Environmental Hearing Board

Adjudications and Opinions

2005

VOLUME II

COMMONWEALTH OF PENNSYLVANIA

Michael L. Krancer, Chairman

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OF THE

ENVIRONMENTAL HEARING BOARD

2005

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2005.

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DON NOLL AND STEPHANIE CLARK	:	
	:	
v.	:	**EHB Docket No. 2003-131-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SCOTT TOWNSHIP BOARD OF SUPERVISORS	:	**Issued: May 20, 2005**

ADJUDICATION

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board dismisses an appeal from the Department's approval of a sewage planning module. The Appellants failed to prove that the approved plan was infeasible or that the public notice and participation process was inadequate.

BACKGROUND

This is an appeal challenging the April 24, 2003 approval by the Department of Environmental Protection (Department or DEP) of a 2002 revision to the official plan developed by Scott Township (Township) pursuant to the Pennsylvania Sewage Facilities Act (SFA).[1] Appellants, Don Noll and Stephanie Clark, both residents of the Township filed a Notice of Appeal (NOA) *pro se* challenging the April 24, 2003 action by the Department.[2]

The genesis of the current dispute regarding the Township's official sewage facilities

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

[2] Appellants filed this appeal on a *pro se* basis, hired counsel shortly before the trial of this appeal, were represented by counsel at the trial and subsequently notified the Board that they again were representing themselves and would proceed with post-trial briefing on a *pro se* basis.

plan originates with the approval of the Township's sewage facilities plan update revision on July 28, 1993 (1993 Plan). The centralized sewage collection and treatment system adopted by the Township in the 1993 Plan has spawned a number of appeals to this Board and was described as epochal in a prior decision in this appeal. *See Noll v. DEP,* 2004 EHB 712 (Summary Judgment Opinion and Order). The history of the disputes and appeals regarding the Township's sewage facilities plan was described in detail in the Summary Judgment Opinion and Order and will not be stated with as much detail in this Adjudication. *Id.* at 712-17.

Briefly, after receiving approval of the 1993 Plan, the Township did not proceed with implementation of its approved plan, rather it informed the Department that implementation would be delayed while the Township assessed the costs of implementing the 1993 Plan against potential alternatives. In October 2002 Scott Township submitted to the Department an Act 537 Sewage Facilities Plan Update Revision (2002 Plan) which, in part, modified the area to be sewered under the 1993 Plan to include an additional area and proposed that the collected wastewater be conveyed to the Lackawana River Basin Sewer Authority Archbald Wastewater Treatment Plant for treatment.[3] On April 24, 2003 the Department approved the 2002 Plan. Appellants, Don Noll and Stephanie Clark (Appellants) filed this appeal on June 12, 2003.

Appellants' NOA included numerous challenges to the 1993 Plan. In the Summary Judgment Opinion and Order we granted summary judgment in favor of the Department and the Township with regard to those portions of the NOA that sought to revisit the 1993 Plan or the 1989 Needs Analysis which was a component of the 1993 Plan. 2004 EHB at 723. Appellants also were precluded from challenging the costs associated with the selection of central sewerage

[3] The 1993 Plan proposed that collected wastewater be conveyed to and treated at a sewage treatment facility to be constructed within the Township.

embodied in the 1993 Plan. *Id.*[4] However, Appellants were permitted to continue their appeal with regard to objections concerning certain costs issues related to the changes to the official plan adopted in the 2002 Plan.

Chief Judge Michael L. Krancer presided over the trial of this matter, which was conducted on October 26, 27 and 29, 2004 in the Board's courtroom located in Norristown, Montgomery County. On December 15, 2004 Appellants filed a Petition to Reopen Record Prior to Adjudication (Petition). The Department filed a response and accompanying memorandum of law opposing the Petition. The Board denied the Petition because Appellants failed to make the showing required under the Board's rule of procedure governing reopening of a record prior to adjudication, Rule 1021.133(b), 25 Pa. Code § 1021.133(b). *Noll v. DEP*, EHB Docket No. 2003-131-K (Opinion issued January 10, 2005). Filing of post-hearing briefs was completed on March 16, 2005 and the matter is now ripe for adjudication. After careful review of the record, the Board makes the following findings of fact:

FINDINGS OF FACT

The Parties and People

1. Appellee is the Department. The Department is the agency with the duty and authority to administer and enforce the SFA; The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001. (CSL); 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

---

[4] We held:

> As for administrative finality then, Appellants are precluded in this case from collaterally attacking the 1993 Plan or the 1989 Needs Analysis which was a component of the 1993 Plan. They, of course, are not barred from challenging the changes that were effectuated in the 2002 Plan Revision. As we understand it, that would include: (1) the increased or expanded sewer service area enacted by the 2002 Plan Revision; and (2) the decision in the 2002 Plan Revision that the collected wastewater be conveyed to the LRBSA Archbald WWTP for treatment instead of a treatment facility to be located within Scott Township.

2004 EHB at 723.

Code) and the rules and regulations promulgated thereunder. Joint Stipulation (Stip.) ¶ 1.

