fiberglass gasoline storage tanks (T-118 and 119, T-126)

According to the bill of sale, Gulf sold "1 Fiberglass Lining U/G Tank" and "2 Tanks, Fiberglass-U/G 10,000 gallons" to the Gabig Family. Also sold to Gabig's at that time was an above-ground 550 gallon tank. (A-5)

5. In accordance with the requirements of the Storage Tank Act and on November 8, 1989, Terry Gabig, as owner, registered with DER the following three underground storage tanks at Gabig's Service Station: two 10,000 gallon tanks storing gasoline and one 6,000 gallon tank storing gasoline. Terry Gabig also registered one 1,000 gallon above-ground tank storing kerosene. One of the two 10,000 gallon tanks was listed as temporarily out of use on his registration form. (C-1, B-1)

6. On November 5, 1990 Mercer Borough received complaints of gasoline odors existing in the vicinity of Gabig's Service Station which is located on the northeastern corner of the intersection of Route 19 (Erie Street) and Butler Streets in Mercer Borough. (B-1, C-2 and T-18)

7. During the morning of November 14, 1990, DER received a call from Trooper Leroy Woods of the Pennsylvania State Police Fire Marshall's Office

who reported the presence of gasoline fumes in a storm sewer line at Route 19 and Butler Streets in Mercer. (B-1, T-15 through 16)

8. In response to the telephone call from Trooper Woods on November 14, 1990, DER sent Susan Vanderhoof (Vanderhoof) and James Sturm (Sturm), a hydrogeologist, to Mercer to investigate the complaint. (B-1, T-16 through 17)

9. Upon arriving in Mercer, Sturm and Vanderhoof talked with Trooper Woods and others about the odors then went about two and one-half blocks north of Gabig's Service Station on Erie Street to "the square" to check the storm sewers for gasoline or fumes. (C-2, B-1, T-16 through 19)

10. As Sturm and Vanderhoof moved south on Erie Street following the storm sewer, Sturm and Vanderhoof found no fumes or gasoline until they reached the corner at which Gabig's Service Station is located. There strong fumes were present and "product" was found in the storm sewer catch basin. (T-19)

11. Since storm sewers also ran east to west here, Sturm and Vanderhoof next went east on Butler Street as far as Pitts Street but found neither storm sewer catch basins nor manholes with either fumes or "product" in them. (C-2 and T-19 through T-20))

12. DER's staff did not look west of Gabig's because there were no storm sewers which ran from the west into the storm sewer catch basin on the corner next to Gabig's Service Station. (T-19). DER did not check storm sewers south of this intersection because the gradient of the storm sewers here is north to south and thus flow to this catch basin would have to come from some uphill location. (T-20 through 21)

13. The storm sewers at this location are on the same side of both Erie Street (south) and Butler Street (east) as Gabig's Service Station. The

storm sewer catch basin is of the common open grate variety installed to receive road runoff. (T-22 through 24). The storm sewer lines north and east of Gabig's had been flushed by the Borough on November 14, 1990 prior to the DER investigation but were no longer draining. (T-39 through 43).

14. "Product", which smelled like "weathered gasoline" to Vanderhoof, was observed floating on the surface of water flowing into this catch basin from storm sewer running east on Butler Street but there was no flow seen upgradient further east in the sewer. (T-24, T-43 through 44). The subsequent laboratory analysis of a sample of this liquid confirmed that this was weathered gasoline. (T-24, B-1)

15. Sturm and Vanderhoof talked with Terry Gabig and learned that the station's underground gasoline storage tanks were located on the south side of Gabig's Service Station between the station building and the storm sewer. (T-25 through 26)

16. DER's personnel asked Terry Gabig to dig a trench on the site between the tanks and the storm sewer and he agreed, arranging for the excavation of a 25-foot-long trench that same day. (B-1, T-25 through 26)

17. The trench was from 2 to 7 feet deep. (B-1). At a depth of 1 to 2 feet below the surface in the western end of the trench, groundwater was encountered during excavation and the water had gasoline in it. (C-3, T-26). Water which had product in it was also encountered at the eastern end of the trench and the soil was contaminated there also. (T-26 through 27). Analysis of a sample of the "product" in the trench showed it to be weathered gasoline and to be similar to the sample from the storm sewer (T-26 through 28, C-3, C-4, C-5 and B-1).

18. At the point the storm sewer pipe enters the storm sewer catch basin at the corner of Gabig's property it is 2 to 3 feet deep. (T-54)

19. The water intercepted at a depth of one to two feet by the trench which Gabig dug shows groundwater is at a high elevation in this area. (T-68)

20. The surface of the site slopes to the south or southwest. The surface topography controls groundwater flow patterns here, which would mean that the groundwater at Gabig's flows to the south or from the tanks toward the trench and from the trench toward the storm sewer in Butler Street. (T-65)

21. From Sturm's experience when flowing groundwater intercepts a storm sewer or any other underground conduit it will flow along the fill around such a storm sewer which is more permeable than the undisturbed soils. (T-66 through 68). This is how a french drain system functions. (T-68). If there are cracks or holes in such an underground sewer line the groundwater may enter it. (T-68)

22. Terry Gabig installed a monitoring well on the north side of this property uphill of the tanks, and analysis of a sample from it in April of 1991 showed no contamination by hydrocarbons. (T-36)

23. DER did not investigate possible sources of this gasoline north or east of the Gabig service station because in its staff's opinion there was no evidence to support such an investigation under the facts here. (T-50 and 72)

24. On November 25, 1990, Gabig's removed the gas pumps from the pump islands and discontinued commercial sale of gasoline product. (B-1)

25. On January 15, 1991, DER issued Gabig's the order which is the subject of this appeal. (T-29, C-7)

26. In April of 1991 Gabig's, which cooperated with DER throughout DER's investigation, notified DER that it was going to excavate and remove the three fiberglass tanks. (T-46)

27. Terry Gabig called DER to advise of tank removal. (T-30). He had passed the test to become certified by DER as to tank installation and removal. (T-120 through 124)

28. When removing the three tanks Terry Gabig visually inspected them and found no leaks (T-124, A-4), but he neither air pressure tested nor hydrostatically tested the tanks to see if they leaked. (T- 153). After removing these three tanks Terry Gabig cut them in half (T-124).

29. On April 10, 1991 Vanderhoof returned to Gabig's to check on the status of the tank removal by Terry Gabig, to find all three tanks had already been removed. The pit on Gabig's property where the tanks had been located had water and product in it. (T-29 through 30). This product was black, thick and sticky. (T-31)

30. Marilyn Gabig observed a sheen on the water in the pit created by removal of the three tanks. (T-109)

31. In the course of removing the three fiberglass tanks, Terry Gabig discovered a fourth underground storage tank (Tank 4) located between the service station building and the pit where the three fiberglass tanks were located. (T-33, B-1)

32. Tank 4 is a steel tank and was partially filled with sand and gravel. (T-34). Analysis of a sample of soil taken from the top of Tank 4 showed the soil was contaminated by weathered gasoline. (B-1, T-34)

33. When Terry Gabig began pulling dirt from around Tank 4, Vanderhoof saw water and product come through holes on the sides of Tank 4 and flow into the

pit created by removal of the first three tanks. (T-34, T-107). Analysis of a sample of this discharging material as collected by DER says this material is weathered gasoline. (B-1, T-34)

34. Neither Gabig's nor DER was aware of Tank 4 before April of 1991. (T-33, T-105). The area over the tank was covered by four layers of asphalt and there were no surface indications of Tank 4's presence. (T-148)

35. Tank 4 was removed by Terry Gabig on June 16, 1991. (T-112)

36. While digging in the hole created by Tank 4's removal in preparation for filling that hole, Terry Gabig discovered a fifth underground storage tank (Tank 5). Tank 5 was steel also and located end-on-end with the fourth tank but east of Tank 4. (T-112, T-146)

37. Tank 5 also had some gravel in it. (T-114)

38. Tank 5 leaked water and product. (T-110, A-26)

39. Marilyn Gabig observed as many as ten leaks from either Tank 4 or Tank 5. (T-114)

40. Tank 5 was removed in June of 1991. (T-112). Tank 4 and Tank 5 were cut in half at the service station before removal from the ground because Terry Gabig was afraid with their age and the gravel inside that they would break if removed while whole. (T-115)

41. As near as Terry and Marilyn Gabig can determine, Tank 4 and Tank 5 were installed in 1957 and their use ceased in 1970. (T-115)

42. The gravel from Tanks 4 and 5 is still at the service station covered by plastic. (T-115). The tank excavation has been refilled by Gabig's. (T-38)

43. There is no evidence the thicker black material seen in the pit created by removal of the three fiberglass tanks flowed to the storm sewer.

(T-59). Terry Gabig believes this material, which he observed ooze into this pit as Tank 4 was removed (T-143 through 144, A-25), is the coating from Tank 4 and Tank 5 which was washed off by fuel leaking out of those tanks (T-157) because Gabig's never sold fuel oil at Gabig's Service Station. (T-161 through 162)

44. Terry Gabig did not dig up the lines that ran from his tanks to the gas pumps and did not test them for leaks; they had check valves installed on them, and, when he opened one of the valves gasoline ran out, so he concluded that they did not leak. (T-125, 155 through 156)

45. Vanderhoof returned to Gabig's on July 10, 1991. At that time there was still an odor of gasoline in the storm sewer catch basin but there was no visible product. At that time Vanderhoof observed water surfacing from the ground through cracks in the sidewalk adjacent to Gabig's and the storm sewer which then flowed across the surface and drained through the grate into the catch basin. (T-37)

46. Gabig's did not pump the contaminated water out of the pit created by the tanks' removal because that was too costly in the opinion of Terry and Marilyn Gabig. (T-116)

47. Gabig's has not hired a hydrogeologist because retaining such a person costs more money than Terry and Marilyn Gabig believe they can afford. (T-103 through 104, T-120). Gabig's did not hydrostatically test the soundness of the fiberglass tanks because they could not afford to buy the gasoline necessary to fill the tanks to run the tests. (T-104 through 105)

48. In its effort to comply with DER's Order of January 15, 1991, Gabig's asserts that it has incurred obligations and expenses in the amount of $11,953.26. (B-1)

49. Based upon the evidence reviewed by Sturm, he concludes that Gabig's is a source of the gasoline in the storm sewer (T-72). DER is not sure if Tank 4 at Gabig's is the sole source of the gasoline or not. (T-47)

50. Terry Gabig admits it is possible the fuel came from Tanks 4 and 5 but says it could have come from anywhere. (T-166)

DISCUSSION

In their Joint Stipulation the parties agree that DER bears the burden of proof in the instant appeal because the appeal arises from the issuance of DER Order. We agree that this is DER's burden here under 25 Pa. Code §21.101. C & L Enterprises, Inc. and Carol Rodgers v. DER, EHB Docket No. 86-626-MJ (Adjudication issued April 2, 1991).

In its post-hearing brief DER contends its Order was authorized under both the Clean Streams Law and the Storage Tank Act and was justified by the evidence adduced. Accordingly, DER concludes its Order was a reasonable exercise of its discretion under Warren Sand and Gravel Company, Inc. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975).

In response, counsel for Gabig's asserts in his post-hearing brief that the Order was an inappropriate exercise of DER's discretion because it and prior correspondence from DER to Gabig's was based on unfounded presumptions and assumptions. The brief also asserts Gabig's is not responsible for any groundwater contamination because they do not own or operate Tank 4 or Tank 5 and as a result the Storage Tank Act does not apply nor do the statute's presumptions on liability make a case against Gabig's. Gabig's also argues DER failed to prove the connection between the sewer's gasoline and Gabig's and failed to eliminate other potential sources of this gasoline.

Under Section 316 of the Clean Streams Law (35 P.S. §691.316), DER is authorized to issue orders to landowners and occupiers to correct conditions on their land which cause either pollution or the danger of pollution. This section of the statute has been interpreted to impose liability on landowners where the groundwater beneath the surface of their land has become contaminated. National Wood Preservers, Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980). Moreover, under this section fault is not a prerequisite to liability. Western Pennsylvania Water Company v. Commonwealth, DER, 127 Pa. Cmwlth. 26, 560 A.2d 905 (1989), aff'd ___ Pa. ___, 586 A.2d 1372 (1991).

Terry Gabig admits he is the owner of the property on which Gabig's Service is located. Gabig's is thus owner and occupant of this site. Western Pennsylvania Water, supra.

In response to complaints of gasoline odors in the area, DER's staff investigated and found fumes and what they first called "product" but is now identified by laboratory analysis to be weathered gasoline in the storm sewer catch basin on the same corner of Erie Street (Route 19) and Butler Street on which Gabig's Service Station is located. DER's staff asked Terry Gabig to dig a trench on his land next to the sewer line running into this catch basin and Mr. Gabig arranged to have it done on the same day DER arrived on the scene. When the trench was dug, groundwater contaminated by weathered gasoline seeped into the trench. This contaminated groundwater obviously did not originate north of Gabig's property because analysis of a sample from Gabig's monitoring well on the north side of the site showed no hydrocarbon contamination.

DER's hydrogeologist opined as an expert that groundwater on the Gabig's property moved from north to south near the surface and his testimony was unrebutted. Gasoline and water were seen flowing into the storm sewer catch basin from the storm sewer running east along Butler Street (parallel with the trench) but neither water nor gasoline was seen flowing into this sewer at the next most easterly location at which it could be observed. This forces the conclusion the water and gasoline were entering the sewer somewhere between those two points. In light of Sturm's testimony as to groundwater traveling along underground conduit and infiltrating same where possible, it is logical in light of the trench's contaminated contents that the storm sewer line received its gasoline from Gabig's. Thus, we have off-site migration of the contaminating groundwater found in the trench on the Gabig's property even though such a migration has not been previously found to be an essential prerequisite for imposition of liability under Section 316.

Even if the five tanks remained in the ground, the evidence recited above was sufficient to be a foundation upon which DER could issue this Order. No evidence of any other explanation of the gasoline was offered on behalf of Gabig's. The fact that there were in the past or are currently other gasoline service stations located in the area does not show it is reasonable to suspect them or to eliminate Gabig's as the source, especially where they were farther away from this catch basin and sewer. In an appeal from this Order DER's burden under Section 316 is not proof beyond a reasonable doubt but merely proof by preponderance of the evidence. Midway Sewerage Authority v. DER, EHB Docket No. 90-231-E (Adjudication issued August 26, 1991). DER's evidence, absent rebuttal, meets the test.

With the removal of the five tanks, the proof to support an Order under Section 316 only increased. The pit where the three fiberglass tanks were located contained gasoline contaminated water. Tank 4 leaked gasoline contaminated water, and while DER's staff never saw Tank 5, it also leaked as shown graphically in Gabig's own photograph (A-26). Nothing in Section 316 requires Gabig's to own Tank 4 or Tank 5 for the Order to be valid under this section as long as Gabig's is the land owner and occupant and Gabig's clearly owned the other three tanks and the pit in which the contaminated water lay. Finally, when DER's Susan Vanderhoof returned to Gabig's in July of 1991, after the pit had been filled in, she still found a discharge from Gabig's (up through the sidewalk, across the surface of the ground and into the catch basin) which smelled of gasoline. The pollution or danger thereof has thus not ended but continues.

Under these circumstances, an order to hire a hydrogeologist to study the area of groundwater contamination to identify its sources is not an unreasonable exercise of DER's authority under Section 316, particularly where everyone thinks the previously unknown Tank 4 is a probable source but no one has said it is the sole source of this gasoline. It must be remembered in judging this action by DER that its inarticulately worded Order did not direct Gabigs to clean up the groundwater but rather only to identify its source(s) and make suggestions on remediation.

This conclusion does not change based on the arguments in Gabig's post-hearing brief. There Gabig's says the gasoline was not shown to reach the waters of the Commonwealth. Insofar as this means some surface stream this is true, but "waters of the Commonwealth" is defined in the statute to include the underground waters of the Commonwealth. The evidence produced at

the hearing shows these waters were contaminated at least in the area beneath the surface of the Gabig's property. The fact of the discovery of previously unknown Tanks 4 and 5 only after Gabig's compliance with DER's request to dig the trench does not change this result, either. DER was not required to prove pollution before asking Gabig's to dig the trench, just as Gabig's was not mandated to comply with DER's request (though DER could have ordered this trench to be dug if Gabig's refused). Moreover, hearings before this Board are de novo. Warren Sand and Gravel, supra. Thus, in reviewing DER's Order we are not barred from considering evidence arising after the Order's January issuance. This includes Sturm's unrefuted expert opinion testimony that gasoline was migrating to the storm sewer from Gabig's and Tank 4's leaky condition confirming this as a probable source.

Gabig's Brief also argues DER ignored the fact of the Borough's flushing of the storm sewers all around Gabig's property but not the storm sewer catch basin next to Gabig's. The fact of the flushing only reinforces the likelihood that Gabig's is at least a potential source. When DER's staff looked at all the previously flushed storm sewers they were all without flow except one portion of one sewer and this was that sewer next to Gabig's which had water and gasoline in it. If all the storm sewers drain to the storm sewer catch basin on Gabig's corner, which in turn drains to a southbound storm sewer line, as the evidence showed, that catch basin was flushed out when the other sewers and catch basins were flushed. The return of gasoline to that storm sewer segment and catch basin thereafter, while the other sewers were dry, only reinforces DER's contention.

Finally, Gabig's offered evidence of a spill of a small quantity of gasoline from the tank of a tiltbed tow truck parked on a corner of the

property onto the surface of the property because its gas tank was overfilled. It then argues DER failed to consider this evidence. But hearings before this Board are de novo and even if this overfill spill occurred it does not rebut the substantial volume of evidence before us as to another source of this pollution.

Having found sufficient evidence to support this Order under Section 316 of the Clean Streams Law, we need not reach or address the issue of Gabig's liability under the Storage Tank Act.

We also do not address questions of liability between Gabig's and Gulf Oil Company herein.

Finally, at the merits hearing, counsel for Gabig's raised the issue of cost of compliance as a defense to DER's order and Boardmember Ehmann barred the testimony offered thereon. At no point in its post-hearing brief does Gabig's re-raise this issue. Since pursuant to Lucky Strike Coal Company et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988), a party is deemed to abandon those issues not raised in a post-hearing brief, we deem this issue and any issue of the propriety of the ruling at the hearing to have been abandoned in this appeal. Thus we do not address them herein. Accordingly, we make the following Conclusions of Law and enter the following Order.

CONCLUSIONS OF LAW

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

2. DER has the burden of proving by a preponderance of the evidence that it acted within the scope of its authority and did not abuse its discretion in issuing the Order which is the subject of the instant appeal.

3. The hearing before this Board on the issues raised in this appeal is de novo.

4. When DER finds pollution or the danger of pollution exists at a piece of property as a result of certain conditions on that property it may issue orders to the owners or occupiers thereof under Section 316 of the Clean Streams Law to take specific steps to address same.

5. Gasoline contaminating the groundwater beneath the surface of the property at which Gabig's is located and entering the adjacent storm sewer system with this groundwater is the type of condition which may be addressed by an Order issued under Section 316.

6. Fault is not a prerequisite for the imposition of liability under Section 316.

7. It is not essential for liability to attach to a property owner/occupant pursuant to Section 316 that there be pollution occurring off-site, i.e., off the land owned or occupied by the recipient of that order.

8. There is sufficient evidence of gasoline contamination of the groundwater and soil to warrant issuance of DER's Order of January 15, 1991.

9. DER did not abuse its discretion by directing Gabig's to hire a hydrogeologist to study the contamination and define its sources.

10. A party is deemed to abandon any arguments not raised in its post-hearing brief.

O R D E R

AND NOW, this 27th day of November, 1991, it is ordered that the appeal of Gabig's Service 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

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 27, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
David A. Gallogly, Esq.
Western Region
For Appellant:
Joseph J. Nelson, Esq.
Mercer, PA

rm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

MONTGOMERY COUNTY	:	
	:	
v.	:	EHB Docket No. 91-053-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	
WHEELABRATOR POTTSTOWN, INC., Intervenor	:	
BROWNING-FERRIS, INC., Intervenor	:	
and BERKS COUNTY	:	Issued: December 3, 1991

OPINION AND ORDER
SUR MONTGOMERY COUNTY'S
MOTION FOR SUMMARY JUDGMENT

By Richard S. Ehmann, Member

Synopsis

Appellant Montgomery County is appealing to this Board the Department of Environmental Resources' ("DER") approval of Berks County's Municipal Waste Management Plan because that plan provides for a portion of Berks County's municipal waste to be sent for processing and disposal to a proposed resource recovery facility to be constructed by Wheelabrator Pottstown, Inc. in Montgomery County, which is allegedly inconsistent with Montgomery County's own Municipal Waste Management Plan. It is undisputed that the Commonwealth Court in Stapleton v. Berks County, ___ Pa. Cmwlth. ___, 593 A.2d 1323 (1991), has declared the process by which Berks County awarded a contract to WPI's facility to be void and has enjoined Berks County from executing or performing

on that contract. Since it is DER's approval of this plan rather than Montgomery's contracting methodology which is before us, Stapleton is not dispositive, and, thus, Montgomery has not shown that it is entitled to summary judgment at this time.

OPINION

On February 8, 1991, Montgomery County ("Montgomery") filed an appeal with this Board from DER's January 9, 1991 approval of the Berks County Municipal Waste Management Plan ("Berks' Plan") pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.* ("Act 101"). Montgomery's appeal claims that on November 20, 1990, DER approved Montgomery's municipal waste management plan ("Montgomery Plan"), for which use of a resource recovery facility proposed to be constructed and operated by WPI in Montgomery ("WPI facility") is under consideration. The appeal asserts that Berks' Plan is contrary to the Montgomery Plan to the extent it provides for disposal of Berks' municipal waste at the WPI facility without qualifying that intention by providing that it is subject to Montgomery's decision regarding use of the WPI facility.

By Order dated May 31, 1991, we granted WPI's unopposed petition to intervene in this appeal.

Presently before the Board is a Motion for Summary Judgment, filed by Montgomery on August 16, 1991, which asserts that the facts are undisputed, that Berks' Plan contemplates the vast majority of the municipal waste generated in Berks is to be sent for processing or disposal to WPI's facility and that this facility was designated as the disposal site based on a selection process by Berks which the Commonwealth Court in Stapleton v. Berks

County, ___ Pa. Cmwlth. ___, 593 A.2d 1323 (1991), has held to be invalid.[1] The motion further claims that the Stapleton court held that Berks' contract with WPI which underlies use of the WPI facility by Berks' Plan is void. On these bases, Montgomery's motion seeks to have us strike from Berks' Plan the provisions regarding Berks' use of the WPI facility, which Montgomery asserts will in turn eliminate the alleged inconsistency between the two plans. Additionally, the motion claims that Berks' Plan provides BFI's Morgantown Landfill would be used if the WPI facility could not be used.

DER filed its response to Montgomery's motion and an accompanying memorandum of law on August 30, 1991. On September 11, 1991, Berks responded as well, echoing DER's response and incorporating by reference DER's memorandum. WPI likewise filed a response to the motion on September 27, 1991, adopting the arguments of DER and Berks.

In its response, WPI argues we should deny Montgomery's motion because it is unverified and merely refers to Stapleton without substantiating its claims with any meaningful references to pleadings, affidavits, depositions, or other discovery responses. Likewise, DER and Berks contend there is insufficient factual basis for Montgomery's assertion that the "vast majority" of Berks' municipal waste is to be sent to the WPI facility, since Montgomery has not supported its motion with the proper documentation. All of the parties opposing the motion contend that because a joint petition for allowance of appeal of the Stapleton decision is pending before the

---

[1]Included with Montgomery's Motion for Summary Judgment is a Motion for Stay of Proceedings pending resolution of the summary judgment motion. This motion sought a stay of the discovery completion deadline. We need not rule on this motion for stay as the time for discovery in this matter has already come to a close and it is now moot.

Pennsylvania Supreme Court,[2] the Stapleton decision is not final. Further, all three contend Stapleton is not dispositive of the issue of whether Berks' Plan can designate waste to go to a resource recovery facility while Berks is accepting bids for a new implementing contract, in light of 53 P.S. §4000.513 which gives Berks one year from the date of DER's approval of Berks' Plan in which to submit all implementing documents. In addition, WPI asserts that it may be the successful proposer on rebid, so Montgomery's motion is premature.

On September 18, 1991, Montgomery replied to DER's and Berks' oppositions, arguing the only fact relevant to its motion is whether Berks' Plan requires waste generated in Berks to be disposed at the WPI facility and that this is not in dispute. Additionally, Montgomery says this fact is shown by the deposition of DER's Keith Kerns, a section of which is attached to Montgomery's Reply. Montgomery contends Stapleton is dispositive of its motion since the requirements in Berks' Plan to send waste to the WPI facility are based on the selection process which Stapleton has ruled violated Pennsylvania law. Montgomery further urges that whether allocatur in Stapleton may be granted by the Supreme Court and the Commonwealth Court's decision reversed is speculation at this point, as is the possibility of WPI's facility being selected by Berks to provide resource recovery on rebid of the contract.

DER replied to Montgomery's Reply on September 24, 1991, arguing the Commonwealth Court in Stapleton did not decide whether the Berks-WPI contract

---

[2]WPI has attached to its Response a copy of the transmittal letter, dated September 14, 1991, which accompanied this joint petition for allowance of appeal.

violated provisions of Act 101 or whether Berks could include the WPI facility in Berks' Plan, so Stapleton is not controlling here.

On October 4, 1991, Montgomery replied to WPI's response by arguing its motion is entirely based on undisputed facts and legal interpretations, but nevertheless attaching the affidavit of Michael M. Stokes, an associate director of Montgomery's Planning Commission and a member of the Waste System Authority of Western Montgomery County ("Western Authority") and excerpts from the deposition of Lucien Calhoun, planning consultant to Berks County, to support its contention.

Since the filing of these documents with this Board and on October 22, 1991, the Commonwealth Court entered an order reversing our denial of Browning-Ferris, Inc.'s ("BFI") Petition to Intervene herein. See Browning-Ferris, Inc. v. Department of Environmental Resources, No. 1087 C.D. 1991 (Opinion issued October 23, 1991). BFI has now filed a response to Montgomery's motion opposing same. Simultaneously, it has filed a motion to dismiss Montgomery's appeal but we do not address that motion herein.[3]

We have the authority to grant summary judgment only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Snyder v. DER, ___ Pa. Cmwlth. ___, 588 A.2d 1001 (1991). The movant bears the burden of proving that no genuine issue of fact exists. Penn

---

[3]We have also scheduled this matter for a hearing on its merits to begin on January 21, 1991.

Center House v. Hoffman, 520 Pa. 171, 553 A.2d 900 (1989). We view a motion for summary judgment in the light most favorable to the non-moving party. Robert C. Penoyer, 1987 EHB 131.

Initially Montgomery's motion was not accompanied by any affidavits, depositions, answers to interrogatories, or admissions. Apparently Montgomery intended to base its motion strictly on the facts contained in the "pleadings" and on the Stapleton decision until the opponents of the motion properly asserted the lack of factual support as a defect in the motion. Only then did Montgomery file the Stokes' affidavit and excerpts from the Kerns and Calhoun depositions. None of the motion's opponents has objected to Montgomery's filing these documents after filing its motion or factually rebutted same. Under the circumstances of this case and for purposes of disposition of this motion only, we will treat Stokes' affidavit as part of the factual record. See Commonwealth v. Diamond Shamrock Chemical Co., 38 Pa. Cmwlth. 89, 391 A.2d 1333 (1978). We remind Montgomery, however, that the procedure before the Board is for supporting affidavits to be attached to the motion or filed simultaneously therewith. See County of Schuylkill et al. v. DER, 1990 EHB 1370. Stokes' affidavit states that all of the statements set forth in the motion are true and correct. Although Montgomery should have an affidavit detailing the facts supporting its motion with the motion itself, we will not deny its motion on this basis since the defect has been cured to some degree.

As to the deposition excerpts, we will also treat them as part of the factual record for motion disposition purposes here since no objection has been raised by the opponents of the motion to their being filed with Montgomery's Replies rather than with its motion and because inclusion of the deposition excerpts in the record has no effect on our determination in this

matter. There is no question at this point that Berks' Plan designates WPI's facility to provide resource recovery capacity to Berks for Berks' waste when the facility commences operations. In fact, WPI's response states that Berks' Plan designates WPI's facility for the disposal of 500 tons per day of Berks' waste, which is the allegation made by Montgomery's notice of appeal. Whether or not 500 tons per day is a "vast majority" of Berks' waste, as Lucien Calhoun testified in his deposition, is not a material fact in dispute. A fact is material if it directly affects the disposition of a case. Mann v. City of Philadelphia, 128 Pa. Cmwlth. 499, 563 A.2d 1284 (1989). As long as Berks' Plan designates some waste to go to the WPI facility, the amount of that waste does not directly affect the disposition of Montgomery's appeal.

It is further undisputed at this point that upon an appeal by a Berks County taxpayer, John J. Stapleton, the Commonwealth Court, reversing the Common Pleas Court of Montgomery County, held the selection process under which WPI was awarded the contract with Berks for use of WPI's facility was invalid, and the Court annulled the contract and enjoined Berks from executing or performing on it. See Stapleton, supra.

The opponents of the motion have not convinced us that it is necessary for us to delay ruling on Montgomery's motion until after the Supreme Court has ruled on the petition pending before it in Stapleton. Although the Supreme Court might ultimately grant the petition and then reverse the Commonwealth Court's decision, until then, the Commonwealth Court's order is a final decision. See AT&T Communications of Pennsylvania, Inc. v. Commonwealth, PUC, 131 Pa. Cmwlth. 390, 570 A.2d 612 (1990).

The parties do not differ on what the Commonwealth Court held in Stapleton, i.e., that the WPI-Berks contract is void and that Berks is

The parties do not differ on what the Commonwealth Court held in Stapleton, i.e., that the WPI-Berks contract is void and that Berks is enjoined from implementing that contract. Stapleton has instructed Berks that it must rebid the resource recovery contract for the WPI facility to be used pursuant to its Plan. Stapleton, at __, 593 A.2d at 1332. The parties do differ on its impact. DER correctly points out that before this Board, by virtue of Montgomery's appeal, is DER's approval of Berks' Plan, not Berks' contract with WPI for the plan's implementation. The Board has no power to adjudicate private contract rights. Bob Groves - Plymouth Co., et al. v. DER, 1976 EHB 266. As observed in City of Harrisburg v. DER, 1988 EHB 946, we are not authorized to act on such questions. Section 4 of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 5430, No. 94, 35 P.S. §7514, clearly limits our authority to the review of actions of DER, such as that it took by approving Berk's Plan. Thus, Stapleton, *supra*, may invalidate the contracting methodology previously employed by Berks, but DER's approval of Berks' Plan remains for us to adjudicate. Accordingly, Montgomery's motion does not establish that it is entitled to summary judgment in this matter and its motion must be denied.[4]

[4]In reaching this conclusion, we make no determination on the impact of whether Section 513 of Act 101 makes Montgomery's motion premature.

O R D E R

AND NOW, this 3rd day of December, 1991, Montgomery's Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 3, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Thomas Y. Au, Esq.
David J. Gromelski, Esq.
Office of Chief Counsel
For Appellant (Montgomery County):
Bruce W. Kauffman, Esq.
John F. Smith, Esq.
Sheryl L. Auerbach, Esq.
J. Bradford McIlvain, Esq.
Philadelphia, PA
For Berks County:
Lee E. Ullman, Esq.
Jeffrey L. Schmehl, County Solicitor
Reading, PA
For Intervenor (WPI):
Louis B. Kupperman, Esq.
Philadelphia, PA
For Intervenor (BFI):
Jan Z. Krasnowiecki, Esq.
Philadelphia, PA

rm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BC

DARMAC COAL, INC.	:	
	:	
v.	:	**EHB Docket No. 91-305-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 5, 1991

OPINION AND ORDER SUR MOTION FOR PROTECTIVE ORDER AND FOR SANCTIONS

By Joseph N. Mack, Member

Synopsis

Where DER may enter a mining site for enforcement and compliance purposes by virtue of the authority granted to it by statute and landowner consent, it is still obligated to abide by the rules of discovery. Therefore, if DER wishes to enter a site for the purpose of conducting discovery thereon, it must comply with the requirements of Pa. R.C.P. 4009(a)(2).

OPINION

This matter was initiated with the filing of a notice of appeal by Darmac Coal, Inc. ("Darmac") on July 25, 1991, challenging Compliance Order No. 91G193 issued by the Department of Environmental Resources ("DER") on July 26, 1991. The complianc order charges Darmac's mining operation with the degradation of an unnamed tributary to Glade Run in East Franklin Township, Armstrong County.

On October 15, 1991, Darmac filed a Motion for Protective Order and for Sanctions, alleging that DER had conducted unauthor-

ized discovery of the Darmac site by failing to comply with the Board's rules on discovery at 25 Pa.Code §21.111(d) and Pa. R.C.P. 4009(a)(2) regarding entry for inspection. Specifically, Darmac states that DER personnel visited Darmac's site on three occasions, September 20, 1991 and October 1 and 3, 1991, to collect data for discovery purposes without giving prior notice to Darmac or making a request under Pa. R.C.P. 4009(a)(2). In support of its allegations Darmac has included with its motion an affidavit signed by its chief engineer, as well as a copy of DER's report prepared at the time of the September 20, 1991 inspection (Exhibit 2 to Darmac's Motion). The report states that DER's inspectors were "collecting water sample an [sic] looking over site for a hydro report in preparation for an appeal that co. has file [sic] on compliance order 91G193." The motion further states that prior to the two visits in October 1991, Darmac's counsel had notified counsel for DER by letter of September 23, 1991 (Exhibit 3 to Darmac's Motion) and again on September 24, 1991 that requests for entry pursuant to Pa. R.C.P. 4009(a)(2) should be forwarded to Darmac's counsel prior to any further entry onto the permit site for discovery purposes.

In its motion, Darmac requests that the Board enter an order preventing DER from conducting any further discovery involving entry onto Darmac's site until proper requests have been made under Pa. R.C.P. 4009(a)(2). Darmac further requests that the Board sanction DER by barring the introduction of any evidence or testimony gathered, revealed, or discovered at the Darmac site during DER's site visits of September 20, 1991; October 2, 1991; and October 3, 1991.

In its Response and New Matter in Opposition to Darmac's Motion, filed on or about November 5, 1991, DER argues that it is not required to submit a request under Pa. R.C.P. 4009(a)(2) because it is authorized to enter Darmac's site under authority 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 §1396.4c; §5 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; and §1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-1, at §510-17; and by virtue of the Contractual Consent of Landowner forms ("landowner consents") signed by the owners of the land subject to Darmac's surface mining permit. The landowner consents, which were submitte with Darmac's application for a surface mining permit, grant DER the right to enter onto the land and to "inspect, study, backfill, plant and reclaim the land and abate pollution therefrom..." (Exhibit A-6 to DER's Response) DER asserts that the inspections of September 20, October 1, and October 3, 1991 were enforcement and compliance related activities authorized under the aforesaid statutes and landowner consents, thus making discovery procedures under Pa. R.C.P. 4009(a)(2) superfluous. DER admits that the aforesaid "hydro report" and other information obtained from the inspections are likely to be used as the basis for an expert opinic if this case proceeds to hearing, but argues that this fact alone does not require DER to seek another source of authority to enter the mine site. Darmac, on the other hand, argues that the aforesai statutory provisions and consents do not grant DER the permission necessary under Pa. R.C.P. 4009(a)(2) to enter Darmac's site

without prior notice for the purpose of conducting discovery.

On or about November 20, 1991, Darmac filed a Reply responding to DER's New Matter.

We first examine the statutes under which DER claims its authorization to enter the mine site. Pursuant to SMCRA, DER "shall have the right to enter upon and inspect all surface mining operations for the purpose of determining conditions of health or safety and for compliance with the provisions of this act, and all rules and regulations promulgated pursuant thereto." 52 P.S. §1396.4c. Under §5 of the CSL, DER "shall have the power and its duty shall be to...[m]ake such inspections of public or private property as are necessary to determine compliance with the provisions of this act, and the rules, regulations, orders or permits issued hereunder." 35 P.S. §691.5(b)(8). Finally, §1917-A of the Administrative Code gives DER the power and duty "[t]o cause examination to be made of nuisances, or questions affecting the security of life and health, in any locality, and, for that purpose, without fee or hinderance [sic], to enter, examine and survey all grounds, vehicles, apartments, buildings, and places, within the Commonwealth..." 71 P.S. §510-17. Further authority is granted to DER by the landowner consents which Darmac was required to submit with its application to obtain a surface mining permit. The consents were signed by the owners of the site on which DER conducted the September 20, 1991 and October 1 and 3, 1991 inspections. These consent forms grant DER "the right to enter, inspect, study, backfill, plant and reclaim the land, and abate pollution therefrom as a matter within [its] police power..."

The aforesaid provisions do indeed grant DER the power to enter and inspect a site and examine conditions thereon for the purpose of ensuring compliance with the statutes and regulations it is empowered to enforce. However, contrary to DER's position, these provisions do not give DER the right to ignore the rules of discovery.

The Board's rules, at 25 Pa.Code §21.111, state in pertinent part as follows:

> (a) Discovery shall be available to parties without leave of Board upon written notice served upon each party or his counsel of record for a period of 60 days after the appeal or complaint has been filed with the Board...
>
> (d) Written requests for the production of documents, things, or for entry for inspection and other purposes shall be governed by Rule 4009 of the Pennsylvania Rules of Civil Procedure...
>
> (Emphasis added)

Rule 4009 of the Pennsylvania Rules of Civil Procedure provides in relevant part as follows:

> (a) Any party may serve on any other party a request...
>
> (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rules 4003.1 through 4003.5 inclusive [dealing with the scope of discovery]."

The rules governing discovery apply equally to DER as to any party before us. As Darmac correctly points out in its supporting memorandum of law, if DER is not required to abide by the rules of discovery, Darmac may be deprived of important procedural safeguards. Under Rule 4009(b)(2), when a party is

served with a request for entry and inspection, the party upon whom such request is served may file a written objection thereto. Failing to serve a request for entry and inspection upon a party deprives that party of the opportunity to raise an objection or of having a representative present during the inspection. It also deprives the party of the opportunity to observe sampling or to conduct joint or split sampling should it wish to do so. See Pennsylvania Game Commission v. DER and Ganzer Sand & Gravel, Inc., 1983 EHB 355, 360-61.

DER asserts that Darmac does not have "the necessary 'possession or control' that would require [DER] to follow the procedure under Pa. R.C.P. 4009(a)(2)." We disagree. There is no requirement under Rule 4009(a)(2) that the party be an owner of the property. The property need only be within his possession or under his control, such as in the case of a lessee or licensee. See Goodrich-Amram 2nd, §4009(a):11.

By virtue of its status as a permittee authorized to conduct surface mining on the site in question, Darmac certainly exercises some degree of control over the site. Moreover, so long as it is conducting mining activities thereon, it is in possession of the site as well. Therefore, Darmac falls within the scope of Rule 4009(a)(2).

DER states that the inspections in question were for enforcement purposes and "the general purpose of determing whether conditions at the site are inimical to health and safety and to what extent these conditions constitute violations of the Surface Mining Act, Clean Streams Law and regulations adopted pursuant to these Acts", and were not simply for the purpose of conducting

discovery for trial. However, by DER's own admission, one purpos of the inspections was to conduct discovery for use in this appea. Therefore, DER was bound to follow the requirements of Rule 4009(a

By stating that DER is bound by the rules of discovery, we are not limiting DER's access to sites for the purpose of enforcing and ensuring compliance with the applicable statutes and regulations. However, when DER wishes to conduct discovery it must abide by the rules of discovery, as set forth at 25 Pa.Cod §21.111 and the rules of civil procedure. Therefore, DER was obligated to comply with Pa. R.C.P. 4009(a)(2) before conducting discovery at Darmac's mining site on September 20, October 1, and October 3, 1991.

Where a party fails to abide by the Board's rules of practice and procedure, it may be subject to sanctions. 25 Pa.Cod §21.124. By failing to comply with Rule 4009(a)(2), DER deprived Darmac of the opportunity to have an expert or other representativ present during sampling and to take joint samples. Therefore, DER will not be permitted to introduce the results of any sampling taken during the inspections of September 20, October 1, and October 3, 1991, nor any expert testimony or reports based on sampling conducted on those dates. Moreover, any future inspections for the purpose of discovery must be conducted pursuant to the requirements of Pa. R.C.P. 4009(a)(2).

O R D E R

AND NOW, this 5th day of December , 1991, upon consideration of Darmac's Motion for Protective Order and for Sanctions, DER's Response and New Matter, and Darmac's Reply, it is ordered that the Motion is granted as follows:

1) DER is barred from introducing in this appeal the results of any sampling conducted during the inspections of September 20, October 1, and October 3, 1991 and any other subsequent inspections which failed to comply with Pa. R.C.P. 4009(a)(2).

2) DER is ordered to comply with the requirements of Pa. R.C.P. 4009(a)(2) before conducting any further discovery on the site covered by Darmac's mining permit.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 5, 1991

cc: **Bureau of Litigation:**
Library, Brenda Houck
For the Commonwealth, DER:
David A. Gallogly, Esq.
Western Region
For Appellant:
Stephen C. Braverman, Esq.
William T. Gorton III, Esq.
Stephen G. Allen, Esq.
BUCHANAN INGERSOLL P.C.
Philadelphia, PA

ar

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

ENVIRONMENTAL NEIGHBORS' UNITED FRONT, et al.	:	
v.	:	**EHB Docket No. 91-372-MJ**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and MILL SERVICE, INC., Permittee	:	**Issued:** December 6, 1991

OPINION AND ORDER SUR MOTION TO STRIKE

By Joseph N. Mack, Member

Synopsis

Where a memorandum in opposition to a motion to dismiss is submitted by a county which is not a party to this action, it will be treated as an "amicus" brief.

OPINION

This matter originated with the filing of an appeal by Environmental Neighbors' United Front ("ENUF") on September 9, 1991, challenging an August 8, 1991 letter from the Department of Environmental Resources ("the Department") to Mill Service, Inc. ("Mill Service") regarding Mill Service's application to operate a hazardous waste landfill and treatment facility in Smith Township, Washington County.

On October 10, 1991, Mill Service filed a Motion to Dismiss the appeal, asserting that the August 8, 1991 letter was not an appealable action and, therefore, the Board lacked

jurisdiction over it. The motion also contended that ENUF lacked standing to bring the appeal. ENUF filed a memorandum opposing the motion on November 5, 1991. No ruling has yet been issued thereon

On November 8, 1991, the County of Washington ("the County") submitted a Memorandum in Opposition to Mill Service's Motion to Dismiss. A review of the docket in this matter reveals that the County is not a party to this action; nor has it sought or been granted status as an intervenor.

The memorandum submitted by the County states that it intends to file an amicus brief in support of the appeal, and asserts that the Department's action of August 8, 1991 is an appealable action because it will adversely impact the economic climate of the area.

On November 21, 1991, Mill Service filed a Motion to Strike the County's memorandum since the County is not a party to this action. Mill Service asserts that the County is seeking the benefits of participating as a party in this appeal without subjecting itself to the Board's jurisdiction.

Our rules at 25 Pa.Code §22.2(a) define a "party" as being "[a]ny person with the right to institute or defend or otherwise appear and participate in proceedings before the Board. A party shall be an appellant, appellee, plaintiff, defendant or intervenor." Clearly, the County does not fall within the definition of a party. It has not sought to intervene in this appeal, nor has it filed a separate appeal from the August 8, 1991 letter.

In its memorandum, the County asserts that the August 8, 1991 letter is an appealable action because it affects the County's rights and duties by adversely impacting the economic climate of the area. In particular, the memorandum states, "The County has spent and committed considerable taxpayer money toward economic development and targeted the Northwest corridor of the County as a meaningful potential growth area. The action of DER undermines the County's efforts." Thus, although the County asserts it is filing this memorandum on behalf of the appellant, ENUF, it appears that the County is concerned more with how it will be impacted by the landfill if it is approved. Thus, the County is attempting to play the role of appellant without being a party to this case.

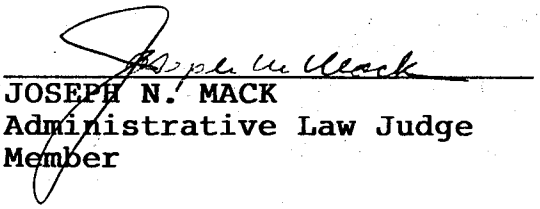
Because the County is not a party to this appeal, it may not be accorded the same status as a party. Del-Aware Unlimited, Inc. v. DER, 1988 EHB 158. However, the Board has allowed the filing of "amicus" briefs by non-parties. BethEnergy Mines Inc. v. DER, 1990 EHB 638, 641. City of Harrisburg v. DER, 1988 EHB 945, 952. In ruling on the dispositive motion before us, we shall treat the County's memorandum as an "amicus" brief. Therefore, the County's memorandum will not be quashed, as requested by Mill Service, but, rather, will be accorded the weight of an "amicus" brief.

ORDER

AND NOW, this 6th day of December, 1991, upon consideration of the Motion to Strike the County of Washington's Memorandum in Opposition to Motion to Dismiss, the Motion to Strike is granted in part and denied in part. The County's Memorandum

shall not be quashed, but shall be treated as an "amicus" brief filed in support of the appeal.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 6, 1991

cc: **Bureau of Litigation:**
Library, Brenda Houck
For the Commonwealth, DER:
Kenneth J. Bowman, Esq.
Western Region
For Appellant:
Jonathan B. Robison, Esq.
Pittsburgh, PA
For Permittee:
R. Timothy Weston, Esq.
KIRKPATRICK & LOCKHART
Harrisburg, PA

ar

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BC

FRY COMMUNICATIONS, INC.	:	
	:	**EHB Docket No. 87-450-W**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 10, 1991

OPINION AND ORDER SUR
MOTION FOR RECONSIDERATION

By Maxine Woelfling, Chairman

Synopsis

A motion for reconsideration pursuant to 25 Pa. Code §21.122(a)(1) is denied where the moving party did brief the issue it alleges it should have had the opportunity to brief.

OPINION

In an adjudication dated November 6, 1991, the Board sustained in part and dismissed in part Fry Communications, Inc.'s (Fry) appeal of a September 24, 1987, order from the Department of Environmental Resources (Department) directing Fry to undertake various remedial actions to abate alleged violations 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 the rules and regulations promulgated thereunder. The Board held, *inter alia*, that Fry had not violated §301 of the Solid Waste Management Act by spilling residual waste on the ground without a permit, since only operators

of residual waste processing and disposal facilities were required to obtain a permit. The Board instead held that Fry was subject to §302 of the statute and found that Fry had not disposed of residual waste in a manner which adversely affected the environment.

On November 26, 1991, the Department filed a timely motion for reconsideration of this portion of the adjudication, contending that since Fry had not raised the issue of the applicability of §301 in its post-hearing brief and the Department had only "mentioned but not briefed" the issue in its post-hearing brief, the Board's decision, therefore, rested on a legal ground not considered by the parties. The Department went on to argue that the Board's analysis of the applicability of §301 of the Solid Waste Management Act was in error, citing the dire policy consequences if the holding is allowed to stand.

Fry advised the Board in its December 5, 1991, response to the Department's motion that it was taking no position on the issue.

We will deny the Department's motion as it does not satisfy the requirements of 25 Pa. Code §21.122(a)(2). The Department is correct in alleging that Fry's post-hearing brief does not address the applicability of §301 of the Solid Waste Management Act; rather, it concentrates on the remedial action ordered by the Department as being disproportionate to the violations alleged by the Department. But, the Department's post-hearing brief is another matter.[1]

The Department's motion for reconsideration disingenuously characterizes its post-hearing brief as "mentioning," but not briefing, the issue of the applicability of §301 of the Solid Waste Management Act. Our

---

[1] We note that there are two parties to this appeal and that the Department, the proponent of this motion, bore the burden of proof.

reading of the Department's post-hearing brief is that it did more than "mention" the issue. The following excerpts from the Department's post-hearing brief are illustrative of the importance placed on this issue by the Department.

The Department's proposed Finding of Fact No. 9 states:

> 9. Fry has not applied for nor has it been issued a permit from the Department for the disposal of residual waste at the Church Road Facility. [N.T. p. 225].

The summary of argument at pages 11-12 contains this passage:

> In its appeal, Fry has challenged limited aspects of the Department's Order which charged Fry with violations of the SWMA and required Fry to assess and remediate contamination on its property, among other things. The evidence presented by the Department at the hearing focused on the illegal disposal of residual waste and the reasons supporting the Order's requirements to install a groundwater monitoring well, to conduct additional soil sampling, and to prepare a PPC Plan. The evidence presented shows that the Department did not abuse its discretion nor act arbitrarily in ordering such activities.

Pages 13-14 of the brief contain this argument:

> Consequently, the only violation in question now before the Board is whether Fry disposed of or permitted the disposal of residual waste without a permit.
>
> Section 301(a) of the SWMA, 35 P.S. §6018.301, allows the disposal of residual waste only if it is consistent with or is authorized by the rules and regulations of the Department. Section 75.21(a) of the rules and regulations of the Department, 25 Pa. Code §75.21(a) requires a permit for the disposal of solid waste, which includes residual waste. Section 610(1) of the SWMA, 35 P.A. §6018.610(1), also makes it unlawful to dispose or permit the disposal of solid wastes without a permit....

The argument continues on page 14:

> Under the evidence presented at trial, the Department has proven that Fry had disposed of or had permitted the disposal of residual waste without a permit. Since Fry has (sic) does not have such a permit [F.F. 9], the question before the Board is whether Fry disposed of or permitted the disposal of residual waste.

Again, it states on page 16:

> Whether this disposal was deliberate or accidental, the evidence clearly shows that residual waste was deposited on the ground. Therefore, Fry has violated Section 301(a) of the SWMA, 35 P.S. §6018.301(a) and 25 Pa. Code §21(a) (sic) by disposing and/or permitting the disposal of residual waste without a permit.

And, finally, Conclusion of Law No. 3 reads:

> 3. Fry's discharge and/or disposal of and/or its permitting the discharge and/or disposal of residual waste onto the surface the ground of the Church Road Facility without a permit is a violation of 25 Pa. Code §§ 75.21(a) and Sections 301 of the SWMA, 35 P.S. §§ 6018.301.

Because the issue was argued by the Department in its post-hearing brief, the Department's motion for reconsideration fails to satisfy the requirements of 25 Pa. Code §21.122(a)(1) and must be denied. City of Harrisburg v. DER and Pennsylvania Fish Commission, 1989 EHB 365, 367-368.

ORDER

AND NOW, this 10th day of December, 1991, it is ordered that the Department's motion for reconsideration is denied.

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

DATED: December 10, 1991

cc: **DER, Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Dennis A. Whitaker, Esq.
Central Region
For Appellant:
Robert A. Swift, Esq.
KOHN, SAVETT, KLEIN & GRAF
Philadelphia, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

FRANCIS NASHOTKA, SR., et al.	:	
	:	
v.	:	**EHB Docket No. 88-216-M**
	:	**(consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
LAWRENCE HARTPENCE AND IMOGENE KNOLL	:	
	:	
v.	:	**EHB Docket No. 89-033-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
LAWRENCE 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: December 12, 1991**

OPINION AND ORDER
SUR
CONSOLIDATED PETITION TO ENFORCE GLOBAL SETTLEMENT AGREEMENT
AND
MOTION TO DISMISS FOR LACK OF JURISDICTION

Robert D. Myers, Member

Synopsis

The Board lacks power to enforce consent adjudications. Lacking that power, the Board holds that it also lacks the power to declare whether an agreement was reached to settle the appeals. Such power is not a necessary adjunct to its limited field of jurisprudence.

OPINION

On September 11, 1991 Appellants filed a Consolidated Petition to Enforce Global Settlement Agreement alleging, *inter alia*, that they and the Department of Environmental Resources (DER) had reached an oral agreement to settle these appeals, that the terms of the oral agreement had been memoralized in a letter from Appellants' attorney to DER's attorney, that the Consent Adjudication subsequently prepared by DER's attorney included provisions not previously discussed or agreed to and that DER refuses to delete the new provisions. Appellants request the Board to order DER to "prepare and execute a Consent Adjudication with language similar to that contained" in the letter from Appellants' attorney to DER's attorney.

In response to Appellants' Petition DER filed on October 1, 1991 a Motion to Dismiss for Lack of Jurisdiction (and supporting memorandum of Law), claiming that the Board lacks jurisdiction to grant the relief requested. Appellants filed their Response (and supporting brief) on October 21, 1991.[1]

Board precedents have held that we lack jurisdiction to enforce agreements between DER and other parties: *Westinghouse Electric Corporation v. DER*, 1990 EHB 515; *Empire Sanitary Landfill, Inc. v. DER*, 1990 EHB 1270. *Westinghouse* involved and oral agreement to reconsider effluent levels in a NPDES permit; *Empire* involved an oral agreement to settle an appeal from the modification of a solid waste permit. Appellants distinguish *Westinghouse* on its facts and argue that *Empire* was wrongly decided because of its reliance on *Westinghouse*.

---

[1] Appellants' Response appears to modify the relief requested. We are no longer asked to enforce the oral agreement, only to decide whether an agreement was made. Our disposition of the Petition applies to both.

It is true, as Appellants claim, that *Westinghouse* concerned an *ante litem* agreement while *Empire* concerned a *pendente litem* agreement. Does this distinction dictate different conclusions, however? Appellants argue that it does since the Board's powers, once jurisdiction attaches, extend by implication to the limits necessary to carry out its express powers. This proposition obviously has some application but not to the degree advocated by Appellants. We have no powers, for example, to enforce our own orders--even those approving written, executed consent adjudications: *Commonwealth, Dept. of Environmental Resources v. Leechburg Mining Company*, 9 Pa.Cmwlth. 297, 305 A.2d 764 (1973); *Commonwealth, Dept. of Environmental Resources v. Landmark International Ltd.*, 133 Pa.Cmwlth. 333, 570 A.2d 140 (1990).