2. Appellee is the Scott Township Board of Supervisors. Scott Township is a legally incorporated township of the second class in the Commonwealth of Pennsylvania doing business at RR#1, Box 432D, Olyphant, Pennsylvania 18477. Stip. ¶ 2.

3. Appellant is Don Noll, *pro se.* Appellant has an address of 1520 Lakeland Boulevard, Jermyn, Pennsylvania 18433. Stip. ¶ 3.

4. Appellant is Stephanie Clark, *pro se.* Appellant has an address of 1193 Rushbrook Road, Jermyn, Pennsylvania 18433. Stip. ¶ 4.

5. KBA Engineering, p.c. (KBA Engineering or Township Engineer) serves as the Township Engineer for Scott Township and prepared the 2002 Plan for the Township. Tr. 203; Ex. A-2.

6. Dennis Kutch is a professional engineer employed by KBA Engineering who works with the Township on its sewage issues. Tr. 203.

7. George Hallesky is currently the Vice-Chairman of the Scott Township Sewer Authority (Sewer Authority). Prior to his appointment to the Sewer Authority in 2002 Mr. Hallesky was a member of the Township Board of Supervisors. Tr. 133-34.

8. Robert Vail is the Chairman of the Board of Supervisors for the Township having been elected to the Board in 2001 and taking the office in January 2002. Tr. 475-76.

9. Patrick Devitt is a sanitary engineer for the Department in the Wilkes-Barre office who reviewed the 2002 Plan. Tr. 597.

The 1993 Plan Adoption and Non-Implementation

10. On July 28, 1993, the Department approved Scott Township's Sewage Facilities Plan Update Revision (1993 Plan) to its Official Sewage Facilities Plan. The 1993 Plan proposes the construction of a sewage collection and conveyance system that would transmit wastewater to a

single sewage treatment plant to be constructed in the Township. Stip. ¶ 5.

11. The cost estimates in the 1993 Plan did not include the costs to individual property owners to install lateral pipes from the house to the right-of-way, reconfiguration, if any, of interior and exterior plumbing to connect to the system or to decommission existing on-lot systems (Private Costs). Tr. 437-448.

12. Scott Township chose to delay implementation of its adopted plan in order to evaluate the cost associated with potential alternative sewage treatment system configurations. Stip. ¶ 6.

13. There were ongoing communications between the Department and the Township regarding the Township's efforts to evaluate its sewage needs and sewage treatment alternatives. Tr. 897; Ex. A-7.

14. In the period of time after the Department approved the 1993 Plan until the 2002 Plan was submitted to the Department for approval, the Township Supervisors considered the issue of the Township's sewage treatment system needs for many years and discussed the issue at most meetings of the Board of Supervisors from 1996 until 2002. Tr. 168-69, 303-06, 499-500.

15. On March 18, 2002, the Department issued an administrative order to the Township and the Township Authority. The order required, among other things, the Township to submit a revised schedule of implementation for the approved 1993 Plan or submit for Department approval an Official Plan Revision to the 1993 Plan within 120 days. Stip. ¶ 7.

The 2002 Plan

16. On August 6, 2002 the Township had the following notice published in the *Scranton Times*:

> Scott Township, Lackawanna County, has prepared revisions to the Act 537 Official Sewage Facilities Plan. The amended plan will be submitted to the Pennsylvania Department of Environmental Protection, Bureau of Water Quality Management, as required by Act 537.

> This revised Plan provided for the collected sewage to be transported to the Lackawanna River Basin Sewer Authority's Archbald Wastewater Treatment Plant for treatment and disposal instead of treatment at a proposed Wastewater Treatment Plant initially planned to be constructed in Scott Township near [Interstate]-81 at Interchange 201 as proposed in the previously adopted 1993 Plan. The sewage will be transported to the LRBSA's Archbald Wastewater Treatment Plant from the intersection of Chapman Lake Road (SR1017) and Rushbrook Road (SR1006) easterly along Rushbrook Road to SR0107 and then south along SR0107 to the LRBSA's interceptor at the Lackawanna River on the easterly side of Washington Avenue (SR1023) in the Borough of Jermyn.
>
> The capital cost of implementing the project is estimated to be approximately $13.9 million. Connection fees are estimated at $2,500 per equivalent dwelling unit (EDU). Annual operating costs are anticipated to be $633 per EDU. (These fees are contingent upon receiving PENNVEST funding).
>
> A copy of the Plan is available for inspection, and written public comments will be accepted at the Township Building, RD#1, Box 457, Olyphant, PA 18447 for a period of 30 days after the publication of this notice. The Plan will be considered for adoption at a special public meeting of the Scott Township Board of Supervisors on October 10, 2002 at 7:00 p.m. (local time) in the Scott Township Municipal Building, RD#1, Box 457, Olyphant, PA 18447.

Ex. A-27.

17. Mr. Noll and Ms. Clark reviewed the proposed 2002 Plan during the public notice period on two occasions. Tr. 61, 76.

18. On September 4, 2002, Scott Township held a special public meeting to discuss its proposed official sewage facilities plan update revision (September 4, 2002 Meeting). At that time, the Township's engineer provided a true and realistic estimate of the projected costs to a homeowner regarding the construction of a lateral to connect a home to the municipal sewage collection system. The Township's consultant gave a presentation and displayed sketches describing projected cost estimates to be borne by individual homeowners to construct laterals to the Township's proposed sewer system. Stip. ¶ 8.