Lacking the power to compel DER or any other party to comply with a consent adjudication, we fail to see any benefit to anyone from having us determine whether an agreement, in fact, was made. This is not an area where the special expertise of the Board is needed to set the framework for judicial review; it is an area dealt with daily by the courts. Our express powers are limited by statute to a narrow field of jurisprudence. While some implied powers flow from that same source, we do not consider one of them to be declaratory proceedings: *Paul R. Brophy et al. v. DER*, 1990 EHB 1244. That, in effect, is what we are being asked to engage in by virtue of Appellants' Petition. We decline to do so.

ORDER

AND NOW, this 12th day of December, 1991, it is ordered as follows:

1. DER's Motion to Dismiss for Lack of Jurisdiction is granted.
2. Appellants' Consolidated Petition to Enforce Settlement Agreement is dismissed for lack of jurisdiction.
3. The appeals docketed at 88-216-M and 89-033-M shall be placed on the list of cases to be scheduled for hearing.
4. Appellants in the appeal docketed at 90-028-MR shall file their pre-hearing memorandum on or before December 31, 1991.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: December 12, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Nels J. Taber, Esq.
Central Region
For the Appellants:
Stephen W. Saunders, Esq.
KREDER, O'CONNELL, BROOKS & HAILSTONE
Scranton, PA

sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

WILLIAM RAMAGOSA, SR., et al.	:	
	:	
v.	:	**EHB Docket No. 89-097-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 12, 1991**

OPINION AND ORDER
SUR
MOTION FOR CERTIFICATION
AND
PETITION FOR RECONSIDERATION

Robert D. Myers, Member

Synopsis

Reconsideration of an order denying an extension of discovery is denied because the order is interlocutory and there are no exceptional circumstances present. Certification of the order for appeal to Commonwealth Court is denied because it does not involve a controlling question of law.

OPINION

Appellants have taken exception to an Opinion and Order issued on September 9, 1991, by Administrative Law Judge Robert D. Myers. On September 19, 1991 they filed a Motion for Certification to Commonwealth Court and on September 30, 1991, they filed a Petition for Reconsideration. The Department of Environmental Resources (DER) filed responses on October 9 and October 21, 1991 respectively.

The Order in question denied Appellants' motion for a 90-day extension of the discovery period, filed on August 29, 1991, one day prior to the scheduled close of discovery. This extension request was the latest in a series of requests dating back to June 22, 1989, all of which had been granted by the Board. The August 29, 1991 request was not granted, according to the Opinion and Order, because: (1) the discovery period had been adequate, (2) the issues had been significantly reduced by a recent Board ruling, and (3) the attorneys had turned the discovery process into an ongoing contest of personalities.

In their Petition for Reconsideration, Appellants challenge Judge Myers' reasons for denying the extension request. While the Board's Rules of Practice and Procedure provide for reconsideration when "compelling and persuasive reasons" exist, 25 Pa. Code §21.122(a), reconsideration of interlocutory orders is granted only in exceptional circumstances: *Luzerne Coal Corporation et al. v. DER*, 1990 EHB 23. An Order denying extension of the discovery period clearly is interlocutory and appellants have presented no exceptional circumstances to merit reconsideration.

The Motion for Certification requests us to certify the Order to Commonwealth Court on the premise that it involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the case: 42 Pa.C.S.A. §702(b). We are unable to grant this motion because the underlying issue is in no sense controlling. An appeal would further delay the ultimate termination of the proceedings.

ORDER

AND NOW, this 12th day of December, 1991, it is ordered as follows:

1. Appellants' Motion for Certification is denied.

2. Appellants' Petition for Reconsideration is denied.

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: December 12, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Mary Martha Truschel, Esq.
Central Region
M. Dukes Pepper, Jr., Esq.
Regulatory Counsel
For the Appellants:
Richard B. Ashenfelter, Jr., Esq.
King of Prussia, PA
and
Joseph P. Green, Jr., Esq.
West Chester, PA

sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

DAVIS COAL :
:
v. : EHB Docket No. 91-192-MJ
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 12, 1991

OPINION AND ORDER SUR MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS, MOTION TO LIMIT ISSUES AND MOTION TO SHIFT BURDEN OF PROOF

By Joseph N. Mack, Member

Synopsis

A Motion for Partial Judgment on the Pleadings will be granted where the notice of appeal indicates on its face that backfilling equipment was inoperable for a period of time without notice to, or permission of, the Department of Environmental Resources ("DER or Department"). A Motion to Limit Issues will be denied where the issues of the appeal are narrow and defined. The Motion to Shift the Burden of Proof is also denied where one of the issues is the order of the department and the reasonableness of the order. The proof of affirmative defenses will be governed by 25 Pa.Code §21.101(a)

OPINION

This matter originated with the filing of a Notice of Appeal by June Davis of Davis Coal Company ("Davis") on May 13, 1991, directed to two compliance orders of the Department dated April 11, 1991 and April 19, 1991, each of which dealt with the issues of proper backfilling in compliance with Surface Mining Permit 65860110 and 25 Pa.Code §87.141(c)(1), and failure to

maintain operable backfilling equipment on the mining premises in violation of 25 Pa.Code §87.141(d).

The matter currently before the Board is a Motion by the Department which is threefold in nature; a Motion for Partial Judgment on the Pleadings, a Motion to Limit Issues, and a Motion to Shift the Burden of Proof. This threefold Motion was filed on October 15, 1991, and any response thereto was due not later than November 7, 1991. No response was filed by Davis.

We will separately review these Motions.

Motion for Partial Judgment on the Pleadings

The Department argues that it is entitled to judgment on the pleadings on that part of the Davis appeal that deals with its failure to maintain backfilling equipment as required by 25 Pa.Code §87.141(d). A motion for judgment on the pleadings will be granted when there are no material facts in dispute and a hearing is pointless because the law on the issue is clear. Upper Allegheny Joint Sanitary Authority v. DER, 1989 EHB 303, aff'd, 130 Pa. Cmwlth. 106, 567 A.2d 342 (1989); allocatur denied, ____ Pa. ____, 582 A.2d 327 (1990). In ruling on such a motion the Board will treat all facts pled by the non-moving party as true. Id.

The regulation at issue, i.e. 25 Pa.Code §87.141(d), reads as follows:

> (d) Backfilling equipment needed to complete the restoration may not be removed from the operation until backfilling and leveling has been completed and approved in writing by the Department. Upon written request by the operator to the Department specifying the need to remove backfilling equipment for protection of backfilling equipment from weather conditions, for required maintenance or for protection from vandalism during strikes, the Department may approve, in writing, the temporary removal if inspection of the site demonstrates that the operation is in compliance with the rules of the EQB and the statutes of the Commonwealth relating to environmental protection and that the request for temporary removal is justified for the reasons specified by the operator. Temporarily removed backfilling equipment shall be returned to the site promptly upon the Department's direction. Backfilling equipment shall be operable, in use and capable of meeting the requirements of the reclamation plan throughout the life of the mining operation.

Thus, the regulation requires prior, written approval from the Department for the temporary removal of operable backfilling equipment from the site.

Davis in Paragraph 2 of its Notice of Appeal states that "The backfilling equipment was down for repair less than 30 days. The department was notified when it went down and when repairs were complete." Davis does not state that it ever sought or received permission from the Department for the absence of backfilling equipment from the operation. Davis's pre-hearing memorandum indicates only that it intends to prove that it notified the Department of the down time, not that it obtained prior written permission as required by the regulation. Additionally by failing to respond to DER's June 20, 1991 Request for Admission Davis has admitted the facts surrounding the lack of operable backfilling equipment on the mine site and no permission from DER for such a situation. Finally Davis has not responded in this appeal by filing a response to the Department's Motion. Assuming for purposes of this Motion that Davis proves all that it claims it will, Davis has not been in compliance with 25 Pa.Code §87.141(d) as above quoted, and partial judgment on the pleadings on this issue is granted to the Department.

Motion to Limit Issues

As the Department's Brief in support of its Motion says, the "Davis case is limited to the matters it has raised in its notice of appeal." The actual appeal deals with only two issues, the question of maintaining backfill equipment on the job site during the entire time of operation, which we have dealt with hereinabove, and the question of approximate original contour and whether it is an abuse of discretion for the Department to order an area already contoured and revegetated to be regraded to a "better" final grade and further, if an area is to be regraded, whether it is an abuse of discretion to order the same to take place within 60 days.

In an effort to narrow the issues, the Department filed a request for admissions which went unanswered and which under Pa. R.C.P. 4014(b) are therefore deemed admitted for purposes of this action. However, the Department in its brief admits that "In this case the matters to which Davis has admitted are generally not those contained in the Notice of Appeal." We agree with the Department's evaluation of the deemed admissions and do not feel they help to limit the already narrow issues of this case. We therefore deny the Motion to Limit Issues.

Motion to Shift the Burden of Proof

The Department seeks by this Motion to shift the burden of proof to Davis on the theory that all of the defenses of Davis are in essence affirmative defenses and that the burden of proving an affirmative defense is on the party propounding the affirmative defense. We believe this to be a correct statement of the law, and to the extent that the appellant's Notice of Appeal, as limited by this opinion, is made up of affirmative defenses, the burden of proving those defenses will be upon the appellant. However, the Department still has the burden of going forward to demonstrate the operator's failure to backfill or backfilling in a way not in compliance with 25 Pa.Code §87.141(a). See Easton Area Joint Sewer Authority v. DER, 1990 EHB 1307, 1319 (Burden of proof or persuasion never leaves the party on whom it is originally placed.) The burden of proof is on the Department under 25 Pa.Code §21.101(b)(3) where the Department has ordered an affirmative action, such as the regrading of an already graded and vegetated area, unless there are special circumstances such as are outlined at 25 Pa.Code §21.101(d)(1) and (2), under which this case does not fall. We therefore deny the Department's Motion to Shift the Burden of Proof.

O R D E R

AND NOW, this 12th day of December , 1991, after a full consideration of the Department's Motion for Partial Judgment on the Pleadings, Motion to Limit Issues, and Motion to Shift the Burden of Proof, the Board enters the following order:

1) The Motion for Partial Judgment on the Pleadings is granted where the Notice of Appeal admits a violation of 25 Pa.Code §87.141(d).

2) The Motion to Limit Issues and Motion to Shift the Burden of Proof are denied.

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

DATED: December 12, 1991

cc: **Bureau of Litigation:**
Library, Brenda Houck
For the Commonwealth, DER:
Steven Lachman, Esq.
Western Region
For Appellant:
June C. Davis
Davis Coal
Ford City, PA

ar

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

GEORGE A. CLOPPER	:	
	:	
v.	:	EHB Docket No. 91-293-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 12, 1991

OPINION AND ORDER SUR
MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

The Board lacks jurisdiction to hear an appeal of a civil penalty assessment for alleged violations of the Noncoal Surface Mining Act where the appellant fails to forward the amount of the proposed penalty or post an appeal bond in that amount as required by 52 P.S. §3321(b)(1). Therefore, the appeal is dismissed.

OPINION

On July 17, 1991, George A. Clopper filed an appeal from a civil penalty assessment issued by the Department of Environmental Resources ("DER") on June 17, 1991. The civil penalty was assessed pursuant to DER's authority under, inter alia, §21 of the Noncoal Surface Mining Conservation and Reclamation Act ("Noncoal Surface Mining Act"), Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 et seq., at §3321, for alleged violations of that act.

On October 24, 1991, DER filed a Motion to Dismiss Mr. Clopper's appeal for lack of jurisdiction. The motion avers that Mr. Clopper has failed to perfect his appeal by neither prepaying the penalty nor posting an appeal bond and, therefore, the Board lacks jurisdiction over his appeal. Along with its motion, DER has provided certification from the Secretary to the Environmental Hearing Board that no civil penalty payment has been made nor any appeal bond posted to this docket as of October 22, 1991. (Exhibit B to Motion). Mr. Clopper did not respond to the motion.

Section 21(b)(1) of the Noncoal Surface Mining Act provides in pertinent part as follows:

> The person charged with the penalty shall...have 30 days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the secretary for placement in an escrow account...or post an appeal bond in the amount of the proposed penalty...Failure to forward the money or the appeal bond to the secretary within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

52 P.S. §3321(b)(1)

In other words, section 21(b)(1) requires that anyone appealing a civil penalty assessment issued thereunder or the violation forming the basis of the assessment must, within 30 days of the assessment, either forward the amount of the proposed penalty to DER to be placed in escrow or post a bond in that amount. 52 P.S. §3321(b)(1). Notice of this requirement is contained in the cover letter accompanying the civil penalty assessment. (Exhibit A to Motion). Failure to do so results in a waiver of the appellant's legal rights to contest the penalty and/or violation.

The Board has interpreted similar language in §18.4 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., at §1396.22, and §605(b)(1) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., at §691.605(b)(1), as depriving the Board of jurisdiction where an appellant fails to perfect its appeal by prepaying the proposed penalty or forwarding an appeal bond within the 30-day period. See Raymond Westrick v. DER, 1987 EHB 96. See also Boyle Land and Fuel Co. v. Commonwealth, EHB, 82 Pa. Cmwlth. 452, 475 A.2d 928 (1984), aff'd 507 Pa. 135, 488 A.2d 1109 (1985).

As of October 22, 1991, well beyond the 30-day period for complying with 52 P.S. §3321(b)(1), Mr. Clopper had neither prepaid the penalty amount nor posted an appeal bond. (Exhibit B to Motion). Nor has he alleged in his notice of appeal any financial inability to pay. Moreover, he was provided with an opportunity to explain his failure to pay the penalty or post a bond by responding to DER's Motion to Dismiss, but elected not to do so.

Therefore, where Mr. Clopper has not complied with the provisions of §21(b)(1) of the Noncoal Surface Mining Act by prepaying the amount of the proposed civil penalty or posting an appeal bond in that amount, the Board lacks jurisdiction over his appeal and it must be dismissed.

O R D E R

AND NOW, this 12th day of December, 1991, upon consideration of DER's Motion to Dismiss, it is ordered that the motion is granted, and this appeal is dismissed for lack of jurisdiction.

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: December 12, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Dennis A. Whitaker, Esq.
Central Region
For Appellant:
Thomas M. Painter, Esq.
Waynesboro, PA

ar

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOA

BOROUGH OF DUNMORE	:	
	:	
v.	:	**EHB Docket No. 90-402-B**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 13, 1991
and BOROUGH OF THROOP, Intervenor		

OPINION AND ORDER SUR
CROSS-MOTIONS FOR SUMMARY JUDGMENT

By Thomas M. Ballaron, Hearing Examiner

Synopsis

A motion for summary judgment filed by the Department of Environmental Resources (DER) is granted; a host municipality's cross-motion for summary judgment is denied and its appeal from DER's allocation of the host municipality benefit fee is dismissed. Act 101 requires that the fee be allocated according to the percentage of the currently permitted landfill located within the boundaries of the respective municipalities. There is no authority to support appellant's theory that the acreage of two adjoining, but separately permitted, landfills be combined with the currently permitted site in calculating the allocation. As there are no material facts at issue, DER is entitled to judgment as a matter of law.

OPINION

On September 25, 1990, the Borough of Dunmore (Dunmore) filed a notice of appeal with the Board from DER's allocation of the host municipality benefit fee between Dunmore and the Borough of Throop (Throop), both of which were host municipalities for the Logan-Tabor landfill. The landfill, originally known as the Logan site and consisting of 25 acres in Dunmore, received Permit No. 101247 on March 31, 1982. The facility was extended into Throop and expanded to its present 617.7 acres upon issuance of a Permit Modification on July 18, 1988. The allocation, dated August 24, 1990, was issued pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, (Act 101), the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.*, and required 74.5% of the fee to be paid to Throop and the remaining 25.5% to be paid to Dunmore.

Following submission of pre-hearing memoranda, DER filed a motion for summary judgment to which Dunmore responded with an answer and a cross-motion for summary judgment on July 15, 1991. Briefs accompanied both motions, followed on August 6, 1991, by a joint stipulation of facts filed by DER and Dunmore. The affidavits attached to the respective motions and the joint stipulation of facts constitute the undisputed material facts upon which this opinion is based. Throop was granted intervention on the side of DER on June 11, 1991, and on November 25, 1991, it filed an answer to Dunmore's motion and a memorandum of law in which it reiterated and supported DER's arguments.

In its notice of appeal and its cross-motion for summary judgment, Dunmore contended that DER fundamentally erred in allocating the fee because the agency failed to incorporate two contiguous and separately permitted

landfills (the Keystone and Dunmore landfill sites) into its calculations.[1] According to the joint stipulation, both landfills were located entirely within the boundaries of Dunmore and were closed in accordance with a consent order and agreement executed with DER on April 23, 1987. Dunmore conceded that the two adjoining sites were closed and outside of the boundaries of the Logan-Tabor Landfill, but argued that this was of no consequence. Dunmore asserted that Act 101 was ambiguous as written and that it should be interpreted to take into account the two adjoining landfills, which it alleged were operated with the Logan-Tabor site as a single, functionally integrated landfill. Dunmore did not offer any legal authority to buttress its argument.

DER stipulated to the facts asserted by Dunmore in support of its argument, but the agency countered that its calculation of the respective areas of the Logan-Tabor site and DER's allocation of the fee correctly tracked the letter and intent of Act 101, and, therefore, did not constitute an abuse of authority or arbitrary and capricious behavior. In the agency's view, Act 101 mandated that the fee should be paid to the municipality which was the site of current disposal activity in order to encourage municipalities to host such facilities and that the permitted area of the Logan-Tabor site was the sole factor to be considered in determining the allocation of the host municipality benefit fee.

The Board is authorized to enter summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

---

[1] According to the parties' stipulation of facts, the Department allocated the area of Permit No. 101247 between Dunmore and Throop in a March 14, 1989, determination that Dunmore challenged. The Department subsequently modified Permit No. 101247 to reflect an understanding between it and Dunmore. Dunmore did not appeal the modification, nor is it challenging it here. Rather, it is disputing the Department's failure to include the Dunmore and Keystone landfill acreage in its acreage calculation for the Logan-Tabor site.

affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Summerhill Borough v. DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978); Willowbrook Mining Company v. DER, EHB Docket No. 90-346-E (Opinion issued, March 27, 1991). In the present matter, there are no genuine issues of material fact; the dispute lies with the interpretation of Act 101.

The text of the contested section states in relevant part:

> (a) Imposition - There is imposed a host municipality benefit fee upon the operator of each municipal waste landfill.....that has a valid permit.... If the landfill or facility is located within more than one host municipality, the fee shall be apportioned among them according to the percentage of the permitted area located in each municipality. 53 P.S. §4000.1301.

The only issues before the Board are how "permit" is defined for the purpose of Section 1301(a) of Act 101 and whether it can be read as including the acreage of the closed landfills which adjoin the Logan-Tabor site. Section 104(b) of Act 101 requires that the act be read in pari materia with the Solid Waste Management Act (SWMA), the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* Consequently, the meaning of "permit" in Section 1301(a) must be the same as the meaning attributed to it under the SWMA. It must follow that what is meant by the term "permit" is the permit document, itself, which is issued by DER pursuant to Section 503 of the SWMA. As a result, the permitted area set forth in Permit No. 101247 is the only factor that can be considered in allocating the host municipality benefit fee under Section 1301(a) of Act 101. Although the parties agree that the three landfills have a common fence and common support network (roads, storm water

control, leachete collection, etc.) and are under common management and maintenance, there is still no authority or precedent for including the acreage of the Keystone and Dunmore landfills in the calculation of the acreage for the Logan-Tabor landfill.

As there is no dispute regarding the permitted area of the Logan-Tabor landfill, DER is entitled to judgment as a matter of law. Accordingly, DER's motion for summary judgment must be granted; Dunmore's motion must be denied and its appeal dismissed.

ORDER

AND NOW, this 13th day of December, 1991, it is ordered as follows:

1) DER's motion for summary judgment is granted;

2) Dunmore's cross-motion for summary judgment is denied; and

3) The appeal of Dunmore 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

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 13, 1991

cc: **Bureau of Litigation**
Attention: Brenda Houck, Library
For the Commonwealth, DER:
Barbara L. Smith, Esq.
Northeastern Region
For Appellant:
Armand E. Olivetti, Jr., Esq.
OLIVETTI & SCACCHITTI
Scranton, PA
For the Intervenor:
Paul J. Walker, Esq.
Moscow, PA

jcp

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

HUBERT D. TAYLOR	:	
	:	
v.	:	**EHB Docket No. 90-516-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and ESSEX-ASHFORD COUNTRYSIDE L.P. Permittee:		**Issued: December 13, 1991**

OPINION AND ORDER
SUR MOTION FOR NON-SUIT

By: Richard S. Ehmann, Member

Synopsis

While a party has the right to appear *pro se* before this Board, a lay person assumes the risk that his lack of legal expertise could prove his undoing. Michael F. and Karen L. Welteroth v. DER et al., 1989 EHB 1017.

Where a third party appellant fails to timely challenge the issuance of the initial NPDES permit to this permittee, that appellant may not challenge those portions of the permit which remain unchanged in an appeal from DER's renewal of that permit. Hatfield Township Municipal Authority v. DER, 1988 EHB 122.

Where in an appeal from renewal by the Department of Environmental Resources ("DER") of an NPDES permit, the *pro se* third party appellant fails to make a *prima facie* showing of abuse by DER of its discretion in renewing this permit, then an appropriately timed Motion for Non-suit by DER and the permittee must be granted. County of Schuylkill et al. v. DER et al., EHB Docket No. 90-124-W (Opinion issued January 3, 1991).

OPINION

On October 11, 1990, DER issued National Pollutant Discharge Elimination System (NPDES) Permit No. PA-0102652 to Essex-Ashford Countryside L.P. ("EAC") pursuant to the Clean Water Act, 33 U.S.C. §1251 *et seq.*, and 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") for the Countryside Park (a trailer park) in McKean Township, Erie County. The renewed permit authorizes a discharge of sewage treatment plant effluent to the headwaters of an unnamed tributary to Elk Creek.

On November 23, 1990 this Board received an appeal from DER's action by Hubert D. Taylor ("Taylor") of McKean Township, Erie County. While it is less than clear, Taylor's Notice of Appeal can be said to raise a challenge to the permit issuance procedure of DER, challenges to the proper address of the permittee, a zoning issue relating to McKean Township's "R-2 Ordinance 1983", and challenges to the lack of a "Plot or Plot Plan" on file in the township or with the Erie County Planning Commission and a lack of permits on file with the township which Taylor asserts results from the township secretary and zoning administrator being the same person. Taylor also raised concern as to "green snow" in a ditch in front of his house and an excessive amount of water running around his house and wells.

Thereafter the instant matter and an appeal from this same DER permit decision by Albert P. Leonardi at EHB Docket No. 90-507-E were consolidated at Docket No. 90-507-E until Mr. Leonardi subsequently elected to withdraw his appeal. At that point, by Order of June 3, 1991, the Board again unconsolidated the two appeals. During the period of consolidation Taylor filed his Pre-Hearing Memorandum as did EAC and DER. EAC also conducted discovery as evidenced by our Opinion and Order dated April 24, 1991

addressing EAC's Motion For Sanctions. Thereafter, DER and EAC filed Amended Pre-Hearing Memoranda, the parties filed a Joint Stipulation with us on July 31, 1991 and we conducted the merits hearing in this appeal on August 12 and 13, 1991.

At the merits hearing after Taylor had presented his case-in-chief, counsel for both DER and EAC moved orally for a non-suit. Because the sitting Board member advised them that he was not empowered by himself to grant such motions, they presented evidence to support their position on the merits issues while preserving the right to re-raise the non-suit issue to the entire Board in their respective Post-Hearing Briefs. At the merits hearing's conclusion and after the filing of the transcripts, DER, EAC and Taylor all filed Post-Hearing Briefs and Taylor filed a Reply Brief Of Appellant.

In their Post-Hearing Briefs EAC and DER renewed their Motion For Non-Suit. That motion is addressed herein.

DISCUSSION

Before turning to the joint EAC/DER motion it is appropriate to briefly address *pro se* status. Throughout this proceeding Taylor elected to proceed *pro se*. Section 21.21 of our rules at 25 Pa. Code allows persons to appear *pro se*. However, persons untrained in the law may place the contentions they wish to advance through appeal at risk when they make the decision to appear *pro se*, because when a merits hearing is held, the *pro se* party's opponents often appear through counsel and the Board member hearing the appeal acts in the role of judge, not that of appellant's counsel or advisor. Past experience with this type of situation led this Board through letters dated February 21, 1991 and March 14, 1991 to unsuccessfully urge Taylor to retain counsel to represent his interests. This was again brought up at the merits

hearing (T-6).[1] Despite these suggestions Taylor elected to continue *pro se*. As we have noted in the past, lay persons proceeding *pro se* assume the risk that their lack of legal expertise will prove their undoing. Welteroth, *supra*, citing Appeal of Ciaffoni, 124 Pa. Cmwlth. 407, 556 A.2d 504 (1989). As noted there, we cannot and have not let such a decision by Taylor impair the rights of the other parties in this proceeding.

Motions for Non-Suit and this Board's ability to grant same have been discussed at length in County of Schuylkill, *supra*, Welteroth, *supra*, and Clearfield Municipal Authority v. DER, et al., 1989 EHB 627. It is clear from a reading of these cases that only the Board *en banc* may grant such motions. It is also clear that the procedure followed at the hearing on the merits of the instant proceeding after the motion was made was proper. At the close of Taylor's case, after the Motion was made, the Board member said he did not believe it was clear (without review of the transcript) that the movants' oral Motion could be granted and that even if it were clear in his mind, he could not grant it by himself. 25 Pa. Code §21.86 mandates that final orders, such as that entered when a motion for non-suit is granted, must be entered by a majority of this Board. Accordingly, Board member Ehmann's direction to EAC and DER to proceed with the presentation of their evidence, while allowing these two parties to address this issue further in their Post-Hearing Briefs, was proper.

Other than by stating in his Reply Brief that his "submittal of a post hearing brief is proof enough that this case should not be dismissed," Taylor

---

[1] Transcript page references herein are referenced as "T-__". Taylor's Exhibits are referenced as "Exh. T-__". Board Exhibits, which were stipulated to by all parties, are "B-__".

offers us no reason why we cannot grant this Motion, assuming the appropriate standards are met with regard thereto. Accordingly, we turn to this issue. In doing so, we recognize that as a third party appealing DER's renewal of the permit, Taylor bears the burden of proof by preponderance of the evidence pursuant to 25 Pa. Code §21.101(c)(3). County of Schuylkill, *supra*. We also recognize that our review of the EAC/DER Motion must be in a light most favorable to Taylor and that we cannot grant it unless we find his case clearly insufficient. County of Schuylkill.

Preliminarily, but importantly, we point out that on cross-examination, Mr. Taylor admitted he could not say the effluent limitations established by DER in this permit for discharge from EAC's trailer park sewage treatment plant were wrong.(T-156) They are not an issue for him. (T-156) He further indicated he was satisfied with the schedule in this permit for construction of improvements to the treatment plant as long as EAC complies with it. (T-157)[2]

Pursuant to Lucky Strike Coal Co. et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988) a party is deemed to abandon those issues not raised in his Post-Hearing Brief. Accordingly, we turn to Taylor's Post-Hearing Brief for the list of issues we must review in addressing this motion.

According to his Post-Hearing Brief, Taylor's issues are:

A. Mistakes found in the Pennsylvania Bulletin;
B. Different Locations of Weir Outfall and Park;
C. Responsibility of the Erie County Health Department;
D. Reference to Permit Without Amendment Number One;
E. Problems of the Parks (sic) Conveyance System;
F. Amount of Effluent Discharged;

---

2 EAC has taken no appeal to this Board from any portion of the renewed permit issued by DER.

G. Direction Of Effluent Flow.

Taylor's Post-Hearing Brief Table of Contents.

Turning to Taylor's first issue, there are three mistakes which Taylor claims exist in the two publications which DER causes to appear in the Pennsylvania Bulletin concerning permit renewal. The first of these errors is that when the Permit was issued, notice of its issuance as published in the Pennsylvania Bulletin indicated that EAC's address was 130 East Main Street, Rochester, Pennsylvania 14604, rather than indicating that the EAC's office was in Rochester, New York. (Exh. T-65) Taylor's Brief also asserts a second alleged error as to the Post Office Box reference appearing in the Pennsylvania Bulletin when notice of the renewal application's receipt was published by DER. (Exh. T-64) Finally, Taylor says the phone number listed for the DER office in Meadville (which issued the permit) is incorrect. (Exh. T-65) Taylor contends this DER phone number was changed but it took DER two weeks to get the new number shown in the Pennsylvania Bulletin. (T-95) Mr. Taylor's evidence establishes the first and third errors appear. No evidence was offered as to another more correct post office box number. From these two errors, Taylor asserts DER should be more careful in publications.

We grant this Motion on this issue because Taylor never asserts or proves any harm to himself or anyone else by these publishing errors. Indeed when asked what he wanted out of this appeal he said he wanted no more water running in the front or rear of his property, conditional zoning use from McKean Township for the trailers at Countryside Park and monetary compensation for the cost of his investigation of these problems. (T-137 through 138) None of what he wants relates to these publishing errors, and the permit, as issued (B-1 and B-3) shows EAC's address to be Rochester, New York. In short,

while Taylors' evidence shows that more care may be needed when notices are published, it does not show even a *prima facie* case for abuse of DER's discretion in renewal of this permit.

Taylor's second argument with DER's permit issuance decision is based on the fact that EAC's application to renew this permit, the renewed permit itself, the 1988 amendment of this permit, a DER 1971 memo relating to this sewage treatment plant and the permit and application for permit of the prior owner of the treatment plant all record slightly different latitudes or longitudes for the treatment plant.[3] While evidence of different latitudes and longitudes between the prior owner's application for permit and EAC's application was offered to us (they also differ from that in the renewed permit), there was no evidence offered to the Board that indicates the location in the permit, now being challenged, is in error in any way. Moreover, Taylor admitted the treatment plant's discharge weir, as shown in the permit, is located on EAC's property. (T-27) Further, on cross-examination, the following exchange occurred between Taylor and DER's counsel on this issue:

> Q Do you contend that it's wrong in the current permit?
>
> A I can't say that.

---

[3] The DER memo referenced at the point in Taylor's Brief where this issue is discussed was not introduced into the record of this appeal as an exhibit, nor were its latitude and longitude references testified to at the hearing. Taylor has attached it to his Brief, however. Since it is not part of the record in this appeal, neither it nor the other seven pages of documents attached to his Brief was considered in reaching our decision in this matter. Taylor had the opportunity to offer this letter as an exhibit when the hearing was conducted but did not. (T-171 and 172) This attempted "supplement" cannot be considered now. Zinman v. Commonwealth, Dept. of Insurance, 42 Pa. Cmwlth. 249, 400 A.2d 689 (1979). It constitutes but one example of why representation by trial counsel can be helpful both to a *pro se* party and this Board.

Q You don't know one way or the other?

A All I can say is what I read on pieces of paper and look at the map up here.

Q All right. What difference does it make to you what the latitude and longitude in the 1990 permit says; does it make any difference to you what it says?

A No, it don't make any difference, but it should be for pinpointing your permit.

Q Okay. And the permit, what is actually issued as to the permit, is what we're going to use for locating this discharge point, right?

A Yes.

Q And you have no reason to think that what is in the permit is wrong?

A I have no reason to think that what's in there is wrong, no.

(T-146 through 147)

In sum, then, Taylor has no injury from these different attempts to define the correct latitude and longitude of the discharge weir (in order to specify plant location).

Under this second section of his Brief dealing with "Different Locations of Weir Outfall and Park", Taylor also argues that the office at EAC Trailer Park is located in a house which sits on a 2½ acre parcel of land which is not part of the trailer park parcel and which parcel has its own well and septic system. His Brief asserts that under 25 Pa. Code §71.51 the combination of these two parcels requires a new permit's issuance and revision of the

township's Official Plan. The Brief then says Taylor could not even find a copy of this Official Plan so no permit should have been issued, absent proof of a plan revision to include this 2½ acre parcel. The hearing record contains no evidence on his allegedly unsuccessful search for this plan, and the documents he references to factually support this argument are again attached to his Brief but are not a part of the record from the evidentiary hearing. There is also no evidence in the record of Taylor's case-in-chief as to the alleged combination of parcels or what is or is not shown in the township's Official Plan. Accordingly, when weighed in the *prima facie* balancing that we undertake in response to the Motion, Taylor has failed to establish a *prima facie* case under this theory as well.

Taylor's Brief next raises the role of the Erie County Health Department ("ECHD") in regard to the permit. There Taylor first contends that neither Mr. Nick nor Mr. Sterett (ECHD employees) is a registered sewage enforcement officer pursuant to 25 Pa. Code Chapter 71. His Brief then asks the question of whether Michael Rinkevich is the sewage enforcement officer for Erie County. The record transcript of the evidentiary hearing shows that Mr. Taylor's case-in-chief concluded by transcript page 175. In evaluating the merit of this Motion For Non-Suit, it is only Mr. Taylor's evidence we consider (plus the stipulated exhibits and the parties' Stipulation Of Facts). Again, on this issue there is <u>no</u> evidence of any type in this portion of the record on the status of Mr. Nick or Mr. Sterett in regard to Chapter 71 and Mr. Rinkevich was not even mentioned. There is also no evidence as to how their status regarding sewage enforcement officer regulations found in 25 Pa. Code Chapter 71 relates in any way to the propriety of DER's renewal of the NPDES permit.

Taylor also raised what his Brief describes as ECHD's role in determining the number of trailers allowed in EAC's Countryside Park and a discrepancy between the numbers of trailers McKean Township records show to be located in the park and those which ECHD says may be in the park. Excepting Exhibit B-12, ECHD's letter stating its limits on the number of trailers in the park, all of the evidence cited by Taylor to support this contention was elicited in the case-in-chief of EAC or DER rather than in Taylor's case-in-chief, so it is not before us for purposes of this motion, and again there is no relationship established between even this evidence and DER's permit renewal decision.

Here we also digress briefly to note jurisdictional problems with this Board tackling certain of Taylor's concerns. The Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7511, *et seq.*, created this Board as an independent quasi-judicial agency, 35 P.S. §7513. This Board is given a limited jurisdiction under Section 4 of the Act (35 P.S. §7514(a)) and is empowered "to hold hearings and issue adjudications ... on orders, permits, licenses or decision of the [DER]." We are not empowered to generally address actions by the ECHD concerning its relations to McKean Township or to address its administrative communication on the numbers of trailers allowed in this park, unless it has acted in that regard on behalf of DER. Similarly, under this Act, we are not empowered to address Taylor's concerns as to zoning in McKean Township unless DER has acted in regard thereto. Evidence in regard to ECHD acting for DER as to these trailers or DER actions on zoning issues in this Township was never produced at the hearing nor are there even allegations of same by Taylor. Thus, even if he had offered evidence of ECHD's actions or of zoning matters in his

case-in-chief, this Board would have been powerless to address same absent the connecting link as to DER and the statutes it administers.

Taylor's Brief next raises his concern that the prior NPDES permit was amended in 1988 (when EAC purchased Countryside Park), but when this permit was renewed, the renewal does not explicitly say it renews the prior permit as amended. In his Brief, Taylor does not challenge the renewed permit for failing to include something which was in the amendment but was deleted on renewal; rather, he objects that a history that an amendment occurred is not included in the permit in the same fashion a used car's title reflects the number of prior owners each time it is transferred to a new owner. Taylor is correct that this "history" is not in the renewed NPDES permit, but he fails to allege or show any injury therefrom or any violation of statute or regulation by DER in omitting same. No abuse of DER's discretion in issuing this permit is shown thereby.

Taylor's next issue raises concerns about malfunctions or breakdowns in the system of sanitary sewers conveying sewage from the trailers to EAC's sewage treatment plant. Taylor's Post-Hearing Brief says when breakdowns occur the sewage has to be removed before repairs can begin. His Brief also cites testimony from EAC's witness that part of this system needs to be replaced at an estimated cost of $70,000. Of course, this latter piece of evidence is not part of Taylor's case-in-chief for purposes of this Motion.

There is evidence in the form of Taylor's testimony concerning operational problems at both the sewage treatment plant and within the conveyance system during the time period preceding EAC's ownership of this trailer park and

sewerage system. Simply put, however, while this may give Taylor cause to be concerned about this system, it does not create a cause to reverse or revise DER's renewal of this permit.

In 1988 when EAC acquired this trailer park, the permits for the sewage treatment plant were transferred to it by DER. Neither Taylor nor anyone else challenged that transfer by an appeal therefrom to this Board. (B-29) If Taylor had concerns about this sewerage system based on the prior owner's operation thereof, that was the time they should have been raised. Because no such appeal was filed, to allow an attack in 1991 on DER renewal of the previously unchallenged 1988 transfer of that permit based thereon would be to authorize an untimely collateral challenge. This we cannot do. Hatfield Township Municipal Authority, *supra*. All that may be challenged in the instant appeal are changes, additions or deletions in the renewed permit from the prior unchallenged permit transfer or challenges to the renewal based on post-1988 facts. Arthur Richards, Jr. v. M.D. and Carolyn B. Richards v. DER, et al., 1990 EHB 382.

Taylor did produce evidence that he was aware of a 1990 malfunction at the sewage lift station (which pumps sewage from the sewer lines into the treatment plant) during EAC's ownership of the sewerage system, but he did not see this malfunction. (T-129) Taylor said the malfunction was recorded by the local television station's news staff. (T-129) He was not present at that time. (T-135) At the hearing, Board member Ehmann properly barred admission of Taylor's videotape of the television station's news broadcast as hearsay. Moreover, evidence of a 1990 malfunction at the lift station does not show DER abused its discretion in renewing the permit to discharge treatment plant effluent in compliance with the permit's effluent limitation. Whether or not

DER should act to address conditions in the park's conveyance system is a different question than whether renewal of this discharge permit was warranted. The latter question is before us. The former is not. [4]

The sixth issue raised in Taylor's Brief is the volume of the discharge authorized by the renewed permit. The renewed permit authorizes a discharge of 50,000 gallons of treated effluent per day from EAC's plant. (B-1) Taylor testified the initial permit approved three hundred trailers with 2.4 persons per trailer "or 60 gallons per day", which produces a flow of 43,200 gallons of sewage. (T-120) He then argues that if 1970 census figures of 3.5 persons per residence is used, the volume of sewage discharged approaches 75,000 gallons per day ("gpd"). (T-120) Using still other alternative figures for gallons per day of flow from trailers, he says the discharge volume might reach 82,500 gpd (T-121), and if 400 gallons per day per trailer is used for 300 trailers, then the discharge volume rises to 120,000 gpd. From this, he concludes the system is or may be overloaded and therefore the sewage is only partially treated. (T-121)

The one piece of evidence critical to a challenge to DER's renewal decision as being an error because there is more actual flow volume than that approved is evidence showing the 50,000 gpd authorization figure is ever exceeded. No such evidence was produced by Taylor. To prevail on such

---

4 Taylor's Post-Hearing Brief does not challenge the effluent limitations in the renewed NPDES permit for good reason. Board Exhibit 5 details recent effluent violations at EAC's treatment plant. However, Taylor stipulated that based on these violations that in renewing this permit DER included a schedule of remedial actions which EAC must adhere to. He also stipulated that compliance with the effluent limitations and the schedule to remediate the past situation will insure compliance with all relevant provisions of both the Clean Streams Law, *supra*, and other regulations promulgated thereunder. (B-29) That stipulation eliminates claims that renewal was unwarranted from this perspective.

grounds, Taylor must produce more than census figures which show the average numbers of persons in a residence in the United States, since there was no showing either of the number of persons living in this park (or even the actual number of occupied trailers) or that average number of people per trailer at the park is 3.5 (or the actual numbers). In short, Taylor has conjecture, but the critical linkage is not found in Taylor's case-in-chief, and, thus, the motion has merit as to this argument, too.

Finally, Taylor argues the permit fails to clearly define the direction of the effluent flow. The permit specifies a discharge to an unnamed tributary of Elk Creek. (B-1)[5] The evidence establishes that the discharge is supposed to leave the plant and flow down a ditch on EAC's property in a southeasterly direction until it reaches the ditch on the northern edge of Schaeffer Road (also known as Township Route 611). (B-15 through 16, 19; T-47) Thereafter, the effluent is to flow west along that ditch until it reaches a culvert beneath Schaeffer Road, which the United States Geological Survey map (B-19) shows to convey the flow of this unnamed tributary in a generally south/southwestern direction to Elk Creek. A portion of this ditch lies between the front of Taylor's home and Schaeffer Road. Interestingly, Taylor testified the plant's effluent was not flowing to the Schaeffer Road ditch, but had broken out of EAC's ditch near its plant and flowed briefly northwest

---

5 Board Exhibit 7 (another of those stipulated to by all parties - see T-7 and 8) shows how the effluent limitations for this plant were initially calculated. DER started with the conclusion that this discharge was to the headwaters of a tributary to Elk Creek. The discharge is listed as "headwater is dry stream". This is significant because from it came the very stringent effluent limitations necessary because of the absence of any dilution at the discharge point. It is also important to note this discharge flows to Elk Creek, which is protected as a cold water fishery and migratory fishery under 25 Pa. Code Chapter 93. This Chapter's protection also mandates stringent effluent limitations for this discharge.

until it reached the adjacent portion of the Interstate 90 right-of-way and the Walnut Creek Watershed. (B-15; T-28) Taylor does not object to that occurring. (B-19; T-145)

Contrary to the assertion in Taylor's Brief, the testimony does not show the plant's effluent flows in three directions. There is no evidence the flow is currently reaching the Schaeffer Road ditch as it should. There is also no evidence the current discharge routinely flows across the rear of Taylor's property. (T-139 through 140) Taylor testified "water reached there" and that water ponded on the rear of his property on several occasions in the past, but admitted he had never walked up to EAC's property to see if it came from EAC's treatment plant. (T-141 through 143) Further, Exhibit B-24 is a letter Taylor signed which refers to this portion of his property as swampy, suggesting the treatment plant discharge may not be the problem.

While there is no malfunction at EAC's plant that he can personally testify to (although some have occurred according to B-5), nor is there any connection between the conveyance system's malfunctions and treatment plant operation (T-152 through 153), Taylor does not like the water in the Schaeffer Road ditch in front of his house. (T-163) The problem with Taylor's challenging such a discharge location is that Hatfield Township Municipal Authority, *supra*, bars it since it was not timely raised by Taylor when the prior permit (B-2) was transferred to EAC in 1988.

Taylor may not want this treated effluent to flow in the Schaeffer Road ditch, but it is a highly treated effluent and currently it is not doing so according to his own testimony. Of course, as soon as the break in the ditch is corrected, the flow will return to this approved pathway to the unnamed tributary to Elk Creek. We can personally sympathize with Taylor's dislike

for this situation, but in doing so, we cannot say that if the township allows this use of its ditch and Taylor did not timely object thereto, that we may lawfully act to reverse DER's renewal decision on that basis.

In sum, as to the arguments which are not time-barred, Taylor's case-in-chief does not contain the requisite *prima facie* showings. Accordingly, we must grant the EAC/DER motion for non-suit. Thus we enter the following order.

O R D E R

AND NOW, this 13th day of December, 1991, the Motion For Non-Suit on behalf of EAC and DER is granted and Taylor'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
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 13, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Theresa Grencik, Esq.
Western Region
For Appellant:
Hubert D. Taylor
McKean, PA
For Permittee:
Joanna K. Budde, Esq.
Donald E. Wright, Jr., Esq.
Erie, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

CARL OERMANN	:	
	:	
v.	:	**EHB Docket No. 88-153-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 17, 1991**

OPINION AND ORDER
SUR
MOTION FOR RECONSIDERATION AND/OR REARGUMENT

Robert D. Myers, Member

Synopsis

Where a motion for a directed adjudication is made at the conclusion of DER's case-in-chief, which is taken under advisement by the presiding Administrative Law Judge who requests the movant to proceed with his evidence, and where the motion is renewed in the movant's post-hearing brief, and where the Board's Adjudication fails to mention the motion or dispose of it, reconsideration is appropriate because a review of the record establishes that the motion should have been granted.

OPINION

This appeal involves a civil penalty assessment imposed by the Department of Environmental Resources (DER) on a water supplier (Appellant) under the Safe Drinking Water Act (SDWA), Act of May 1, 1984, P.L. 206, 35 P.S. §721.1 *et seq.* The Board issued an Adjudication on September 10, 1991, ruling, *inter alia*, that $3,000 was an appropriate civil penalty for

Appellant's violation of 25 Pa. Code §109.4(a)(4). DER's $5,000 assessment was reduced by the Board because it found Appellant responsible only for a failure to have in effect an emergency response plan. A pump malfunction, a temporary water connection and the failure to contact DER were not, in the Board's opinion, violations of 25 Pa.Code §109.4(a)(4).

Appellant timely filed a Motion for Reconsideration and/or Reargument on September 19, 1991. The Board issued an Order on September 26, 1991, granting reconsideration "solely for the purpose of tolling the appeal period to allow the Board to review the merits of the Motion." DER filed Objections on October 18, 1991.

Appellant's Motion calls the Board's attention to the fact that, during the hearing on December 11, 1990, Appellant moved for a directed adjudication at the conclusion of DER's case-in-chief, arguing that a *prima facie* case had not been made out. The motion was taken under advisement by the presiding Administrative Law Judge and Appellant was asked to proceed (N.T. 40-42). After the conclusion of Appellant's case-in-chief, DER presented rebuttal testimony through a witness (Leon B. Lankford) who had not been listed in DER's pre-hearing filings. Appellant's objection that the testimony was not proper rebuttal and should have been part of DER's case-in-chief was overruled (N.T. 71).

In his post-hearing brief Appellant argued, *inter alia*, that his motion for a directed adjudication should be granted. The Board's Adjudication made no reference to the motion and failed to dispose of it. The Motion for Reconsideration and/or Reargument brings this omission to the Board's attention and asserts that the evidence on which the Board based its conclusion that Appellant violated 25 Pa.Code §109.4(a)(4) was presented

solely by DER's rebuttal witness. DER denies this assertion and argues that its case-in-chief was adequate on this point to survive a directed adjudication motion.

Our review of the record convinces us that Appellant is correct. We concluded (Conclusion of Law 9) that the "unavailability of any responsible person associated with the Del-Brook Estates water system and the absence of any established procedures for responding to an emergency" constituted a violation of 25 Pa.Code §109.4(a)(4), the only violation justifying a civil penalty. The evidence of Appellant's unavailability, therefore, is of controlling importance.

In its case-in-chief DER presented only one witness, Chester E. Young, District Supervisor for the York, Adams and Franklin County District of DER's Bureau of Community Environmental Control. He testified (N.T. 9-17, 25-33) to receiving a telephone call from Dover Township on the morning of May 8, 1987 reporting an emergency connection between the Dover Township public water system and the Del-Brook Estates water system. Young attempted unsuccessfully to contact Appellant by telephone and then went to Del-Brook Estates. While there, he observed the emergency connection and a truck parked near a well casing - the type of truck that would be able to pull a pump out of a well. No one was around to talk to and he returned to his office. Young believed, but could not specifically recall, that he went to Appellant's home while in Del-Brook Estates but found no one there. On May 11, 1987 he received a call from the Township reporting that the emergency connection had been severed. Appellant never contacted him.

While this testimony clearly establishes Appellant's failure to contact DER, it has no bearing on the question of Appellant's unavailability

to respond to the water emergency. The only hint of that in Young's testimony is a statement that the water outage had lasted "at least 24 hours" before the emergency connection had been made. This statement had been made to Young during the telephone call from Dover Township on the morning of May 8. When the contents of this telephone call were first proferred, Appellant's attorney objected to it as hearsay. DER's attorney responded as follows:

> Your Honor, it's true, it's hearsay if the Department is relying on it for the truth of what in this case, I believe, it was Mr. Lankford from Dover Township, told Mr. Young. I am more interested in what precipitated Mr. Young's next move. (N.T. 9-10)

The testimony was permitted for that purpose, and Young testified that he had no other knowledge of how long it took to make the emergency connection (N.T. 32).

While hearsay evidence can be relied upon under appropriate safeguards, *Commonwealth, Unemployment Compensation Board of Review v. Ceja*, 493 Pa. 588, 427 A.2d 631 (1981), it cannot be used for purposes other than that for which it was proffered. Here, DER's attorney, in response to a hearsay objection, clearly stated that the evidence was not intended to establish the truth of what was reported to Young but only what induced Young to go to Del-Brook Estates. With the evidence so limited in its purpose, we are not at liberty to give it a different probative effect.[1]

Giving Young's testimony its broadest construction, it is insufficient to establish a *prima facie* case of Appellant's unavailability to

---

[1] It should also be noted that Mr. Lankford, the Township official who called Young on May 8, was available to testify and did, in fact, testify as a DER rebuttal witness. The use of hearsay evidence under these circumstances would be inappropriate even under the less rigid standards discussed by the plurality opinion in *Ceja* but not subscribed to by other members of the Supreme Court. See *Ford v. Commonwealth, Unemployment Compensation Bd. of Review*, 91 Pa. Cmwlth. 502, 498 A.2d 449 (1985).

respond to the water emergency. Appellant's motion for a directed adjudication should have been granted in our Adjudication of September 10, 1991.

The Board's Rules of Practice and Procedure provide for reconsideration in limited circumstances: 25 Pa. Code §21.122. While the application here does not fit comfortably into either of the instances described in §21.122(a) as generally applicable, we believe that an unaddressed motion for directed adjudication presents "compelling and persuasive reasons" for granting such relief.

ORDER

AND NOW, this 17th day of December, 1991, it is ordered as follows:

1. Appellant's Motion for Reconsideration and/or Reargument is granted.

2. The Order appended to our Adjudication of September 10, 1991 is replaced with the following Order:

> AND NOW, this 17th day of December, 1991, it is ordered that Appellant's appeal is sustained.

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: December 17, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Mary Martha Truschel, Esq.
Julia Smith Zeller, Esq.
Central Region
For the Appellant:
Eugene E. Dice, Esq.
Harrisburg, PA
sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

BRIDGEVIEW, INC. and BVW ACQUIRING CORP.	:	**EHB Docket No. 91-149-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 17, 1991

OPINION AND ORDER SUR MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

A motion to dismiss is denied. A document which is perfected in accordance with the provisions of 25 Pa. Code §21.52, but which fails to satisfy the commencement, form, and content requirements enumerated at 25 Pa. Code §21.52, is a skeleton notice of appeal. Once a skeleton notice of appeal is docketed, specific objections are untimely only if they are not filed upon request by the Board.

OPINION

This matter was initiated by Bridgeview, Inc. (Bridgeview) and Valley Forge Investment Company (Valley Forge)[1] on April 16, 1991, with the filing

[1] Bridgeview owns the facility which is to operate the incinerators affected by the Department's plan approval and the permit modification which are appealed here. On March 15, 1991, the principals of Valley Forge entered into an agreement to purchase Bridgeview from its then-owner, Jacob Lutz. The principals of Valley Forge signed the agreement as promoters of BVW Acquiring Corporation (BVW), which was not incorporated at that time. BVW was incorporated on May 16, 1991, and subsequently ratified the purchase agreement signed by its promoters, becoming the succesor-in-interest to Valley Forge and its principals. (Bridgeview and BVW's memorandum in opposition to the motion to dismiss, pp. 5-6)

of a document entitled "Skeleton Notice of Appeal." The document sought review of two March 8, 1991, actions of the Department of Environmental Resources (Department): a modification of Bridgeview's solid waste and/or processing permit for a medical waste incinerator, and a plan approval under the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.*, for a medical waste incinerator.

The document contained no specific objections to the Department's action. Instead, it stated:

> 4) This appeal is a "skeleton appeal" within the meaning of 25 Pa. Code §21.52(c). Upon request of the Board, Appellants shall supply any information lacking in this Skeleton Notice of Appeal.
>
> 5) Appellants reserve the right to modify this Skeleton Notice of Appeal at any time hereafter for any reason.
>
> (Bridgeview and Valley Forge's notice of appeal, at Exhibit 1 of the Department's motion to dismiss.)

The Board did not, however, request any additional information from Bridgeview or from Valley Forge, and on May 20, 1991, Bridgeview filed its "Notice of Appeal Pursuant to 25 Pa. Code §21.52(c)." That document sets forth in detail Bridgeview's objections to the permit modification and plan approval.

On September 6, 1991, the Department filed a motion to dismiss for lack of jurisdiction, along with a supporting memorandum of law. The Department contends that the Board lacks jurisdiction over this appeal because Bridgeview and Valley Forge failed to file a notice of appeal within the 30 day limit. According to the Department, the "skeleton notice of appeal" cannot confer jurisdiction on the Board because the document sets forth no specific objections to the Department's action, the Board's rules do not allow

for the filing of a skeleton notice of appeal, and the skeleton appeal rule is not an exception to the specificity requirement at §21.51(e) of the Board's rules of practice and procedure.

On October 30, 1991, Bridgeview and BVW Acquiring Corporation (BVW) filed objections to the Department's motion to dismiss, along with a supporting memorandum of law. Bridgeview and BVW do not contend that they raised specific objections in the skeleton notice; instead, they argue that the Board's rules do allow for the filing of skeleton appeals and that those appeals need not necessarily contain specific objections.

We will deny the Department's motion to dismiss.

Generally, appeals before the Board must comply with the norms for commencement, form, and content set forth at 25 Pa. Code §21.51, including subsection (e), which provides, in pertinent part:

> The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. Such objections may be factual or legal. Any 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.

Subsection (c) of 25 Pa. Code §21.52, however, provides:

> An appeal which is perfected in accordance with the provisions of this section but does not otherwise comply with the form and content requirements of §21.51 of this title will be docketed by the Board as a skeleton appeal. The appellant shall, upon request from the Board, file the required information or suffer dismissal of the appeal.

The document filed by Bridgeview and BVW is a skeleton notice of appeal. Where a permittee appeals the conditions of a permit, it need only file its appeal within 30 days of notice to perfect the appeal in accordance

with the provisions of §21.52.[2] By its very definition under §21.52(c), moreover, a skeleton notice of appeal does not comport with the commencement, form, and content requirements set forth at §21.51.

The Department contends that our recent decision in Raymark Industries, Inc., *et al.* v. DER, EHB Docket No. 90-180-E (Opinion issued February 7, 1991), stands for the proposition that skeleton notices of appeal must comport with the specificity requirements at §21.51(e). We disagree. In Raymark the appellants petitioned the Board for leave to amend their notice of appeal to add another specific challenge to the Department's action. The original notice of appeal filed in Raymark contained numerous specific objections, both factual and legal, and met the requirements of our rules at 25 Pa. Code §21.51. We held in Raymark that, because the notice of appeal comported with the §21.51 requirements, the notice of appeal was not a skeleton notice of appeal, and, consequently, Raymark could not amend the notice of appeal without good cause. See Raymark, pp. 8-9. In short, Raymark never held that the §21.51 requirements apply to skeleton appeals; it held only that those requirements apply to appeals other than skeleton appeals.

We find the Board's decision in Raymond Proffitt v. DER and Rohm and Haas Delaware Valley, Inc., 1990 EHB 267 (Proffitt), to be controlling. In Proffitt, a third-party appeal of a National Pollutant Discharge Elimination System (NPDES) permit, the appellant did not set forth his objections to the Department's issuance of the NPDES permit in separate, numbered paragraphs in the initial notice of appeal. He did not file specific objections until another seven months had passed.

---

[2] In third-party appeals of Department decisions to grant a permit, license, approval, or certification, the appellant must additionally serve the recipient of the permit, license, approval, or certification with notice before the appeal will be considered perfected. 25 Pa. Code §21.52(b).

We concluded in Proffitt that the notice of appeal was a skeleton notice of appeal because, although perfected in accordance with the provisions of §21.52, it did not set forth specific objections as required by §21.51(e). In addition, we held that once a skeleton appeal is docketed, specific objections and other information are untimely only if they are not filed upon request by the Board. Absent such a request, the additional information cannot be considered untimely.[3] The specific objections raised in the instant appeal, therefore, are not untimely because the Board never requested additional information.

Our position is consistent with the Commonwealth Court's decisions in Pennsylvania Game Commission v. DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989), and Bobbi L. Fuller, *et al.* v. DER, No. 157 C.D. 1991 (Opinion issued Nov. 8, 1991). In Fuller, the Commonwealth Court characterized its holding in Pennsylvania Game Commission as follows:

> In Pennsylvania Game Commission this court held that an appeal from an action of the Department must set forth specific grounds for appeal and an amended appeal filed after the thirty day period has run is analogous to an appeal *nunc pro tunc*. Thus, this court held that the board need not grant a petition to amend without a showing of fraud or breakdown in the court.
>
> (Fuller, at p.12.)

The rationale employed in Fuller was similar:

> In this case, [the appellants have] not alleged fraud or breakdown in the department's

---

[3] At the present, notices of appeal which fail to set forth specific objections are infrequent before the Board. Generally, they involve unsophisticated *pro se* appellants, litigants who have not consulted with counsel promptly enough to allow sufficient time for a detailed notice of appeal, or instances where the Department gives no justification for its action in the written notice. The Board will not dismiss a skeleton appeal simply because it contains no specific objections to the Department's action; we do not, however, wish to condone this approach.

> operation. Furthermore, the issues [the appellants raise] in [their] amended memorandum of law are outside the scope of this appeal. Therefore the board did not err in granting the department's motion to strike [the appellants'] amended memorandum of law.
>
> (Fuller, p.12.)

It is essential, however, to understand the specific question at issue in both cases. There was no question in either Pennsylvania Game Commission or Fuller that the original notices of appeal comported with the requirements of §21.51. They did and, consequently, the notices of appeal were not skeleton notices. The distinction is crucial. In Pennsylvania Game Commission and Fuller, as in the Board's Raymark decision, discussed above, the appellants sought to add different specific objections to the specific objections raised in the initial notice of appeal; here, as in our decision in Proffitt, the appellants seek to enumerate specific objections where the original notice of appeal listed none.

O R D E R

AND NOW, this 17th day of December, 1991, it is ordered that the Department's motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: December 17, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Carl B. Schultz, Esq.
Central Region
For Appellant:
David G. Mandelbaum, Esq.
Brendan K. Collins, Esq.
BALLARD SPAHR ANDREWS & INGERSOLL
Philadelphia, PA
bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

MCDONALD LAND & MINING CO., INC. :
:
v. : EHB Docket No. 90-464-E
: (Consolidated)
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 18, 1991

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

Where the Department of Environmental Resources ("DER") issues Compliance Orders to McDonald Land & Mining Co., Inc. ("McDonald"), it is DER which bears the burden of proof that the miner is the probable cause of the conduct sought to be remedied through the orders. DER must make this showing through a preponderance of the evidence.

A surface miner is liable for discharges originating on the mine site, regardless of assertions of nonresponsibility, and may be held liable for discharges even where others are jointly responsible. Where the discharge occurs outside the permit's boundaries, however, DER must establish a hydrologic link between the mine site and the discharge before the miner can be held liable. Where DER's evidence fails to preponderate in favor of such a hydrologic link, the issuance of its Compliance Orders cannot be sustained by this Board.

Background

The instant consolidated appeals arise from two compliance orders issued in 1990 by DER to McDonald which pertain to the discharge of mine drainage adjacent to a McDonald surface mine located in Ferguson Township,

Clearfield County. On January 31, 1991 the Board issued an Opinion and Order granting McDonald's Petition For Supersedeas of these two compliance orders. Pages 2 and 3 of that Opinion recite the procedural background of these appeals up through that date, including their consolidation. We do not repeat that background information here, but refer the reader to that Opinion and proceed from that point with the subsequent background of this appeal.

On February 13, 1991, McDonald filed its Pre-Hearing Memorandum with us and, on March 1, 1991, DER reciprocated by filing its own Pre-Hearing Memorandum. Thereafter, by Order dated March 6, 1991, this matter was scheduled for a hearing on the merits to occur on May 6, 7, 8 and 9 of 1991. The parties filed their Joint Stipulation with us on April 29, 1991 in conformance with other requirements of that Order.

On May 3, 1991, McDonald filed an Amended Pre-Hearing Memorandum and the hearings took place as scheduled.

By Order dated July 26, 1991, this Board acknowledged receipt of the hearing transcripts and directed the filing of the parties' Post-Hearing Briefs. We ordered DER to file its Brief by August 26, 1991 and we received a copy on that date. On September 17, 1991, McDonald filed its Memorandum In Support Of Appeal, together with its Proposed Findings Of Fact, Conclusions Of Law And Order. Finally, under cover of a letter dated September 25, 1991, DER filed a Post-Hearing Reply Brief with us.

In preparing this adjudication we have reviewed the entire record in this matter. It consists of a transcript of 1,201 pages from both the supersedeas and merits hearings[1] and 81 Exhibits. After this full and complete review of this record we make the following findings.

---

[1] The parties incorporated much of the testimony from the supersedeas hearing into the merits hearing by stipulation.

FINDINGS OF FACT

1. DER is the agency with the duty and authority 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.* ("Clean Streams Law"); the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. 1396.1 *et seq.*, ("Surface Mining Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 and the rules and regulations promulgated thereunder. (Stip.)[2]

2. McDonald is a Pennsylvania corporation with a mailing address of R. D. 1, P. O. Box 53, Curwensville, Pa. 16833. McDonald is engaged in the business of mining coal by the surface method in Pennsylvania pursuant to License No. 100659. (Stip.)

3. On or about May 5, 1987, DER issued Surface Mining Permit ("SMP") No. 1786028 for a site in Ferguson Township, Clearfield County to McDonald. This permit is for a mine known as the Schrot mine ("Schrot"). (Stip.)

4. McDonald began coal extracting activities on Schrot sometime between June of 1987 and August of 1988. (Stip.)

5. McDonald completed backfilling of Schrot in October of 1988 and completed planting in November of 1988. (Stip.)

6. Prior to McDonald's operation at Schrot and in December of 1978, DER issued Mine Drainage Permit ("MDP") 4377SM13 to Benjamin Coal Company

---

[2] References to "Stip." as the basis for a finding of fact is a reference to the Stipulation of the parties which is Board Exhibit 1. Supersedeas hearing transcript references will be "ST-__" because the pages of the transcript of the two hearings are not consecutively numbered. A merits hearing transcript reference shall be "T___". McDonald's Exhibits are referenced as "M___". DER's Supersedeas Hearing Exhibits are referenced as "C___", while its Exhibits from the merits hearing are "D___".

("Benjamin") for operation of a surface coal mine at a site in Ferguson Township, Clearfield County. This permit is for a mine known as the Wiley mine ("Wiley"). (Stip.)

7. Benjamin operated at Wiley from 1978 through 1981, with backfilling completed in June of 1981 and planting completed in approximately October of 1981. (Stip.)

8. Benjamin's Wiley mine is located generally west and north of McDonald's Schrot mine, but some areas, where mining activities of each company sequentially occurred, overlap. (C-1; D-5(a); D-5(c); M-5, M-6, M-42, M-45; Stip.)

9. Both the Schrot and Wiley mines are located north of Legislative Route 17018 ("LR 17018"), which runs east and west. (M-2, M-4 through M-6; T-30)

10. On September 26, 1990, DER's Mine Conservation Inspector, Floyd Schrader ("Schrader"), issued Compliance Order No. 904093 to McDonald. The Order recites a discharge of water at a location identified as MP-2 from an area disturbed by mining, which water had a low pH, acidity exceeding alkalinity and a high level of manganese. The Order directs McDonald to submit to DER a plan to provide interim treatment of the discharge described as "monitoring point No. 2", to install this interim treatment after DER approves the interim treatment plan, to submit a plan to DER for permanent treatment or abatement of the "monitoring point No. 2" discharge and to implement this plan after DER approves same. (Compliance Order attached to McDonald's Notice of Appeal at Docket No. 90-464-E)

11. Monitoring Point No. 2 ("MP-2") for Schrot is the same as Monitoring Point No. 5 (MP-5) or W-5 for Wiley and is located on an unnamed tributary of Wilson Run at a point south of Legislative Route 17018. (D-5(a), D-5(c); M-5; T-31)

12. Contrary to the inference created by DER's Compliance Orders, there is no discrete discharge of mine drainage occurring at the location known as MP-2. MP-2 is located at a point outside the boundaries of the permits issued for the Wiley and Schrot operations and is a location downstream on the unnamed tributary of Wilson Run which McDonald's application for the Schrot permit proposed as one to use to monitor the quality of discharges from the western end of Schrot. (C-1; M-5; ST-51)

13. On or about October 10, 1990, DER issued Compliance Order No. 904093A to McDonald which extended the date for compliance with Compliance Order No. 904093 by thirty days. (Stip.)

14. On November 9, 1990, McDonald submitted to DER a plan for interim treatment of the discharge to the standards found in 25 Pa. Code §87.102. (Stip.)

15. On or about December 26, 1990, DER issued Compliance Order No. 904124AE to McDonald because of DER's perception that McDonald had failed to comply with Compliance Order 904093. (Stip.) Compliance Order 904124AE directed McDonald to comply with Compliance Order 904093 by December 26, 1990 and recited that McDonald was subject to a minimum civil penalty of $750 per day for each day the violation is uncorrected. (Compliance Order 904124AE attached to McDonald's Notice of Appeal at Docket No. 91-021-E)

16. By Opinion and Order dated January 31, 1991, the Environmental Hearing Board superseded Compliance Orders Nos. 904093 and 904124AE. (Stip.)

Benjamin's Wiley Mine Site

17. The extent of the area actually affected by Benjamin in conducting its Wiley mining operations is shown on the aerial photographs which are Exhibits M-6 and M-45.

18. Prior to the mining of the Schrot and Wiley sites, the unnamed tributary of Wilson Run ("unnamed tributary") extended north beyond the

present location of its headwaters at least into the portion of the H. and W. Patterson property mined by Benjamin and affected by McDonald. (D-6; M-4; T-37 through 38)

19. Near the currently existing headwaters of the unnamed tributary is a flow of water referred to in the transcript variously as Seep 1, Discharge 1, Seep 6 and Monitoring Point 1 (hereinafter "D-1"). (C-1; M-3; T-8, T-31, T-216, T-226-227; ST-69, ST-153)

20. D-1 is located within the area covered by Benjamin's permit and affected by Benjamin's mining. The area covered by Benjamin's permit is outlined in green on M-6. (ST-46) D-1 surfaces near the bottom of the toe of the spoil on the eastern edge of the area affected by Benjamin's mining activity. (C-1; M-15; T-254, T-355; ST-48, ST-195)

21. D-1 is located outside the boundaries of McDonald's permit for the Schrot Mine. (C-1; M-5) As shown by the green outline on M-5, McDonald's mine permit surrounds both D-1 and the unnamed tributary on three sides, although on the western side of the tributary where D-1 is located, the only portion of McDonald's permit area is its haul road which connects the remainder of the site to LR 17018.

22. McDonald conducted no mining activity in the area of this haul road other than road maintenance. (ST-143, 146)

23. McDonald's haul road continues to exist even though mining has ceased and today provides access from LR 17018 to Freeman Wiley's residence and garage (located north of the areas in contention in this proceeding). (D-5(c); M-3; ST-51, 100)

24. Benjamin's haul road connecting the Wiley mine site to LR 17018 was in the same location, as it parallels the unnamed tributary, as McDonald's haul road, except that small portion thereof adjacent to LR 17018 where Benjamin's haul road went around a sedimentation and erosion control pond

Benjamin installed and removed after mining was completed (relocating the haul road to its current position in 1983). (T-596 through 599)

25. Three former employees of Benjamin testified that during Benjamin's mining at Wiley, they were involved in mining from two to five seams or splits of coal on Wiley, which they identified variously as the D seam, C seam, "Dirty D" seam, the Upper Kittanning seam, the seam below the Upper Kittanning seam and five splits of the C seam. (T-529 through 530, T-550 through T-551, T-591)

26. Contrary to the opinion of DER's hydrogeologist, David Bisko ("Bisko") (T-471), who was never on the Wiley site during the mining thereof (T-209), Benjamin mined coal east of the existing haul road. (D-5(a), D-5(c); T-534, T-588-589)

27. In mining on Wiley, Benjamin mined east of the haul road using a block cut method. Benjamin's first set of cuts moved in a northeast direction from the haul road to the evergreen tree located east of Freeman Wiley's garage as shown in the photograph which is Exhibit D-5(c). (T-602) Benjamin's second set of pits east of the haul road was slightly northwest of the first line of pits and ran somewhat parallel to the haul road. (T-537, T-603 through 604) Simultaneously with mining this last set of pits east of the haul road, Benjamin began a set of pits west of the haul road which were perpendicular to it. (T-538, T-604)

28. When the unnamed tributary's location, as shown on the aerial photograph which is Exhibit D-6, is compared with the area mined by Benjamin as marked on Exhibits D-5(a) and D-5(c) by Benjamin's former employees, it is clear Benjamin mined through the portion of this unnamed tributary upstream of the point where the headwaters thereof exist today. (D-5(a), D-5(c), D-6; T-528, 534, 589, 594)

29. The seams of coal in the area known geologically as the Curwensville Quadrangle area (which includes this mine site) are geologically identified by letters of the alphabet, with seam A being the deepest seam and the Middle Kittanning and Upper Kittanning Seam being seams C and C' (M-48), but no seam is identified geologically as the "Dirty D" seam (although one former Benjamin employee said this was the C seam). (M-48; T-550-551) The specific lettered coal seams do split into multiple seams with "rider" seams above the main seams. (C-24; M-48; T-70, T-583)

30. Just west of the haul road near D-1, Benjamin made an attempt in 1978 (T-557) to mine a seam of coal approximately 35 feet beneath the Upper Kittanning Coal (T-529 through 530), but when the last lift of overburden was removed from the top of this seam of coal in the first pit excavated by Benjamin, it filled with 4 to 5 feet of water. (T-531) The top of this pool of water was estimated by one Benjamin employee to be as much as 15 feet above the level of the unnamed tributary. (T-554)

31. As a result of the flooding of this deeper pit next to the haul road, Benjamin's employees were instructed to dig a ditch or french drain from the low wall side of this pit across the haul road area toward the unnamed tributary. (T-532, T-552 through 553) This ditch was at the same depth as the pit floor and the tributary. (T-533) Its discharge end was covered with rock (overburden) to hide it. (T-548) It is D-1.

32. Benjamin's Wiley mine also had water in one of the pits where Benjamin mined the Upper Kittanning coal. (T-567) To solve this problem without pumping the water to a pond for treatment, Benjamin brought in John Rose who drilled three blast holes in the pit's floor to a depth of 50 feet. These holes were then "shot" to fracture the pit's floor in a practice known as "shooting the floor" or a "water shot". (T-567 through 568) The day after Rose shot the pit floor, the floor of that pit was as dry as the hearing

room's floor, whereas on the prior day, the water was all across that pit. (T-581) This fracturing of the pit floor caused the water in this pit to drain to a lower elevation.

33. None of DER's witnesses was on the Wiley site during the period it was an active site; they all visited the site after backfilling and planting were completed. (T-209, T-466, T-470; ST-241)

McDonald's Schrot Mine Site

34. While operating at Schrot, McDonald did not undertake coal extraction in the area of its permit north of the unnamed tributary and D-1. (M-4, M-6; ST-44 through 46, 138) McDonald's coal extraction began north-northeast of the unnamed tributary and moved in a south-southeasterly direction (moving from left to right on the map that is Exhibit M-4 and the aerial photograph which is M-6). (ST-45 through 46, 138 through 139)

35. McDonald's first block cut at Schrot went into the hillside in a northeastern direction. (ST-138) McDonald moved southeast in successive cuts around the side of a hill until, as it neared LR 17018, its cuts went from the south in a northerly direction into the hill. (M-6; ST-138 through 140)

36. McDonald mined only the Upper Kittanning and Lower Freeport coal seams on Schrot. (ST-54-55, 143) The Lower Freeport seam is above the Upper Kittanning seam at a higher elevation. (ST-54) McDonald's block cut pits were approximately 80 feet by 150 feet. (ST-147)

37. A portion of the area affected by McDonald's Schrot operation consisted of highwall and pine-tree-planted spoil from an old strip mine operated many years ago by a subsidiary of Benjamin which mined the same coal seam. This old mine's pit had water ponded in it and flowing into it from the old highwall. (T-624 through 625, 693; ST-148 through 150)

38. In the triangular area east of the haul road and north of the unnamed tributary, as shown on the photograph identified as Exhibit D-5(c),

which Benjamin mined, McDonald's sole excavation was for construction of erosion and sedimentation control ponds and ditches. This construction was surface excavation of the first several feet of soil. (T-623 through 264)

39. Exhibit M-36 is an aerial photograph of the western portion of Schrot site/eastern portion of the Wiley site taken by DER, which looks south toward LR 17018 from north of the site; it was taken near the time of McDonald's commencement of the Schrot operations. (M-36; T-618) It is the only south-facing aerial photograph offered by either party. It was given to McDonald's foreman on Schrot (Leo Nelen) by DER's inspector Floyd Schrader. (T-618) It shows spoil storage by McDonald from its first cut. The spoil is stored on the surface of the site north of the triangular area mined and reclaimed by Benjamin and east of the road running from LR 17018 to Freeman Wiley's trailer. (M-36; T-620) It also shows topsoil storage by McDonald east of the spoil storage area and the point on the Schrot site adjacent to the area mined by Benjamin, at which McDonald began coal extraction in a southeasterly direction, i.e., beyond which to the west and northwest it did not mine. (M-36; T-620, 623) North of the tributary McDonald temporarily stored topsoil, stored equipment and temporarily stored spoil but did not extract coal. (M-36; T-618 through 623)

40. The spoil shown as stored on the site's surface in Exhibit M-36 was replaced in the pit as mining progressed. (T-620)

41. North of the triangular area referenced in Finding Of Fact No. 38, McDonald filled in a portion of a ravine which ran south from Freeman Wiley's garage toward this triangular area during site restoration and, in so doing, covered the end of a culvert pipe beneath the portion of haul road at Freeman Wiley's garage, which culvert pipe was discharging water. (M-6; T-633 through 634, 646, 668; ST-77, ST-149) McDonald also backfilled and graded that portion of this ravine which ran across the area where it conducted

mining activities as shown on Exhibit M-6. (ST-77) The remainder of this ravine previously crossed the triangular area east of the haul road which was mined by Benjamin and which Benjamin eliminated during its backfilling in this area. (M-6)

42. After the backfilling on Schrot was completed, the previously referenced topsoil storage pile was removed also, as were the erosion and sedimentation controls. (T-625 through 626)

43. Exhibit M-23 (a photograph) shows the area where McDonald located its erosion control pond on the Benjamin mined area (east of the haul road) after it had been graded and revegetated. (M-23; T-626 through 628)

The Lime Trench

44. Schrader is the DER mine conservation inspector who conducted all of the regular inspections of Schrot for DER except those occurring in a four month period when he was hospitalized. (ST-241 through 242)

45. Prior to the commencement of McDonald's removal of coal at Schrot, Schrader separately told McDonald employees Leo Nelen and Dorothy Colne that there was a seep of acid mine drainage from west of the haul road on Benjamin's Wiley operation. (ST-141, 154) Schrader told these McDonald employees that he had told Benjamin's employees to build a trench filled with lime to run this seep through for treatment prior to discharge and warned Nelen that if McDonald touched it, then it would have water trouble at this site. (ST-140 through 143, 156)

46. Colne and Nelen say that according to Schrader this trench is located just across the haul road from D-1. (ST-141, 155)

47. Schrader admits the trench exists and was installed by Benjamin at his suggestion, but he says the seep it treats dries up in dry weather and is not across the road from D-1 but is located south of D-1, closer to LR 17018. (ST-245)

48. On cross-examination, Schrader, while stating that the seep and treatment trench are not adjacent to D-1 but are at a location identified as Seep D on Exhibit D-4, conceded he could have told Colne it was at D-1 and he is not sure what he told Nelen. (ST-279 through 281, 287)

49. Schrader says a discharge existed at location D-1 prior to McDonald's commencement of mining and it was a larger volume than the discharge at Seep D which he allowed Benjamin to treat with a trench. He conceded on cross examination D-1's quality fluctuated before McDonald's mining began and adversely affected water quality at MP-2. He also agreed that at that time only Benjamin's Wiley operation could have affected the quality of D-1, but despite this fact, he never issued a notice of violation or citation to Benjamin as to D-1 or required treatment of it by Benjamin. (ST-301 through 307)

50. Despite the acid mine drainage being treated by the trench and the existence of D-1's fluctuating quality, Schrader recommended release of the bonds posted by Benjamin for the Wiley site. (ST-335)

Schrot Special Handling Of Spoil

51. Because DER's permit review staff believed there was a potential for creation of acid mine drainage by mining the Schrot, DER inserted a special handling plan in the permit for Schrot to mitigate the production of acid mine drainage. The plan required that toxic material be identified, separated from the remaining spoil, placed back in the refilled pit at the middle depth of the pit (above water which might exist on the refilled pit's floor) and covered with lime, thus segregating this toxic spoil in backfilling from the water and oxygen needed to produce acid mine drainage. (T-41, 151)

52. The first time Bisko was at the Schrot site was in May of 1988. At that time he observed the mining of the Upper Kittanning seam of coal and the spoiling of black shales and binder (toxic) material throughout the

overburden from where mining began to the open pit. By "spoiling", Bisko means the random dispersion of materials where rock is associated with this coal. (T-40)

53. At the time of the May 26, 1988 inspection by Bisko, Schrader, Gary Byron, (DER's District Mining Manager), Inspector Supervisor William Anderson and Mining Engineer Mike Gaborek were on the site, too. (M-13) At that time spoil with rider coal, bony or binders (potentially acid producing), was being dumped over the outside wall of the pit where McDonald was excavating for coal because McDonald did not have another pit ready to receive this material pursuant to the special handling plan, although this material was separated from the regular spoil. (ST-260 through 261) Schrader did not cite McDonald for this situation in this circumstance because on behalf of McDonald, Nelen promptly prepared a pit to receive this material and put it in there. When Schrader returned to the pit area it had been taken care of in accordance with the special handling plan. (ST-275 through 276)

54. The area on Schrot at which Bisko observed the spoiling of this toxic material in 1988 is shown on the map which is Exhibit M-4 as being on the southern edge of the area in which McDonald extracted coal, at a point southeast of D-1 near LR 17018, which area does not drain to D-1 and which area was not shown to discharge to the unnamed tributary. (M-4; ST-276 through 277)

55. Schrader never cited McDonald for any violations of the law, regulations or its permit in connection with Schrot up until the time he issued the Compliance Order which generated the instant appeal. (ST-314 through 315)

56. There were no special handling requirements imposed on Benjamin for the Wiley site. Benjamin's miners had trouble telling coal from spoil. In one case 800 to 1,000 tons of coal were taken back to be dumped into the

site instead of taken off-site for sale. Binder and coal were mixed in the spoil throughout the Wiley site. (T-591 through 593)

Geology Of The Schrot And Wiley Sites

57. Samuel Yost is a Registered Surveyor employed by McDonald who conducted a survey of the area of D-1 and MP-2 for McDonald. Yost's survey shows the elevation of the Upper Kittanning coal seam on Schrot to be approximately 1,444 feet above sea level, whereas D-1 is located 73.92 feet lower at 1,370.08 feet and MP-2 is at 1,347.83 feet. (M-3, 15; ST-42 through 43) Bisko agrees with the accuracy of Yost's survey. (T-52 through 53, 464)

58. The direction of groundwater flow is controlled by geological structure, topography and fractures and joints. (T-154, 344)

59. Geological structure is the architecture or orientation of rocks as the result of tectonic forces. (T-113) The geological structure of Wiley and the relevant portion of the Schrot site shows the Upper Kittanning seam on both sites dips slightly to the south-southeast. (M-2; T-154, 168, 338, 345, 348 through 349, 684 through 685; ST-86 through 87, 195)

60. When McDonald mined Schrot, Leo Nelen observed that the coal sloped to the southeast in the line of pits located northeast and east of the unnamed tributary but leaned into the hill or north when reaching the pits adjacent to LR 17018. (ST-140) During the excavation of the first several pits on the northeast edge of the area of coal extraction on Schrot, McDonald's employees encountered water in the pits. This water flowed across the pit floors to the southeast to lay against the high wall. (ST-144, 147 through 148)

61. The Upper Kittanning seam of coal in the area of the Wiley and Schrot is underlain by a plastic clay of a varying thickness which does not

fracture like coal. This clay is from one to ten feet thick and acts as an aquitard to restrict or limit the vertical movement of water. (M-48; T-71, 300, 302 through 303, 305, 689; ST-124 through 126)

62. The regional groundwater table in this area of the township is normally associated with the Lower Kittanning coal seam and when water reaches this groundwater table, it moves laterally. In the more local area of concern in this appeal, the vertical movement of water in the ground would only be to the depth of the groundwater discharge area associated with Wilson Run. (T-294 through 295)

63. The unnamed tributary and its bed form a hydrologic barrier to seeps from the east of it reaching the opposite side of the stream, so the water discharged from one of these mine sites at the side of the stream will flow into the tributary rather than into the portion of the other mine site on the opposite side of the tributary. (T-223 through 224) Thus, the portions of Wiley and Schrot on opposite sides of the tributary may each discharge to this unnamed tributary of Wilson Run but not to each other. (T-31, 224)

64. The area east of the haul road which Benjamin mined is flat to slightly sloping from the north to the south toward the current headwaters of the unnamed tributary, but at its southern edge it drops steeply down to the tributary. (D-5(b), D-5(c); M-4, 23 through 24, 26; T-645, 666)

65. The area east of the haul road, which is north of that mined by Benjamin and between it and Freeman Wiley's trailer and garage, on which McDonald temporarily stored spoil and then graded out the preexisting ravine, is flat or slightly sloping toward the south. (D-5(a), D-5(c); M-4, 24; T-645, 666)

66. The Wiley site west of the haul road is at a higher elevation than the Schrot site and the portion of the Wiley site east of the haul road. This area of the western portion of Wiley nearest the haul road is steeply

sloped down (to the east) to the road and the existing remains of the unnamed tributary. The remaining portion of the western Wiley site is flatter but nevertheless slopes toward the tributary and haul road, except where Wiley parallels LR 17018, and there it slopes toward LR 17018. (C-3; D-5(a), D-5(c); M-4, 21, 25, 27, 28; T-280 through 281, 283, 285, 642, 645)

67. Generally Schrot is flat to gently sloped. The portion of the Schrot haul road west of the tributary slopes toward LR 17018. The area where coal removal occurred northeast of the tributary is flat to gently sloping to the southwest toward the tributary and the eastern Wiley site. Directly east of the tributary, the area from which coal was removed slopes toward the west and some steeply sloped woods which lie between this portion of Schrot and the tributary. In the area of Schrot from which coal was mined which is nearest to LR 17018, the site slopes south into a steeper sloped wooded area between the mine pits and LR 17018. (D-5(a), D-5(b), D-5(c); M-4, 23; T-280 through 281, 283, 285, 645, 666)

68. Jointing is the fracturing of geologic formations because of tectonic events. (T-128)

69. Jointing or fracturing affects porosity of rock formations, with more fractures equalling more secondary porosity. Groundwater will move through such fractures, and the applications for both the Wiley and Schrot permits show fractures on these two mine sites. In addition, Bisko observed fractures in the pit on Schrot when he visited that site in 1988. (T-128 through 129)

70. Bisko has drawn the three main lines of fractures on Exhibit D-4. The primary fractures are North 15^{o} East and North 65^{o} East and the secondary fracture is North 44^{o} West. (D-4; T-128 through 129)

71. Acid mine drainage is formed by the oxidation of pyritic materials when they are exposed to oxygen and water. It is characterized as

having a low pH, acidity exceeding alkalinity, and both elevated metals and elevated sulfates. (T-142)

72. D-1 is acid mine drainage. (T-144) A review of the analysis of the quality of samples of the discharge at D-1 shows a degradational trend is evident since the alkalinity is down and the sulfates and metals are both up. The same is true as to MP-2's quality. Comparison of the dates of the various activities at Wiley and Schrot and the sample analysis dates shows degradation since the mining at Schrot began. (C-13 through 14; D-7; M-9; T-145)

73. Bisko takes the position that because the Lower Freeport overburden in this part of the state is generally alkaline and it lies above the Upper Kittanning seam on Wiley, in backfilling at Wiley Benjamin mixed the Lower Freeport overburden with the Upper Kittanning overburden to neutralize the acid forming potential in the Upper Kittanning's overburden. Accordingly, Bisko opines that Wiley has a low potential for producing acid mine drainage from the mining of the Upper Kittanning, Lower Freeport and Upper Freeport coals. (T-69, 152 through 153)

74. There was no evidence that the Lower Freeport or Upper Freeport coals were mined by Benjamin east of the haul road.

75. Bisko opines that structure and topography are the keys to groundwater flow at D-1 and that the Schrot topography and jointing are sending acid mine drainage from Schrot to D-1. (T-154 through 158, 167-168, 170)

76. Bisko states that he believes the Middle Kittanning Coal on Schrot is over forty feet beneath the Upper Kittanning coal (T-56) but groundwater is communicated from the Upper Kittanning seam to the Middle Kittanning seam. He bases this opinion on observations made at coal mines

located in this general area where the Upper Kittanning, Lower Freeport and Upper Freeport coals were mined (T-155 through 157) rather than from observations of mines where the Upper and Middle Kittanning seams were mined.

77. In Bisko's opinion, the recharge area for D-1 is shown on Exhibit D-4 and includes all of the area north and west of D-1 which Benjamin mined and reclaimed, some unmined areas west, north and northeast of D-1, the area east (across the unnamed tributary from D-1) and northeast of D-1 which McDonald mined, some unmined areas northeast of D-1 and the temporary spoil storage area north of D-1 which McDonald utilized. (T-157 through 158, and 164)

78. Bisko opines that the structure and jointing of Schrot moves at least a portion of the groundwater beneath Schrot toward D-1. (T-154 through 155)

79. Bisko also opines that groundwater movement is from Schrot to D-1 and the tributary on which MP-2 is located, based upon the fact that McDonald selected MP-2 as a monitoring point to monitor the effect of mining the Schrot site. (T-170 through 171)

80. In Bisko's opinion, the alkaline trench is not connected hydrologically to D-1 because Benjamin's mining primarily affected north and west of the location at which Schrader now says the trench is located (next to seep D) and groundwater flow would have to be perpendicular to such a location to reach D-1, and further because at this site groundwater movement is controlled by topography and joint direction which would not convey water from the seep D area to D-1. (T-173, 177 through 178)

81. Bisko admits both that DER issued its Compliance Orders because of D-1 and that the hydrologic connection of D-1 and Schrot, if any, is the key. (T-222)

82. DER utilized a non-routine procedure in regard to the issuance of its Compliance Order and the conducting of a hydrologic investigation of the existence of any link between Schrot and D-1 because DER first issued its Compliance Order and only after McDonald filed its appeal did DER authorize the undertaking of a hydrologic investigation to determine if there was any connection between Schrot and D-1. (T-230 through 239) This is the first time in Bisko's knowledge that his DER office did not conduct an investigation as to the existence of such a link between a mine site and an off-site discharge prior to issuance of a Compliance Order. (T-482)

83. In addition to agreeing that DER should not have first decided that McDonald was responsible for D-1 and issued its Compliance Order but only thereafter gathered evidence to see if DER's liability conclusion could be sustained (or in a vernacular for this appeal "held water"), Bisko admitted at his deposition that his job for DER in regard to this order was to marshal a case or supply proof of McDonald's liability to support the order, not to conduct a scientific investigation to determine if liability existed or not. (T-231 through 232)

84. Bisko only saw the Wiley site after it was revegetated; he never saw it being backfilled or during coal removal. (T-241)

85. By the time Bisko began his investigation of the connection between Schrot and D-1 in November of 1990, Schrot was fully backfilled. (T-470)

86. At both the supersedeas hearing and the merits hearing, Bisko offered computer generated maps he created through a computer program, which maps each purport to show the structural contour of the Upper Kittanning coal at Schrot and Wiley. (Exhibits D-16; M-40) When compared, the two different maps show different contours for this seam because Bisko used different data on each of them. (T-248)

87. The data contained in the Benjamin permit application for Wiley shows no Middle Kittanning coal seam (T-262) and five splits of the Upper Kittanning coal seam, whereas McDonald drill holes on the Wiley site show only two seams of coal. In preparing his maps and rendering his opinion, Bisko assumed the lowest seam of coal found by Benjamin was the bottom of the Upper Kittanning coal, whereas some of the upper splits of coal were Lower Freeport coal. (T-263, 266 through 267, 273) These assumptions arise because Bisko has never seen five splits of one coal seam on a mine site before. In constructing his structure contour maps Bisko admitted this data forced him to do "geologic interpreting". (T-273 through 274)

88. In preparing his structure contour map, Bisko agrees the map may also be slightly inaccurate because while McDonald's drill hole locations were "surveyed in" for accuracy, he does not know if Benjamin's drill hole locations were located by surveying or not. (T-279)

89. When coal "rolls" it mounds up in some places. "Rolls" occur during the compaction occurring when the coal is formed. The "rolls" in coal are a localized structural feature and could impact on a structure map's accuracy. (T-459) In creating his structure map, Bisko did not take the existence of rolls in the coal seam on Schrot, as identified by Nelen, into consideration. (T-483)

90. In preparing his two structure contour maps, Bisko did not cross check the drill holes on the map which is Exhibit D-16 with those on the map which is Exhibit C-25 and only randomly checked the accuracy of the location of the drill hole locations on Exhibit C-25. (T-480)

91. Bisko admits his lack of experience with clays and further admits that if the clays beneath the Upper Kittanning seam on the Schrot are plastic, rather than flinty, his theory on fractures directing water from Schrot to D-1 may need revision. He agrees this is because plastic clays might bend rather

than fracture and thus interrupt vertical groundwater movement occurring in fractures of higher geologic strata. (T-298 through 305)

92. In forming his theory that fractures direct water from Schrot toward D-1, Bisko assumed the clay beneath the Upper Kittanning seam was a hard flinty clay which fractures like rock. (T-297 through 298, 311 through 313)

93. Bisko agreed that miners who worked for Benjamin on Wiley are the persons who can best tell where Benjamin extracted coal in connection with the Wiley operation. (T-323) Bisko further agrees that water flowing across the floor of a mine pit to impound against a highwall is a good indication of the dip of the structure of the mine site. (T-332 through 333, 339)

94. Bisko agrees that D-1 is at a lower elevation than the horizon of the Upper Kittanning Seam. (T-341)

95. Bisko admits that D-1 contains a component of water from Wiley (T-353) and probably started when Benjamin mined Wiley. (T-478)

96. East and slightly north of D-1 by 15 feet at the same elevation is a discharge known as Discharge 5, which has much better quality than D-1. Bisko contends the water from Schrot flows around Discharge 5 to reach D-1 which is located about 2 or 3 feet west of the unnamed tributary's channel. (M-3; T-48, 355 through 356)

97. Bisko says his deposition testimony to the effect that if the lime trench were located northwest of where he now says it is located it would impact on the D-1's water quality was incorrect, because he now knows the trench is not near D-1. (T-383 through 384)

98. Bisko opines that tying groundwater quality changes too closely to certain events is speculative but groundwater quality can change because an

event occurs; however, all groundwater does not move at the same speed and Bisko cannot say how long it will take groundwater to flow from one point to another. (T-396 through 398)

99. Any joints and fractures in the mined areas are destroyed where overburden is removed and coal extracted but not in adjacent unmined areas or at elevations in the mined areas below the mined coal seams. (T-457 through 458)

100. Bisko opined that based on his review of the overburden at the surface of the Wiley site and the drill hole data for that site that there was no mining on Wiley deeper than the Upper Kittanning seam of coal. (T-467 through 469)

101. In the summer of 1988, Nancy Reig was DER's inspector for Schrot. (T-504) Reig's inspection report of July 5, 1988 says analysis of samples of various pollutants in the D-1 discharge shows increases therein during low precipitation periods. (M-14; T-506)

102. At that time, Reig concluded that D-1 was Benjamin's responsibility because it mined Wiley. (M-18; T-512 through 514)

103. David C. Lindahl ("Lindahl") is currently chief geologist for the E.H. Group's General Engineering Division. (ST-78) In prior employment in the late 1970's, he worked for Benjamin and prepared the geologic portion of Benjamin's permit update for Wiley. Later, while working for McDonald (before joining General Engineering), Lindahl also gathered the data and prepared the geologic portion of McDonald's application for Schrot. (ST-78 through 79)

104. Based upon his analysis of the Schrot and Wiley mine sites, Lindahl opines that the discharge is from the Middle Kittanning seam mined by Benjamin on Wiley. (ST-94) Lindahl bases this opinion on the structural dip of the Wiley and Schrot sites, the relative elevations of the Middle Kittanning and Upper Kittanning coal seams, and on the closeness in elevation

of the Middle Kittanning seam, D-1 and the toe of Benjamin's spoil. (ST-89 through 94)

105. Lindahl also opines that the Middle Kittanning and Upper Kittanning coals are more or less isolated from each other because of the plastic clay underlying the Upper Kittanning seam which does not fracture the way coal and rock do but rather acts as an aquitard, slowing the downward movement of groundwater. (ST-119, 123 through 124, 126 through 127)

106. James Eby ("Eby") is a project hydrogeologist with Meiser & Earl Incorporated, a firm of consulting hydrogeologists, who has studied whether a hydrologic connection exists between D-1 and Schrot on McDonald's behalf. (ST-187 through 190)

107. Eby has examined the Schrot and Wiley site files of DER, including all drill hole data and site maps (ST-190, 192 through 193), discussed the site with Mr. Lindahl, Dorothy Colne and Samuel Yost, (T-192) and reviewed the Pennsylvania Topographic and Geologic Survey Atlas including its maps of the area's geology. (ST-193 through 194) Additionally, like Bisko, Eby has visited the Schrot/Wiley site on more than one occasion. (T-699; ST-205)

108. Eby disagrees with Bisko and opines that the recharge area for the water discharged at D-1 is northwest of D-1. Eby bases his opinion on the southeastern dip of the coal in this area, on the existence of seeps on Wiley and Schrot on the southeastern sides of the hills mined by McDonald and Benjamin (while mining Schrot and Wiley) and D-1 being southeast of the hill mined on Wiley, and on Benjamin's mining of the deeper Middle Kittanning seam, with D-1 being at the toe of Benjamin's spoil at this seam's elevation while McDonald only mined the higher Upper Kittanning seam. (ST-195) He finds that this opinion is also buttressed by the fact that the water in McDonald's pit was not acid mine drainage, whereas pre-Schrot samples of D-1 were acid mine

drainage, there was no acid mine drainage found on the southeast side of Schrot and the Geologic Atlas shows the area's geologic structure dips to the southeast. (ST-195 through 196)

109. Eby opines that if there is a plastic clay at Schrot it would take several years for water to get through it, and groundwater would move laterally at a rate of far less than a foot per day toward D-1, which is 200 to 300 feet away from the nearest portion of the area of coal extraction by McDonald. (ST-197 through 198)

110. In Exhibit M-16, DER's Reig says that historically the mining of the Upper Freeport, Lower Freeport and Upper Kittanning seams in this area does not produce elevated levels of metals, and Eby's review of the samples of the water in the Schrot pits agrees with this. (ST-203)

111. In Eby's opinion structure is the key to groundwater flow patterns on Schrot and Wiley, while topography and jointing have a secondary role. (ST-228)

112. Eby opines that if groundwater flow was to the southwest on Schrot, as suggested by Bisko's finding of a connection between D-1 and Schrot, there would also have to be seeps on the southwestern cropline of Schrot, but he knows of none; and, thus, this lack of seeps confirms for Eby that groundwater flows in a different direction than Bisko suggests. (T-696 through 697)

113. DER's evidence did not establish a link between Schrot and D-1.

DISCUSSION

As set forth above, the main issue before us is whether DER abused its discretion by issuing Compliance Orders Nos. 904093, 904093A and 904124AE to McDonald in connection with the treatment of all of the water flowing down the unnamed tributary at the location of MP-2. Since these are DER's Orders it bears the burden of proof with regard thereto under 25 Pa. Code

§21.101(b)(3). Hepburnia Coal Company v. DER, 1986 EHB 563. DER recognizes it has this burden in its brief. As pointed out in McDonald's Brief, this requires that DER show by a preponderance of the evidence that its orders were lawful and a sound exercise of DER's discretion. Kerry Coal Company v. DER, 1990 EHB 226. Moreover, we have recently defined the "preponderance of the evidence" burden placed on DER in Midway Sewerage Authority v. DER, EHB Docket No. 90-231-E (Adjudication issued August 26, 1991) as:

> Before this Board, burden of proof means proof by a fair preponderance of the evidence. This concept has been defined as requiring:
>
> > the evidence of facts and circumstances on which [the party] relies and the inferences logically deducible therefrom must so preponderate in favor of the basic proposition he is seeking to establish as to exclude any equally well-supported belief in any inconsistent proposition.
>
> Henderson v. National Drug Co., 343 Pa. 601, ____, 23 A.2d 743, 748 (1942). In evaluating this concept, it is clear that more is necessary than that the evidence in favor of the proposition be equal to that opposed to it. The evidence in favor must preponderate. It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. Standard Pennsylvania Practice 2d §49:47, citing Rasner v. Prudential Ins. Co., 140 Pa. Super. 124, 13 A.2d 118 (1940); and Waldron v. Metropolitan Life Ins. Co., 347 Pa. 257, 31 A.2d 902 (1943).

Id. at 32-33.

Even with this burden in mind, however, it is clear that miners have long been liable for discharges arising on their mine sites without regard to causation questions. Thompson & Phillips Clay Company v. Commonwealth, DER, 136 Pa. Cmwlth. 300, 582 A.2d 1162 (1990); petition for allowance of appeal denied No. 691 W.D. *Allocatur* Docket 1990 (Pa. filed October 8, 1991). Such liability exists even where there are others jointly responsible for the discharge. DER v. Lawrence Coal Company, 1988 EHB 561. Indeed, surface miners are also liable for discharges arising at locations "off-site" or beyond their permit's boundaries, providing a hydrologic link is proven

between the site and the off-site discharge. Commonwealth, DER v. PBS Coals, Inc., 112 Pa. Cmwlth. 1, 534 A.2d 1130 (1987). DER's Brief is correct that such a link-up between discharge and site may be proven by direct testimony of a factual and expert nature or by circumstantial evidence. Hepburnia Coal Co. v. DER, 1986 EHB 563, 598; C & L Enterprises, Inc. v. DER, EHB Docket No. 86-626-MJ (Adjudication issued April 2, 1991).

Here, however, DER issued its initial order (Compliance Order 904093) without even first conducting a hydrologic investigation of the existence or nonexistence of a site to off-site discharge link. As a result, before turning to the evidence of any link between McDonald's Schrot operation and D-1, we elect to address this issue briefly.

The only hydrogeologist to investigate the alleged link between Schrot and D-1 on behalf of DER was David Bisko. He began investigating it in October of 1990 after the instant appeal from Compliance Order 904093 was filed. Thus, at the time DER issued that order it had no linkage of the discharge and Schrot. Worse yet, its own mine inspector's (Reig's) report on Schrot said D-1 was Benjamin's responsibility. Further, when the question of McDonald's liability for D-1 arose in connection with McDonald's request to release its Schrot bonds and a meeting occurred between Inspector Reig, a DER hydrogeologist (not Bisko) and DER's District Mining Manager (Gary Byron) on this issue, Mr. Byron decided to approve release of the bonds, thus implying a DER conclusion of no proof of a connection between McDonald and D-1. (T-508 through 514; ST-441 through 442) Why DER would issue such a Compliance Order without possession of proof of such a connection in these circumstances and in light of the state of the law is speculation we need not engage in, however, because there was a subsequent gathering of the evidence DER now offers.

On the stand Bisko, who possesses a Bachelor of Science degree in this field (ST-341), admitted that D-1 was the driving force behind DER's

issuance of the three Compliance Orders to McDonald. (T-41 through 42, 154, 158, 207 through 208, 217, 221 through 222)[3] In this regard his testimony was not that he was asked to come to the Schrot site to look to see if acid mine drainage was being created but that he clearly was to gather evidence of the link between Schrot and D-1. Indeed, virtually the entire record centers around D-1. At the hearing on the merits, however, Mr. Bisko identified several other off-site and on-site locations near Schrot and Wiley where there was acid mine drainage. On Wiley, Bisko said a seep identified as Seep D was such a location and he said this was Benjamin's responsibility. (T-48 through 49, 149, 172 through 180) Bisko identified another bad quality seep as off-site Seep G. (D-4; T-170) On the Schrot site he said seeps identified as Seep A, Seep C and Seep F and Monitoring Point 3 were similarly contaminated.[4] (T-46 through 49, 149, 152, 169 through 170) Of these seeps Bisko does not say any flow from Seep F reaches the unnamed tributary. Seep G as located by Bisko is south of the LR 17018 (the mines are north of it), but, as to Seep G, again Bisko fails to testify that any flow from it reaches Wilson Run or the unnamed tributary thereto. (T-48) Seeps H and I discharge directly to Wilson Run rather than the unnamed tributary. (T-48) Seeps D and L flow to the unnamed tributary. (D-4; T-48 through 49) Seep E flows to Wilson Run and Seep K flows to Wilson Run via yet another unnamed tributary. (T-49 through 50) MP-3 is located by Bisko on DER Exhibit D-4, but there is no testimony it flows to the unnamed tributary, and, on D-4, it is shown as lying further from this tributary than intervening Seep H which testimony

---

3 Indeed, at the Supersedeas hearing counsel for DER stipulated on DER's behalf that the Compliance Order was issued for D-1 (ST-69), but at the merits hearing he withdrew this stipulation. (T-8 through 9)

4 But adjacent on-site seeps identified as Seeps H and I are uncontaminated.

shows to flow directly to Wilson Run. Seep A flows a short distance on the surface of area mined by Benjamin (north of D-1) and reaffected by McDonald through spoil storage and erosion and sedimentation pond construction only (McDonald removed no coal here). After flowing a short distance, it infiltrates back into the surface. (T-477)

In short, other than the discharges from Seeps B, D and L (T-219), Mr. Bisko has neither measurements of discharges to this unnamed tributary nor even flow estimates to show such a discharge and there is no suggestion by DER that McDonald is liable for treatment of either D or L.[5] Thus, we are left with D-1 and Seep B (though it is not clear Seep B's flow reaches the unnamed tributary)[6] as sources of contamination of this tributary.

To prove the case for a link between D-1 and Schrot, DER offered only two witnesses: Schrader and Bisko.[7] Neither witness has ever seen the active operation by Benjamin at Wiley to know what actually occurred there.

---

[5] Bisko also mentions a Seep 11 as adding flow (T-219), but what its quality is or whether it is related to Schrot, Wiley or neither site is not stated and no other reference to it is made.

[6] The record only says a conveyance channel exists between Seep B and the tributary. In a related proceeding over DER Compliance Orders directing McDonald to collect and treat Schrot Seeps A and B (there identified as X-1 and X-2), Bisko testified under oath that like Seep A, Seep B has a low volume of flow, flows a short distance on the surface and then infiltrates into the surface. No evidence was offered that it ever entered the unnamed tributary. See McDonald Land and Mining Co., Inc. v. DER, EHB Docket No. 91-173-E (Opinion issued October 2, 1991).

[7] In addressing the question of the existence of a link between D-1 and Schrot, we do not reach or decide the question of whether DER's orders were an abuse of discretion because they required treatment of the entire volume of the unnamed tributary at the location known as MP-2 rather than collection and treatment of individual discharges of acid mine drainage thereto for which DER says McDonald is liable. D-1 clearly comprised only a portion of the flow in the tributary by the time that flow reached the point known as MP-2. The lack of evidence from DER showing that discharges related to Schrot could not be collected and treated, and thus treatment of the entire flow was necessary, would have been of concern if we had been forced to reach this point in reviewing the validity of the DER Orders.

Benjamin finished backfilling and planted Wiley before Schrader was first there in the spring of 1982. Schrader inspected Schrot for DER throughout its life (except for a four month period in 1988 when he was recovering from coronary bypass surgery). Bisko never visited either site until 1988. In 1988, he spent part of one day on Schrot but did not look for a link between D-1 and Schrot. Bisko never saw open pits on the part of Schrot which he contends now drains groundwater to D-1; all he saw was backfilling and topsoil spreading. Bisko was not assigned the task of linking D-1 and Schrot until October of 1990. By that date Schrot was also backfilled and planted.

This lack of direct first hand information forced Bisko, as DER's expert, to make more than one "educated guess" in establishing what happened in the mining of these sites. Bisko did not know the scope and extent of the mining on Wiley, but assumed properly that overburden removal and coal extraction was conducted to some degree on each portion of the Wiley site on which Benjamin sought and DER approved the removal of coal. However, this ignorance of the actual extent of mining led Bisko to testify twice that Benjamin did not mine east of the haul road and that McDonald mined the area east of the haul road. He also stated that Benjamin did not mine the Middle Kittanning seam. It led him to delineate an area of Benjamin's mining on D-4 which was smaller and more westerly than he subsequently agreed to when reviewing the McDonald's aerial photograph, which is Exhibit M-45. In turn, he then admitted Benjamin's personnel could better define the extent of the Wiley operation. (T-323) When these personnel testified, they graphically confirmed substantial Benjamin mining east of the haul road in virtually all of the area north of D-1, an attempt by Benjamin to mine the Middle Kittanning seam and the construction of a hidden drain from the site of this attempt, the downstream end of which is D-1.

Bisko examined the logs of Benjamin's drill holes for Wiley which showed the coal seams encountered. Some of these logs show as many as five splits or seams of coal at different elevations in the same hole, all of which are identified in these drill logs as Upper Kittanning coal and none of which is identified as Upper or Lower Freeport coals -- coal seams at higher elevations than the Upper Kittanning seam (and seams with the alkaline overburden necessary for him to conclude low potential in Wiley to cause acid mine drainage). Despite this, Bisko opined that Benjamin mined all three seams (Upper and Lower Freeport and Upper Kittanning) on Wiley and assumed the lowest of the five seams was the Upper Kittanning seam for purposes of construction of a structure contour map of the Upper Kittanning seam, which he opined demonstrated that the contour of the structure favoring McDonald was at least partially responsible for D-1. With these drill logs before him, however, he admitted to doing some geological interpreting as to what was beneath the ground on Wiley prior to mining and, thus, what seam was the Upper Kittanning seam. Of course, in turn, this impacts on the weight we can ascribe to his mapping of that seam's contour.

In drawing his conclusion as to the existence of a hydrologic link between McDonald's Schrot site and D-1, Bisko said he looked at: (1) topography, (2) structure, (3) jointing, (4) area affected and (5) timing. (T-254) Bisko also made it clear that groundwater movement is controlled by structure, topography and jointing.

As to structure, our findings of fact state our finding that Wiley's structure slopes toward D-1 while McDonald's does not. D-1 is south and southeast of much of the Wiley site, but southwest and west of the relevant portion of Schrot on which coal was extracted. McDonald may have graded a temporary spoil storage area north of D-1 and installed and removed erosion control facilities there, but those activities only affected the surface of

the area north of D-1 in which Benjamin removed the coal. Moreover, the relevant portion of the McDonald site's structure slopes to the south-southeast, too.

Bisko says his method of establishing structural dip is much more accurate than that used on behalf of McDonald. Bisko argues a structural "hollow" exists on Schrot which would assist in a southwestern movement of groundwater toward D-1 from Schrot. Bisko used a computer software program and data from drill holes on both sites to construct a structure contour map to support this "hollow" hypothesis when he testified at the supersedeas hearing. At the merits hearing, he produced a second new structure map which he argues also supports his opinion. These maps do not aid DER's position here.

Bisko testified he used a computer program available to him at his office. He then said it is generally accepted in the profession because it is used by both DER and the Department of the Interior. (T-120) When there was objection as to whether this is "generally accepted" or not, Bisko could only repeat that his office used it and he has seen some geologists submit data to his office from some firms. (T-121 through 122) Bisko never provided sufficient information on the computer program's use to establish its "general acceptance" within his profession and DER offered no other evidence on this point. The fact that a regulatory agency uses a particular computer program does not establish that the program is "generally accepted" with the hydrogeologic profession.

Further, as mentioned above, Bisko admits to some "interpretation" of the Benjamin drill hole data on coal seams in preparation of his map on Wiley

since the Benjamin data shows five seams.[8] He admits the contour map may be slightly off since McDonald's drill holes were surveyed in, but he does not know if that is true of the Benjamin drill holes. (T-279) While he claims his map is more accurate than the three point procedure used by McDonald, Bisko admits he did not use all of the Wiley or Schrot drill hole data to draw these maps, but was selective in which holes he used. He admits that rolls in coal could affect the accuracy of his maps, but that he failed to consider coal rolls in making the maps. He also admits he did not cross check his two maps for accuracy and only randomly checked the accuracy of his first map's (Exhibit C-25) drill hole locations. Bisko's maps cannot be laid one on top of the other to match them up; they show different contours because they contain different data. Importantly, on both maps Bisko plotted in the location of LR 17018 as a common factor/reference point. While Bisko says he used different coordinates for the road, its location *vis à vis* the mines did not change and the computer printed twin sets of curves in the road on both maps. However, when the road's curves on both maps are aligned, the structure contours on both maps show apparently significant differences between the maps.

Finally, Bisko's opinion on structure ignores Nelen's testimony as to the flow of water in the Schrot pits to the southeast. If the pit water flows downhill to the southeast in the line of Schrot pits running from northwest to southeast, this confirms the opinion on the southeasterly structural dip of Schrot offered by McDonald's hydrogeologists and casts further doubt on Bisko's opinion on Schrot's structure. As stated by Mr. Eby, one of the hydrogeologists testifying for McDonald, if the Upper Kittanning structure on

---

8 McDonald's drilling in the Wiley site in conjunction with the application for the Schrot permit shows only two seams of coal on Wiley. (T-266 through 267)

Schrot dipped to the southwest as Bisko says, there should have been seeps along the face of Schrot's southwestern facing outslopes and there was no evidence of same. (T-696) The Schrot seeps were in the south and southeast. (T-696)

Bisko also says topography is an influence here. According to the surface topographic maps offered by DER and McDonald, at one point in the past the existing unnamed tributary was longer and flowing in a portion of the ravine which ran north from LR 17018 for a greater distance than currently exists. The tributary and ravine ran through the area east of the haul road which Benjamin, and not McDonald excavated for coal removal. It was Benjamin, not McDonald, which backfilled this area, too. After that backfilling, McDonald mined Schrot for Upper Kittanning coal but obviously did not conduct coal removal where Benjamin had already taken out the Upper Kittanning seam. Where Schrot and Wiley overlap, McDonald used that "overlap" area to support its coal extraction operation. McDonald stored spoil on the surface of a portion of this area, it parked equipment on a portion, drove across it to reach its pit area, built an erosion control facility on a piece of its surface and temporarily stored topsoil on part of it. When coal removal ceased, the equipment left, the spoil went back into the Schrot pits, the topsoil was respread and the erosion control facility was removed (the east/west haul road to the Schrot pits, perpendicular to the road to Freeman Wiley's trailer, remains). In grading the spoil storage area which lies north of D-1 on the northern edge of the area east of the haul road which Benjamin mined, McDonald graded out the remainder of the ravine in which the unnamed tributary flowed. There is no evidence offered to the Board that in this extreme northern end of the ravine there was any portion of the unnamed tributary, and at the time of this grading by McDonald a larger portion of the pre-existing ravine and a portion of the tributary had disappeared beneath

Benjamin's regrading of the area it mined east of the haul road. The area Benjamin mined, backfilled and regraded lies between the area subsequently graded by McDonald and the existing remainder of the unnamed tributary. McDonald's regrading did, however, cover the downstream end of a culvert pipe near Freeman Wiley's garage in which there was some flow of water (the source, quality, and quantity of which is not in evidence).

Other than the filling of a portion of the northern portion of this ravine by Benjamin and the grading at its northern extreme by McDonald, the area's post-mining topography has changed little. West of the haul road in the area mined and reclaimed by Benjamin, the land rises sharply and, after rising, flattens on top with a gentle dip toward LR 17018. The haul road toward Freeman Wiley's trailer runs uphill from LR 17018 at a decreasing steepness as one moves away from LR 17018. In the portion of area east of the haul road the mined land in the north which is nearest Wiley's trailer is almost flat, but as one moves south, it picks up a gentle grade to the south. The area north of the unnamed tributary is essentially flat on its east to west line. The area of coal removal by McDonald on Schrot is relatively flat on top but it slopes downhill on its eastern, southern (toward LR 17018) and western boundaries (toward the unnamed tributary). McDonald mined around the three sides of this flat area's perimeter. At the Schrot area east of the unnamed tributary, Schrot slopes more steeply downhill to a small woods which separates it from the tributary. A woods also separates the southern side of the area McDonald mined from LR 17018. It appears that the steep slope of the area west of the haul road for which Benjamin is solely responsible and the tributary and ravine area north of the haul road (which is steep sloped down to the tributary from the mined area), again for which Benjamin is responsible in terms of mining and backfilling, would drain water toward D-1 and MP-2. The Schrot coal removal area clearly has drainage following the surface

topography toward MP-2, but it is through the woods rather than to the west and then turning south.

As to jointing, the parties agree that there are fractures on these sites which run in common directions on both sites. The fracture directions are shown on Exhibit D-4. It is also obvious the hydrogeologists agree such fractures permit the vertical transmission of subsurface waters. The major fracture traces run northeast to southwest and northwest to southeast. There is also a fracture trace running north/northeast to south/southwest, which places it on almost a direct line between D-1 and Wiley's trailer, as shown on D-4. The fracture lines drawn by Bisko on D-4 therefore indicate that if water follows them, it could come to D-1 from Wiley or Schrot or both.

Bisko opines the water at D-1 comes from Schrot because topography and fractures control groundwater here. We have addressed topography above and Bisko admits, however, a portion of D-1 comes from Wiley. Eby and Lindahl disagree and say groundwater does not come from Schrot because structure and topography control, sending Schrot's groundwater elsewhere while sending Wiley's water to D-1. Clearly Wiley contributes water to D-1 naturally and Benjamin's shooting a Wiley pit floor northwest of D-1 interconnects at least a portion of the Upper Kittanning seam's water on Wiley with lower strata (potentially the Middle Kittanning seam), just as Benjamin's building of the hidden trench connects water on Wiley's Middle Kittanning seam excavation to D-1.

The Upper Kittanning seam on Schrot is underlain with a plastic clay according to the evidence presented. While Bisko does not agree the clay is plastic and admits inexperience with clay, he admits a plastic clay may act as an aquitard and joints or fractures may not influence groundwater movement to lower strata as much when a plastic clay is present as if it is not present. Moreover, there is visual evidence of southeastern groundwater

movement on Schrot from Mr. Nelen who testified about the water flowing horizontally across the pit floor (the clay) rather than moving vertically through fractures in the floors of the individual Schrot pits.

Bisko also testified concerning conditions at the Schrot site when he was first present there in 1988. He recounted his observation of non-compliance with the special handling plan. On that day boney or binder and black shales had been pushed out over the low wall of McDonald's pit. DER's own inspector testified that not only was this promptly corrected but also that this "violation" of the special handling plan occurred in the first place only on a temporary basis and only because McDonald had no pit ready to accept this toxic material for backfilling in accordance with the plan to specially handle it in a way which minimizes its acid-forming potential. Further, DER Inspector Schrader never cited McDonald for violation of the permit requirement dealing with special handling.[9] From such a lack of citations we cannot infer non-compliance therewith but must believe if there was non-compliance Schrader would have either cited McDonald for it or at least mentioned it in his inspection reports. In passing, as to the Wiley site, we note that there was no special handling plan for this site's acid-producing spoil. Bisko opined that since the spoil associated with the Freeport seams, which are above the Upper Kittanning seam, is alkaline, Wiley would have low potential to produce acidity. However, this assumes these seams were mined on Wiley, and the Wiley drill logs do not show them to be in existence. Even if they existed (and the drill logs are incorrect), they would exist in the high elevation areas west of the haul road, not in the area

---

9 Here, McDonald's acid producing spoil would not be put on the pit floor or mixed with the remaining overburden but would only be placed back in the pit at an elevation well above any groundwater on the pit floor and then limed for further protection before the pit was fully backfilled graded, topsoiled and replanted.

east of the haul road and north of D-1 which was mined by Benjamin and which is of the same general elevation as the area mined by McDonald. Thus acid-producing spoil mined by McDonald in areas east of the haul road appears to have been handled on Schrot and Wiley as required by the respective permits, but such handling on Wiley would have allowed that spoil to be mixed into the other spoil and thus to increase the potential for acid production on Wiley.

Next we turn to Bisko's "area affected" concerns as to the hydrologic link. It appears that Bisko's conclusions are based on the idea that the haul road is a *de facto* dividing line between Schrot and Wiley. He twice testified that in his opinion Benjamin stayed west of that road with its coal removal activities even though he was never on Wiley when it was active. This was not so, as Benjamin's own former employees testified. Benjamin mined the areas north of D-1 to the considerable extent shown by the drawing placed by the witnesses on the photographs of the site taken by Bisko from a helicopter and entered as DER Exhibits D-5(a) and D-5(c). Even if groundwater could move from the portion of the Schrot site on which McDonald conducted coal removal and backfilling, it would have had to flow through Benjamin backfill or across the Benjamin pit floor to reach D-1 because this area lies between Schrot and D-1. This being true, any such water leaving McDonald's site heading for D-1 could be clean when it left the site but contaminated when it reached D-1 through no fault of McDonald. Further, other than Bisko's testimony, we have no evidence this did not occur and ample testimony from others that it would not occur or that it would not be contaminated while at the Schrot pits if it did occur.

Finally, DER, through Bisko, asserts the timing of the contamination shows McDonald is responsible therefor. DER says the D-1 discharge has turned very bad since 1988, but was not bad in the intervening period occurring prior

to McDonald's mining operation but after Benjamin reclaimed Wiley. From the limited pre-1988 data offered, it is clear that the quality of this discharge has gone downhill markedly in the last ten years. Sample analysis data on the quality of D-1 is reflected on Exhibits D-7 and M-9.[10] The D-1 water quality data begins in 1981. There is no sample data for the period prior to Benjamin's activation of the Wiley site in January of 1978 or for the period from 1978 through 1981 during which Benjamin was active on Wiley. However, in 1981, the pH of D-1 was 3.70 in the field and 3.9 as analyzed in the DER laboratory, whereas the pH should be between 6.0 and 9.0. In addition, sulfates were high but alkalinity exceeded acidity, aluminum was .2 milligrams per liter ("mg/l") and manganese was 7.00 mg/l. Thus D-1 was not good quality water even then.[11] Data for 1981, 1986 and 1988 shows swings in pH, acidity, alkalinity, manganese, aluminum and sulfates. Each parameter has been both good and bad, but in 1991 is consistently bad. pH is low, as is alkalinity, whereas acidity, aluminum, manganese and sulfates are all high.

One explanation offered by McDonald as to this discharge concerns a lime trench installed by Benjamin to treat a discharge from Wiley. In what appears at best to be an irregular procedure, Schrader, a former strip miner himself, observed an acid discharge from Wiley and spoke to Benjamin's staff about it. He told Benjamin it could dig a trench, fill it with lime and let the flow pass through it for treatment. Schrader did not cite Benjamin for the discharge but instead approved a bond release for Benjamin despite the discharge's existence. At the hearings, two McDonald witnesses testified that Schrader told them that the trench was across the haul road from D-1 and

---

10 The first sample result on M-9 may not be from D-1 but the evidence is not clear.

11 Note the exhibits show no samples in the years 1982, 1983, 1984, 1985, or 1987, so water quality trends are less than clear in the period of 1981 through 1988.

was thus treating D-1. Schrader testified this was not the trench's location and that the trench was located near Seep D. Curiously, however, when pressed on cross-examination as to what he told McDonald's employees as to the trench's location, he failed to deny that he told them it was at D-1 and ndicated that it was possible that he said the trench was at D-1. McDonald contends one explanation for the quality of the D-1 discharge is that the trench is at D-1 but its limestone's ability to neutralize has been worn out.

We do not need to decide this issue of trench location, however. Bisko admitted that he has no knowledge of how fast water travels through the materials on the Schrot and Wiley sites (T-396) and that not all groundwater moves at the same speed. (T-397) He also agreed that while in his opinion one can tie groundwater quality changes to particular events, it could be speculative to do so to a specific date (event). (T-398) With this testimony and the lack of adequate sample data, we do not find the timing issue to be dispositive. Even if we were inclined to give it more weight, it is obvious Bisko could not support such an inclination. On cross-examination Bisko was asked in this same vein if a possible explanation of the deteriorated water quality at D-1 here was that the trench was worn out, and the following exchange occurred:

> Q Isn't that a possible explanation?
>
> A That the alkaline trench has worn out?
>
> Q Yes.
>
> A That's one explanation and then another explanation is that there is additional acid mine drainage that is capable of not being treated by the alkaline trench.
>
> Q So that we can have the explanation that either the alkaline trench wore out or that the volume of water involved is too great for the alkaline trench, right?
>
> A Those are two and also that the chemistry of the water has gotten worse.
>
> JUDGE EHMANN: Or even a combination of the three.

MR. BELIN: Or a combination of all three.

MR. BISKO: Yes.

(T-390)

Much time was spent by both sides in addressing the propriety of DER deciding to issue the first Compliance Order to McDonald involving D-1 and then, but only then, assigning a DER hydrogeologist to find the hydrologic link between McDonald's site and this off-site discharge. In his testimony in this case it is clear that Mr. Bisko was uncomfortable with DER's procedure and even agreed that it was the wrong procedure for DER to utilize. This methodology appears to be the reason a less than scientific approach was utilized by DER's hydrogeologist who admitted that his job was to find the link. His above-quoted testimony convinces us that there may be reasonable non-link explanations for D-1's quality, too.

We defined burden of proof above in Midway Sewerage Authority, *supra*. In A. H. Grove & Sons, Inc. v. Commonwealth, DER, 70 Pa. Cmwlth. 34, 452 A.2d 586 (1982), a Board decision finding a landowner responsible for off-site contamination was attacked as unsupported by substantial evidence in the hearing record. In an affirmance of the Board by Commonwealth Court, Judge Doyle stated the test is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". Id. at 38, 452 A.2d at 588. The DER evidence in the record fails to rise to the level that a reasonable mind would agree to the existence of a link between D-1 and McDonald. Its evidence does not so preponderate in favor of this link as to exclude any equally

well-supported belief in an inconsistent proposition, even in Mr. Bisko's expert opinion. Accordingly, we make the conclusions of law set forth below and enter the following Order.[12]

CONCLUSIONS OF LAW

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

2. Since this appeal arises from the issuance of administrative orders by DER, under 25 Pa. Code §21.101(b)(3) DER bears the burden of proof.

3. To prevail, DER must show by a preponderance of the evidence that its orders are lawful and a sound exercise of its discretion. Kerry Coal Company, *supra*.

4. Where a discharge of acid mine drainage from the site of a permitted mine exists, the miner is liable therefor regardless of fault. Thompson & Phillips Clay Company, *supra*.

5. A miner may be held responsible for a discharge of mine drainage even when there are others who are jointly responsible therefor. DER v. Lawrence Coal Company, *supra*.

6. Miners are liable for discharges of acid mine drainage occurring beyond the perimeter of their mine sites provided there is a hydrologic link between the pollutional discharge and the mine site. PBS Coals, *supra*.

---

[12] In coming to this result, we do not reach the issue raised by McDonald's Post-Hearing Brief as to the quality of the expert testimony rendered on behalf of DER and whether it relies on evidence beyond that in the record. Had we done so, it appears Bisko may have relied on evidence beyond that in the record. McDonald is correct that it was difficult to pin Mr. Bisko down on the facts of record on which he relied. Indeed, at times the cross-examination of Mr. Bisko on his evidence did seem to be a debate on his position, rather than the normal question and answer scenario, as suggested by counsel for McDonald. (ST-461) We hope Mr. Bisko's conduct on the stand, about which the Board cautioned him on several occasions, stemmed from his newness to the field of forensic hydrogeology rather than having any other cause.

7. For a miner to be responsible for an off-site discharge the hydrologic link between the mine site and the discharge which DER must show must be a link which conveys acid mine drainage, not merely groundwater, from the mine site to the discharge point.

8. To meet its burden of proof DER must show the merit of its factual contentions by a fair preponderance of the evidence. Midway Sewerage Authority, *supra*.

9. DER failed to meet its burden of proof.

ORDER

AND NOW, this 18th day of December, 1991, it is ordered that the consolidated appeals of McDonald at Docket No. 90-464-E are sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

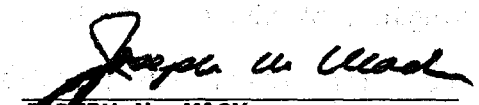
ROBERT D. MYERS
Administrative Law Judge
Member

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: December 18, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Western Region
For Appellant:
Carl A. Belin, Jr., Esq.
Clearfield, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SM
SECRETARY TO THE

MUSTANG COAL & CONTRACTING CORPORATION	:	
v.	:	**EHB Docket no. 89-494-MJ**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 19, 1991

OPINION AND ORDER SUR
PETITION FOR RECONSIDERATION

By Joseph N. Mack, Member

Synopsis

A request for reconsideration of the adjudication of this matter is denied where the appellant has failed to present compelling and persuasive reasons, as required by 25 Pa.Code §21.122(a).

OPINION

On October 24, 1991, the Board issued an adjudication dismissing the appeal of Mustang Coal and Contracting Corporation ("Mustang") docketed at EHB Docket No. 89-494-MJ, thereby sustaining the Department of Environmental Resources' ("DER") assessment of a civil penalty against Mustang for conducting mining activities beyond the bonded, permitted area of a surface mine.

Mustang timely filed a petition for reconsideration of the adjudication on November 12, 1991. DER filed a Memorandum in Opposition to the petition on November 19, 1991, asserting

that Mustang's petition did not satisfy the Board's criteria for granting reconsideration.

The Board's rules at 25 Pa.Code §21.122(a) provide that reconsideration may be granted "only for compelling and persuasive reasons" and will generally be limited to the following instances:

> 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.

J. C. Brush v. DER and Rampside Collieries, EHB Docket No. 87-492-MJ (Opinion and Order Sur Petition for Reconsideration, February 21, 1991)

In its petition, Mustang has set forth two reasons for reconsideration. First it challenges the accuracy of the survey performed by DER's expert witness, Roland Harper. Secondly, it seeks to present a survey prepared by Hess & Fisher Engineers. We find neither of Mustang's arguments to be persuasive or compelling and address each individually.

Mustang first challenges the accuracy of a survey performed by Roland Harper, a mining engineering technician with the federal Office of Surface Mining ("OSM"). From his survey, Mr. Harper was able to prepare a drawing of a map of the area including and surrounding Mustang's permit site, as well as a mylar overlay of the drawing. When placed on an operations map

of Mustang's permit site, the overlay showed that mining had progressed beyond the permit boundaries. The operations map and the drawing and overlay generated by Mr. Harper were introduced by DER at the hearing as Exhibits C-1, C-11, and C-12.

Mustang first takes issue with Mr. Harper's definition of "closing a survey" and states that it differs from the definition contained in Construction Survey and Layout, Paul Stull (Published Craftsman Book Co., 1987). Clearly, Mustang could have challenged Mr. Harper on this matter during cross-examination at the hearing, yet it did not do so. Nor was this raised in Mustang's post-hearing brief. Because Mustang clearly could have raised this issue at hearing and in its post-hearing brief but did not do so, it is not grounds for reopening this adjudication. See T. C. Inman, Inc. v. DER, 1988 EHB 707.

Mustang also asserts in its petition that, if allowed to reopen this proceeding, it will subpoena Mr. Harper's field log and notebook and show the deficiencies therein. Mustang clearly had the opportunity to subpoena these documents prior to the hearing had it wanted to rely on them as evidence. Where evidence which allegedly justified the relief sought was previously available and could have been introduced at hearing, reconsideration may not be granted. 25 Pa.Code §21.122(a)(2); Elmer R. Baumgardner v. DER, 1989 EHB 172.

Finally, Mustang states that it will introduce a copy of a survey map done by Hess & Fisher Engineers to show that mining did not progress off the permit site. Again, Mustang clearly had the opportunity to introduce this survey at the hearing. In

fact, although Mustang made several references to the Hess & Fisher survey in its post-hearing brief, it never even sought to offer the survey map as an exhibit at hearing. As noted above, where evidence was previously available and could have been introduced at hearing, it may not form the basis for reconsideration. Baumgardner, supra.

If Mustang determined that the aforesaid evidence would assist in defending its appeal, it should have pursued these matters prior to and during the hearing on this matter. It is too late, at this stage of the proceeding, after the hearing has concluded and a final adjudication has been rendered, to attempt to rebut DER's case with evidence which was clearly available at the time of hearing. As noted in Baumgardner, we cannot permit a losing party to keep coming back with additional evidence in support of its case, thus preventing the Board from ever reaching a definite and final decision. 1989 EHB at 175-176.

Because the evidence which Mustang cites in support of its petition for reconsideration clearly could have been raised at the time of hearing, its petition must be denied.

O R D E R

AND NOW, this 19th day of December , 1991, it is ordered that Mustang's petition for reconsideration 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: December 19, 1991

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
Kurt J. Weist, Esq.
Central Region
For Appellant:
Peter R. Swistock, Jr.,
President, Mustang Coal
and Contracting Corp.
Houtzdale, PA

ar

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

MONTGOMERY COUNTY	:	
	:	
v.	:	**EHB Docket No. 91-053-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	
BERKS COUNTY,	:	
WHEELABRATOR POTTSTOWN, INC., Intervenor,	:	
BROWNING-FERRIS, INC., Intervenor	:	**Issued: December 19, 1991**

OPINION AND ORDER
SUR BROWNING-FERRIS, INC.'s
MOTION TO DISMISS

By Richard S. Ehmann, Member

Synopsis

The Board denies Browning-Ferris, Inc.'s ("BFI's") Motion to Dismiss this appeal. Appellant Montgomery County is appealing the Department of Environmental Resources' ("DER") approval of Berks County's Municipal Waste Management Plan because that Plan provides for a portion of Berks County's municipal waste to be sent for processing and disposal to a proposed resource recovery facility to be constructed by Wheelabrator Pottstown, Inc. ("WPI") in Montgomery County, which is allegedly inconsistent with Montgomery County's own Municipal Waste Management Plan. The Commonwealth Court in Stapleton v. Berks County, ___ Pa. Cmwlth. ___, 593 A.2d 1323 (1991), declared the process by which Berks County awarded a contract to WPI's facility to be void and

enjoined Berks County from executing or performing on that contract but the effect of Stapleton on the designation of resource recovery of Berks' waste at WPI's facility in Berks' Plan is unclear at this point. Viewed most favorably toward the non-moving party here, this appeal does not seek an advisory opinion, but rather is ripe for adjudication and is not moot. Moreover, it appears that Montgomery has standing to maintain this appeal at the present time.

OPINION

On February 8, 1991, Montgomery County ("Montgomery") filed an appeal with this Board from DER's January 9, 1991 approval of the Berks County Municipal Waste Management Plan ("Berks' Plan") pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.* ("Act 101"). Montgomery's appeal claims that on November 20, 1990, DER approved Montgomery's municipal waste management plan ("Montgomery Plan"), for which use of a resource recovery facility proposed to be constructed and operated by WPI in Montgomery ("WPI facility") is under consideration. The appeal asserts that Berks' Plan is contrary to the Montgomery Plan to the extent it provides for disposal of 500 tons per day of Berks' municipal waste at the WPI facility without qualifying that intention by providing that it is subject to Montgomery's decision regarding use of the WPI facility. Montgomery asserts that DER should have disapproved Berks' Plan as inconsistent with Montgomery's Plan or, alternatively, should have conditioned approval of Berks' Plan on Montgomery's decision on its use of WPI's facility pursuant to its approved plan. For

these reasons, Montgomery alleges that DER failed to discharge its duty under Act 101 and that DER's approval of Berks' Plan was an abuse of DER's discretion, was contrary to law, and was arbitrary and capricious.

BFI initially sought to intervene in this appeal, but we denied its Petition to Intervene by an Order dated May 7, 1991. Upon an appeal of our Order to the Commonwealth Court by BFI, the Court entered an Order reversing our denial of BFI's Petition. See Browning-Ferris, Inc. v. Commonwealth, DER, No. 1087 C.D. 1991 (Opinion issued October 23, 1991). WPI likewise sought to intervene, and we granted its unopposed Petition to Intervene by an Order issued May 31, 1991.

On August 16, 1991, Montgomery filed a Motion for Summary Judgment, to which BFI filed its response and a Motion to Dismiss the Appeal and supporting memorandum on November 27, 1991. We denied Montgomery's motion by an Opinion and Order issued December 3, 1991. Presently before the Board is BFI's Motion to Dismiss the Appeal.

We must view BFI's motion in the light most favorable to Montgomery, the non-moving party. William Fiore, d/b/a Municipal and Industrial Disposal Company v. DER, 1990 EHB 1628. For purposes of ruling on this motion, it is undisputed that upon an appeal by a Berks County taxpayer, John J. Stapleton, the Commonwealth Court, reversing the Common Pleas Court of Montgomery County, held the selection process under which WPI was awarded the contract with Berks for use of WPI's facility was invalid, and the Court annulled the contract and enjoined Berks from executing or performing on it. See Stapleton v. Berks County, ___ Pa. Cmwlth. ___, 593 A.2d 1323 (1991). It is further undisputed that a joint petition for allowance of appeal of the Stapleton decision is pending before the Pennsylvania Supreme Court. The effect of Stapleton on the

designation of WPI's facility in Berks' Plan is disputed, with BFI apparently taking the position that the designation no longer exists and Montgomery contending that it is unaffected by Stapleton.

In its Motion to Dismiss, BFI requests us to dismiss Montgomery's appeal without prejudice, subject to reinstatement if Stapleton is reversed by the Supreme Court, if Berks enters into a new contract with WPI for use of its facility, or if Berks enters a contract with another resource recovery facility located in Montgomery. The first reason advanced by BFI's Motion in support of the relief it is requesting is Montgomery's request for adjudication of the validity of any such contract is not ripe at this time. BFI accordingly urges Montgomery is requesting an advisory opinion on the question of whether a county's municipal waste management plan can flow control waste to another county when such flow control potentially interferes with that other county's own plan. BFI's memorandum in support of its motion contends that if the Stapleton decision is not disturbed on appeal and the Berks-WPI contract remains invalidated, Montgomery's claim that Berks will dispose of the 500 tons per day at a resource recovery facility in Montgomery is speculative. BFI bases this assertion on the claim that Berks may again solicit bids on the resource recovery portion of its Plan, this time either again selecting WPI or another resource recovery facility, or Berks may negotiate an implementing contract, without soliciting bids, with either WPI or another resource recovery facility. BFI points out that the new resource recovery facility selected by Berks may not be located in Montgomery. BFI also argues that Berks may choose to eliminate the concept of resource recovery from its Plan.

In response, Montgomery states that its appeal is from DER's approval of Berks' Plan, which still designates Berks' waste to be sent to WPI's facility, and that it is not seeking a ruling on the implementation of Berks' Plan. Further, Montgomery maintains its appeal presents a ripe question for the Board's consideration, citing Paratransit Association of Delaware Valley, Inc. v. Yerusalim, 114 Pa. Cmwlth. 279, 538 A.2d 651 (1988). Montgomery also urges that its appeal was filed within the mandatory thirty-day appeal period under 25 Pa. Code §21.52(a) following DER's approval of Berks' Plan, and that it could not have awaited implementation of Berks' Plan before filing its appeal.

As we pointed out in our December 3, 1991 Opinion and Order Sur Montgomery County's Motion For Summary Judgment in this matter, it is DER's approval of Berks' Plan which is before this Board and not the validity of Berks' contract for the Plan's implementation. We agree with Montgomery that its appeal is not premature as BFI asserts. It is not disputed that DER has approved Berks' Plan. See Stapleton, supra, and 21 Pennsylvania Bulletin 386 (1991). Montgomery had only thirty days following publication of DER's action in the Pennsylvania Bulletin in which to file its appeal. Paradise Township Citizens Committee, Inc., et al. v. DER et al., EHB Docket No. 91-152-W (Opinion issued October 2, 1991). While the Board cannot render a declaratory judgment or give an advisory opinion, Giorgio Foods, Inc. v. DER, 1989 EHB 331, unlike the appeal in Giorgio Foods, the present appeal directly relates to DER's approval of Berks' Plan and is ripe for adjudication. The fact that Berks has yet to enter into a valid contract to implement the designation of resource recovery in its Plan does not necessarily mean that we will be rendering an advisory opinion if we examine the issue of DER's

approval of Berks' Plan. Appeals are often properly before this Board from DER's approval of plans or permits which have not yet been implemented. Further, by analogy only, the Commonwealth Court in Paratransit, supra, has recognized that a plan which is clearly set forth need not have been implemented in order for an actual controversy to exist.[1]

In a related argument, BFI's motion asserts that in view of the Stapleton decision's invalidation of the Berks-WPI contract, Montgomery's allegation that the contract interferes with its development of a solid waste management program is moot.

Montgomery responds by arguing that its appeal concerns the designation of WPI's facility in the Berks' Plan and that until this designation is removed from the plan, its appeal is not moot. Additionally, Montgomery contends that Stapleton may be reversed by the Supreme Court, and it also points out that BFI's memorandum recognizes that Berks might re-bid the resource recovery component of its Plan and again enter a contract with WPI without amending its Plan.

An issue is moot where there is no longer a live controversy. Paradise Watch Dogs v. DER, et al., 1988 EHB 1138. We will dismiss an appeal as moot if, during its pendency, an event occurs which deprives us of our ability to afford relief to the appellant. Giorgio Foods, supra. As Montgomery correctly points out, in the Stapleton decision the Commonwealth Court ruled on the propriety of the bidding process used by Berks in selecting WPI's facility and, finding that process to have been improper,

---

[1]We acknowledge that Paratransit, supra, involved a petition seeking a declaratory judgment and a permanent injunction brought in the Commonwealth Court's original jurisdiction. We do not wish our citation of this case to be construed as indicating we are empowered to render declaratory relief.

annulled the Berks-WPI contract and enjoined Berks from executing or performing on it. The Court did not examine the matter of whether the designation of WPI's facility remains in Berks' Plan and it is not clear at this point in this litigation that this designation is necessarily no longer part of Berks' Plan as a result of the Stapleton decision. Certainly the possibility exists that Berks may rebid the resource recovery contract and again award it to WPI without amending the Plan's designation of WPI's facility, as is asserted by Montgomery. Since we must view this motion in the light most favorable to Montgomery, we cannot say at this point that Stapleton has deprived this Board of the ability to provide Montgomery County relief from DER's approval of Berks' Plan.

Finally, BFI's motion contends Montgomery lacks standing to bring this appeal since the only aspect of Berks' Plan which Montgomery is challenging is its use of WPI's facility in Montgomery and Berks no longer has an enforceable contract for the disposal of its municipal waste in Montgomery.

Citing Franklin Township v. Commonwealth, DER, 500 Pa. 1, 452 A.2d 718 (1982), Montgomery claims to have a direct, substantial, and immediate interest in this matter because Berks' Plan designates Berks waste to be sent to Montgomery County for treatment and disposal. The harm alleged by Montgomery's Notice of Appeal is DER's approval of Berks' Plan which contains the designation of WPI's facility. While Montgomery concedes that Berks cannot presently use the proposed WPI facility because of the illegal selection process, it argues that until that designation is changed, Berks may use the designation of this facility in its Plan to support another contract award to WPI.

Montgomery's standing to appeal depends on whether Montgomery has a direct and substantial interest which has an immediate causal connection to the challenged action. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). In Wirth v. DER, 1990 EHB 1643, we explained what is meant by the William Penn requirements. We said:

> A substantial interest is defined as one in which there is "some discernible adverse effect, some interest other than the abstract interest of all citizens in having others comply with the law. William Penn, [464 Pa. 168, 195, 346 A.2d 269, 282 (1975)]. "Direct" means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains. *Id.* "Immediate" means something other than a remote consequence of the judgment, focusing on and in the nature of and proximity of the action and injury to the person challenging it. *Id.* at 197, 346 A.2d at 283.

Id. at 1645. At this point in this litigation, viewing BFI's standing argument in the light most favorable to Montgomery, the effect of Stapleton on the designation of WPI's facility in Berks' Plan is unclear. If the designation remains, Montgomery's interest in whether DER approves Berks' Plan designating disposal and treatment of Berks' waste at a resource recovery facility in Montgomery appears to be sufficient to meet the requirements of William Penn. Accordingly, we cannot grant BFI's motion on this basis, either.

O R D E R

AND NOW, this 19th day of December, 1991, it is ordered that Browning-Ferris, Inc.'s Motion to Dismiss Montgomery County's appeal of DER's approval of Berks County's Municipal Waste Management Plan is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 19, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Thomas Y. Au, Esq.
David J. Gromelski, Esq.
Office of Chief Counsel
For Appellant:
Bruce W. Kauffman, Esq.
John F. Smith, Esq.
Sheryl L. Auerbach, Esq.
J. Bradford McIlvain, Esq.
Philadelphia, PA
For Berks County:
Lee E. Ullman, Esq.
Jeffrey L. Schmehl, Esq.
Reading, PA
For Intervenor Wheelabrator Pottstown, Inc.:
Louis B. Kupperman, Esq.
Philadelphia, PA
For Intervenor Browning-Ferris, Inc.:
Jan Z. Krasnowiecki, Esq.
Steven A. Reed, Esq.
Philadelphia, PA

rm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

MONTGOMERY COUNTY	:	
	:	
v.	:	**EHB Docket No. 91-053-E**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
BERKS COUNTY, BROWNING-FERRIS, INC.,	:	
Intervenor, and	:	**Issued: December 23, 1991**
WHEELABRATOR POTTSTOWN, INC., Intervenor	:	

OPINION AND ORDER
SUR MOTION OF MONTGOMERY COUNTY
TO STRIKE BROWNING-FERRIS, INC. DISCOVERY

By: Richard S. Ehmann, Member

Synopsis

Appellant's Motion To Strike all discovery sought by an intervenor shortly after intervention is ordered, is denied. Such a motion seeks extraordinary relief from this Board and will not be granted when based upon allegation that an intervener is required to show its discovery is necessary and proper prior to engaging in same but has failed to do so or the intervenor is required to limit discovery solely to issues raised in the Petition To Intervene and has failed to do so. When a motion seeking to strike all discovery is based upon allegations that the information sought is irrelevant or not calculated to lead to discovery of admissible evidence, it must be denied as long as a portion of the information sought is relevant or is calculated to lead to admissible evidence. The motion must also be denied

where it is based on allegations that discovery by intervenor before this Board may violate an Order of the United States District Court, since it is up to that Court, rather than this Board to enforce its Orders.

OPINION

In the above captioned appeal, where the parties through their counsel begin to appear to be more interested in skirmishing on preliminary matters than addressing the substance of merits of this appeal, we now must write an Opinion and Order addressing Montgomery County's ("Montgomery") Cross Motion To Strike Browning-Ferris, Inc. Discovery. This Cross Motion is part of a document filed on Montgomery's behalf which also replied to Browning-Ferris Inc.'s ("BFI") Motion For Expedited Response To Discovery And For Extension Of Period Of Time To File Pre-Hearing Memorandum. BFI's Motion was granted by our Order of December 12, 1991. To "assist" the Board in passing on the merits of Montgomery's Cross Motion, Montgomery and BFI have filed the Motion, BFI's Answer thereto and Montgomery's Reply to BFI's Answer. The other parties to this appeal have demonstrated a wise shepherding of their respective resources by refusing to become involved in this tactical skirmish.

In ruling on the merits of this motion we depart from our normal custom of providing some of the background of the case before turning to the instant Motion's merits. We do this because all of our prior opinions in this appeal make such an effort redundant. Those readers seeking such information can find it in our Opinions of March 20, 1991; April 12, 1991; June 6, 1991; August 2, 1991; December 3, 1991 and December 19, 1991.[1]

---

[1]See also the Commonwealth Court's Opinion in Browning-Ferris, Inc. v. Department of Environmental Resources, No. 1087 C.D. 1991 (Opinion issued October 23, 1991)

Montgomery's Motion does not seek to limit BFI's discovery or to bar certain lines of discovery on the ground those lines of discovery are improper. Had such a procedure been utilized, Montgomery might have enjoyed some success therein, particularly with regard to the discovery sought by BFI as to a "resource recovery facility operating in Plymouth Township, Montgomery County." Instead, Montgomery's Motion asks this Board to order that BFI's discovery addressed to Montgomery is struck "and to advise BFI -- which has not noticed any depositions in a timely fashion -- that it is too late to start deposing County representatives in this case."

BFI only became an intervening party in this proceeding when, on October 23, 1991, the Commonwealth Court ruled that the Board had erred in denying BFI's Petition To Intervene. Thereafter, this Board waited during the period in which an appeal could be filed from the Court's Order before allowing BFI any discovery in the instant proceeding. Immediately upon expiration of that period and by Order of November 26, 1991, this Board directed BFI to submit its discovery requests in the instant appeal by December 5, 1991. As is clear from this chronology, so little time has passed between the date on which BFI became a party and when it commenced discovery that Montgomery's Motion can easily be seen as seeking an extraordinary order from this Board.

In support of this request for an order barring all discovery by BFI, Montgomery asserts that BFI has failed to make any showing that discovery by it is necessary and proper, that BFI's discovery is not directed to information related solely to the issues raised in BFI's Petition To Intervene, that BFI's Interrogatories and Requests For Production Of Documents by Montgomery do not seek relevant information or information reasonably calculated to lead to discovery of admissible evidence, that BFI's requests

may violate the Court Order of October 1, 1990 entered by the Honorable Charles J. Weiner, Judge of the United States District Court for the Eastern District of Pennsylvania, and that Montgomery has already made the documents produced for the other parties in this appeal available for BFI to inspect.

Our rules on discovery do not mandate that where discovery is authorized to occur, a party must show the discovery it seeks to be both necessary and proper before it engages in same. The same is true of discovery under the Rules of Civil Procedure. Here, BFI was authorized to engage in discovery by our Order of November 26, 1991. With this authorization no other showing is required. BFI was not limited by that Order to discovery only in relation to the issues it raised in its Petition To Intervene. While the lateness of BFI's admission into this proceeding may work to limit its discovery, nothing in our Order limits its discovery as Montgomery urges in its Motion. Moreover, discovery is a two-edged sword. Because discovery can be used to obtain information concerning intervenor's issues or information on an opponent's contentions, it is not conceptually limited to BFI's intervention issues. Further, Montgomery seeks to bar all discovery based on claims of irrelevancy and BFI's alleged failure to seek information reasonably calculated to lead to discovery of admissible evidence. Since BFI asks to inspect all written communications between Montgomery and Berks County on solid waste management and propounds an interrogatory dealing with resource recovery as a solid waste disposal methodology in specific districts of Montgomery County, it is obvious that at least a portion of the discovery sought by BFI may lead to discovery of admissible evidence or seeks information relevant to the issues raised in Montgomery's appeal from DER's approval of the Berks County Plan pursuant 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 *et. seq.*, (which plan proposes use of a resource recovery facility within Montgomery). Hence an Order denying all BFI discovery is unwarranted.

Montgomery also suggests discovery should be barred because it may violate the aforementioned District Court Order. This argument implies Judge Weiner lacks the ability to render a decision on that issue or to enforce his order if he comes to a conclusion that it has been violated and, as a result, this Board should act in his stead to prevent the violation. Unfortunately, Montgomery's Motion fails to point to a single case or statute which might be read to vest this Board with such authority. We believe that Judge Weiner will act as is appropriate in the proceedings before him and is empowered to address non-compliance with his Orders. Moreover, he is clearly more attuned to the issues confronting him and the intent of his Order than we are or than we should be. Further "enforcement" of Judge Weiner's Order by an Order from this Board barring all BFI discovery in the instant appeal would be unwarranted intermeddling by this Board in that Federal proceeding. Accordingly, we decline to take action on Montgomery's Motion based upon this argument.

Finally, Montgomery asks the Board to enter an order barring all BFI discovery because it contends it has already produced for inspection by BFI, all of the documents previously discovered by the other parties. Of course, Montgomery need not produce these same documents for a second BFI inspection, but it is equally obvious that we cannot bar all BFI discovery on this basis, either.

Based upon the above, we enter the following order.

ORDER

AND NOW, this 23rd day of December, 1991, it is ordered that Montgomery's Cross Motion To Strike Browning-Ferris, Inc. Discovery is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 23, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Thomas Y. Au, Esq.
David J. Gromelski, Esq.
Office of Chief Counsel
For Appellant:
Bruce Kauffman, Esq.
John F. Smith, Esq.
Sheryl L. Auerbach, Esq.
J. Bradford McIlvain, Esq.
Philadelphia, PA
For Berks County:
Lee E. Ullman, Esq.
Jeffrey L. Schmehl, Esq.
Reading, PA
For Browning-Ferris, Inc., Intervenor:
Jan Z. Krasnowiecki, Esq.
Steven A. Reed, Esq.
Philadelphia, PA
For Wheelabrator Pottstown, Inc., Intervenor:
Louis B. Kupperman, Esq.
Philadelphia, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAI

CRONER, INC.	:	
	:	
v.	:	**EHB Docket No. 87-206-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 30, 1991**

OPINION AND ORDER
SUR
MOTION FOR RECONSIDERATION

By the Board

Synopsis

The Board grants reconsideration for the purpose of clarifying our Opinion and Order in this matter dated November 20, 1991, and, upon reconsideration, that Opinion is affirmed as clarified by this Opinion.

OPINION

On November 20, 1991, this Board issued an Opinion and Order Sur Cross Motions For Summary Judgment in this matter which granted Croner's motion and denied the Department of Environmental Resources' (DER's) motion. Subsequently, on December 10, 1991, DER filed a Motion For Reconsideration of our Opinion and Order. Croner then filed its response to DER's Motion For Reconsideration on December 20, 1991.

Our rules at 25 Pa. Code §21.122(a) set forth the circumstances in which reconsideration of a Board decision will be granted, but we have

previously granted reconsideration for the purpose of clarifying an opinion or adjudication. See JEK Construction Company, Inc. v. DER, 1990 EHB 716. Because we believe clarification of the grounds upon which our decision rested in the instant matter to be in order in view of the allegations made in DER's Motion, we grant reconsideration for the purpose of clarifying our Opinion and Order.

When we initially considered these cross motions, DER had filed an alternative Motion to Dismiss which we granted in an Opinion issued July 26, 1990. Our reason for dismissing Croner's appeal was our belief that we lacked jurisdiction to consider Croner's constitutional challenge to DER's regulation at 25 Pa. Code §87.127 and that jurisdiction over this question rested in another forum because this regulation was virtually identical to the corresponding federal regulation at 30 C.F.R. §816.67 and was promulgated by the Environmental Quality Board (EQB) to obtain primacy for the state over surface coal mining. We did not read Croner's Notice of Appeal as containing Croner's second argument and, therefore, we did not consider whether the requirements imposed in Croner's Blast Plan pursuant to 25 Pa. Code §87.127(e), (h), and (i) were based on a regulation which is illegal and unenforceable, violating the statutory right of dwelling owners to allow surface mining to take place within 300 feet of their occupied dwelling.

Upon appeal to the Commonwealth Court, the Court considered the issue of whether we have jurisdiction to consider Croner's constitutional challenge to 25 Pa. Code §87.127 and concluded that such jurisdiction properly rested with the Board. Croner, Inc. v. Commonwealth, DER, ___ Pa. Cmwlth. ___, 589 A.2d 1183 (1991). The Commonwealth Court further held that Croner's notice of appeal had raised in general terms the issue of whether 25 Pa. Code §87.127

is in accordance with the underlying statutory authority. Thus, the Court, in reversing our decision and noting that we have jurisdiction to consider the validity and constitutionality of regulations, remanded the matter, specifically directing us to consider both whether 25 Pa. Code §87.127 violates a statutory right set forth in §1396.4b(c) of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4b(c), and whether 25 Pa. Code §87.127 creates a class distinction with no reasonable basis.

On remand, we concluded that §87.127 went beyond DER's legislative authorization to promulgate regulations and we ordered subsections (e), (h), and (i) of 25 Pa. Code §87.127 invalidated to the extent they prohibit a waiver of their requirements by the owner of a structure who is not conducting surface mining. With this determination, we did not proceed to consider the constitutionality of the regulation.

In its Motion For Reconsideration, DER asserts that we erroneously deviated from our precedent of affording regulations a presumption of validity. Citing Uniontown Area School District v. Pennsylvania Human Relations Commission, 455 Pa. 52, 313 A.2d 156 (1973), DER urges that a promulgated regulation is valid and binding on us as a statute if it is: a) within the granted power, b) issued pursuant to proper procedure, and c) reasonable. It contends that by engaging in an analysis of the reasonableness of the regulation, we failed to confine our decision to the issue of whether the challenged regulation was authorized by SMCRA, and that by invalidating §87.127 as we did, we exceeded the scope of inquiry which the Commonwealth Court directed us to undertake. DER alternately claims that if we properly examined the reasonableness of the regulation, Commonwealth, DER v. Locust

Point Quarries, Inc., 483 Pa. 350, 396 A.2d 1205 (1979), placed a heavy burden on Croner to show that the regulation was an unnecessary exercise of the state's police power and that we erroneously placed that burden on DER.

In response, Croner's Brief in Opposition to DER's Motion contends that we appropriately reviewed whether §87.127 was statutorily authorized and, based on our determination that it was not, we properly did not engage in an analysis of whether the contested regulation was reasonable.

We believe that DER improperly construes the Commonwealth Court's order on remand. The Commonwealth Court only decided whether we had jurisdiction to entertain Croner's constitutional challenge to §87.127 and whether Croner's notice of appeal had sufficiently put before us Croner's challenge to the regulation as violative of statutory authority; it did not rule on any of the claims Croner had raised before this Board. Our ability to rule on those matters was not limited by the Commonwealth Court as DER contends. See McGine v. State Mutual Benefit Society, 135 Pa. Super. 35, 4 A.2d 537 (1939). Clearly, part of Croner's argument regarding the invalidity of §87.127 was its claim that the regulation was illegal and unenforceable. See Appellant's Brief in Response to Order Dated January 22, 1990. The Commonwealth Court's instructions to us on remand did not limit our review to merely determining whether the regulation was in accordance with the underlying statutory authority. In fact, to the contrary, the Court specifically acknowledged our jurisdiction to consider the validity of the regulation.

We recognize, however, that clarification of our opinion would be helpful in light of the language in this opinion concerning reasonableness of the challenged regulation.

DER's Motion correctly points out that we must employ different standards when reviewing the validity of regulations, depending upon whether the regulation is derived from the administrative agency's legislative or interpretative rule-making power. When an agency's rule-making power is based on a statutory grant expressly authorizing rule-making, it is legislative, whereas when the basis for the rule-making power is to be inferred from the agency's authority to administer, it is interpretative. Board of Education of Fairview School District v. Tomb, 40 Pa. Cmwlth. 458, 397 A.2d 1268 (1979); Girard School District v. Pittenger, 481 Pa. 91, 392 A.2d 261 (1978); Uniontown, supra. As DER's Motion asserts, a regulation adopted pursuant to an agency's legislative rule-making power is "valid and binding upon a court as a statute if it is a) within the granted power, b) issued pursuant to proper procedure, and c) reasonable." Girard School District, supra at ___, 392 A.2d at 262.

Although neither party's brief specified whether §87.127 had been promulgated pursuant to DER's legislative or interpretative rule-making power, Croner acknowledged that DER is authorized by the legislature to generally regulate surface mining operations, including blasting activities. It nevertheless contended that the EQB was without legislative authority to prohibit the dwelling owners' right to waive the prohibition on surface mining. DER, on the other hand, pointed to its broad rule-making power under 52 P.S. §1396.4b(a) and argued that the challenged regulation was within its legislative authority because it was necessary for the protection of the public.

Our previous Opinion examined the statutory authority upon which §87.127 was promulgated and stated that it was promulgated pursuant to SMCRA,

as well as several other statutes indicated in that Opinion. We acknowledged that 52 P.S. §1396.4b(b) of SMCRA provides that the use of explosives for the purpose of blasting in connection with surface mining shall be done in accordance with regulations promulgated by and under the supervision of the secretary. We also recognized DER's broad rule-making powers under 52 P.S. §1396.4b(a) which provides in pertinent part:

> Except as otherwise provided hereunder, and subject to the provisions of section 4(a)(2)L. all surface mining operations coming within the provisions of this act shall be conducted in compliance with such reasonable rules and regulations as may be deemed necessary by the department for the fulfillment of the purposes, and provisions of this act, and other acts where applicable...for the health and safety of those persons engaged in the work and for the protection of the general public. (Footnote omitted.)

We concluded that 25 Pa. Code §87.127 is a legislative rule enacted pursuant to a specific grant of legislative policymaking power in §1396.4b(a) and §1396.4b(b) of SMCRA. Since the parties did not agree that the challenged regulation falls within that grant of power, we proceeded to examine that issue. Upon this examination, we determined that 25 Pa. Code §87.127(e), (h), and (i) are not within the grant of legislative power because the legislature has clearly provided in 52 P.S. §1396.4b(c) for all owners of occupied dwellings to waive the prohibition on surface mining, including blasting, to be conducted near their homes, and that this statutory waiver right is broad enough to encompass limitations on airblast and peak particle velocity within the 300-foot barrier area around the dwelling owners' structure. We further pointed out that §87.127(e), (h), and (i) exceeded DER's broad rule-making powers found in 52 P.S. §1396.4b(a), since regulations specifying which

persons may waive the prohibition on surface mining within the 300-foot barrier surrounding their dwellings do not provide for the health and safety of those persons engaged in the work of mining and do not serve to protect the general public, as DER alleged in its Brief filed on July 12, 1991. Based upon our conclusion that 25 Pa. Code §87.127(e), (h), and (i) was not within DER's legislative grant of rule-making power, there was no need for us to proceed to consider whether it was issued pursuant to proper procedure or whether it was reasonable, but rather we determined that the challenged portions of §87.127(e), (h), and (i) were invalid. See Chambers Development Company, Inc., 118 Pa. Cmwlth. 97, 545 A.2d 404 (1988).

The portions of our Opinion to which DER's Motion points as showing we engaged in an analysis of the reasonableness of regulation do not show that we in fact engaged in such an analysis. We merely mentioned the word "reasonable" in relation to our discussion of whether the challenged regulation fell within DER's granted legislative rule-making power under 52 P.S. §1396.4b(a). Finding that it did not, we could not have engaged in an analysis of whether an otherwise valid challenged regulation was reasonable. Accordingly, there is no merit to DER's assertion that we employed an improper standard in reviewing the reasonableness of the regulation. Additionally, we find no merit in DER's claim that we improperly placed the burden of proof, which belonged to Croner, on DER. The portions of our Opinion to which DER directs our attention did not place the burden of proof on DER, but rather are only part of our discussion of the evidence before us bearing upon whether the challenged regulation was beyond DER's rule-making power, as alleged by Croner, or within that power, as alleged by DER.

We have also considered DER's assertion that we failed to afford the challenged regulation a presumption of validity, but we do not find this argument to be a compelling and persuasive reason for modifying our decision. We did recognize that regulations promulgated pursuant to a grant of legislative power enjoy a presumption of validity. Northampton Bucks County Municipal Authority v. Commonwealth, DER, 521 Pa. 253, 555 A.2d 878 (1989). The Board decisions cited by DER in support of its argument, however, are each distinguishable from this appeal. In Sanner Brothers Coal Company v. DER, 1987 EHB 202, and Northampton, Bucks County Municipal Authority v. DER, 1986 EHB 638, we found the regulation involved to be within the legislative grant of rule-making power to DER, and in Coolspring Township et al. v. DER, 1983 EHB 151, the appellants were challenging the absence of regulations, rather than the validity of a regulation. We also do not find DER's assertion regarding the effect of invalidation of the challenged regulation on the Commonwealth's efforts to maintain primacy over its mining program to be a compelling and persuasive reason for us to modify our decision. Any alleged effect on the Commonwealth's ability to maintain primacy is irrelevant to our decision; if DER does not possess the power to adopt a regulation such as §87.127(e), (h), and (i), the necessity of having such a regulation to secure federal surface mining primacy will not confer that authority. We thus affirm our Order of November 20, 1991, as clarified by this Opinion and Order.

O R D E R

AND NOW, this 30th day of December, 1991, it is ordered that upon reconsideration of our Opinion and Order dated November 20, 1991 in this matter, that Opinion and Order is affirmed as clarified herein.

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

A concurring Opinion by Board Member Richard S. Ehmann is attached.

DATED: December 30, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
L. Jane Charlton, Esq.
Western Region
For Appellant:
Matthew Melvin, Esq.
Somerset, PA

rm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

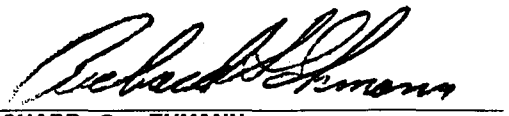
CRONER, INC.	:	
	:	
v.	:	**EHB Docket No. 87-206-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 30, 1991**

CONCURRING OPINION

By Richard S. Ehmann, Member

While I continue to disagree with my colleagues concerning the reasoning in the decision now challenged by the instant Petition For Reconsideration, I concur in full with the foregoing Opinion's rejection of this Petition.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 30, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
L. Jane Charlton, Esq.
Western Region
For Appellant:
Matthew Melvin, Esq.
Somerset, PA

rm