19. The public comment period ended on September 5, 2002. *Noll v. DEP*, EHB Docket

No. 2003-131-K (Opinion issued January 10, 2005), *slip op.* at 2.[5]

20. Ms. Clark submitted written comments to the Township on September 5, 2002. Ex. A-2, Attachment N; Ex. C-7; Tr. 77.

21. Mr. Noll submitted written comments to the Township dated September 4, 2002. Ex. A-2, Attachment N; Tr. 931-34.

22. The Township received written comments from residents other than Appellants. Ex. A-2, Attachment N.

23. The Township forwarded all comments received to the Township Engineer to provide a response and counsel regarding the comments. Tr. 298.

24. The Township Engineer provided a letter dated September 19, 2002 to the Township Supervisors that responded to comments received from the public, including the comments submitted by Mr. Noll. Tr. 931-36.

25. On September 24, 2002, the Township Engineer provided written comments to the Township Supervisors regarding a September 5, 2002 letter to the Township by Appellant, Stephanie Clark. Stip. ¶ 9; Ex. A-2, Attachment N; Ex. C-8.

26. On October 24, 2002, the Township adopted its proposed official sewage facilities plan update revision, Stip. ¶ 10, in Resolution #02-10-24. Ex. A-2; Ex. C-3.

27. Resolution #02-10-24 identified the selected alternative as:

> the construction of sanitary sewer interceptor and collector lines throughout the Justus/Griffin Pond and Chapman Lake/Montdale areas (as delineated on Scenario "B1", Attachment D) with conveyance to the Lackawanna River Basin Sewer Authority's Archbald wastewater treatment facility; and the adoption, and implementation, of an on-lot sewage management program for those areas of the Township not serviced by the collection and conveyance system.

Ex. A-2; Ex. C-3.

[5] The Department stipulated to this fact in its Response to Appellants' Petition to Reopen Record Prior to Adjudication.

28. On October 28, 2002, the Department received a Sewage Facilities Plan Update Revision from Scott Township for review and approval (2002 Plan). The 2002 Plan proposed transporting its sewage from its previously approved sewage collection system to the Lackawanna River Basin Sewer Authority's (LRBSA) sewage treatment plant in the Borough of Throop, Lackawanna County. Stip. ¶ 11.

29. The 2002 Plan identified and evaluated 5 alternatives: Scenario A, Scenario B, Scenario C, Scenario B1, and Scenario B1 with East View/West View. Ex. A-2 §§ V, VI; Ex. C-4.

30. The 2002 Plan included cost estimates for each of the alternatives identified and evaluated. Ex. A-2.

31. Scenario A in the 2002 Revision is the alternative of choice from the 1993 Plan, a culmination of Alternative One and Alternative Two from the 1993 Plan. Ex. A-2 § VI; Ex. C-4.

32. The estimated costs for Scenario A in the 2002 Plan are Project Costs of $18,100,000, Connection Fee of $2,500/EDU and Annual User Fee of $949/EDU. Ex. A-2 § VI; Ex. C-4.[6]

33. The selected alternative was Scenario B1 with East View/West View. Ex. A-2; Tr. 205.

34. The total project cost for Scenario B1with East View/West View is $13,912,000.

35. The cost estimate for the selected alternative in the 2002 Plan included a $2,500 per EDU connection fee (based on 1350 EDUs) and an Annual User Charge per EDU of $633. Ex. A-2, § VI, Ex. C-4.

36. The cost estimate for the selected alternative in the 2002 Plan does not include the

[6] The acronym EDU stands for Equivalent Dwelling Unit and is a unit of measurement for volume of sewage flow. *Ainjar Trust v. DEP*, 2001 EHB 927, 930. Typically a single-family home counts as one EDU. Tr. 215.

cost to the individual homeowners to install lateral pipes from the house to the right-of-way, Tr. 236-37; Ex. A-2, § VI; Ex. C-6, reconfigure internal plumbing, if necessary, Tr. 294; Ex. A-2, § VI; Ex. C-6, or decommission existing on-lot systems (i.e., Private Costs). Tr. 295-96; Ex. A-2, Attachment O; Ex. C-6.

37. It is not the practice in the industry to include in calculations of total project cost the homeowner's costs for the laterals from the house to the system unless the laterals are owned and maintained by the utility or municipality funding the sewage system. Tr. 561.

38. The costs to homeowners to install lateral pipes from the house to the right of way, reconfigure internal plumbing or decommission an existing on-lot system (i.e., Private Costs) vary depending upon the topography of the property, the location of the structure on the property, Tr. 75, 293, 439-40, 915, the on-lot system existing on the property and the personal preference of the homeowner with regard to removing the features of the existing on-lot system. Tr. 75, 293-94.

39. It has been DEP's practice to review official plans and official plan revisions that contain cost estimates that do not include Private Costs. Tr. 465, 610.

40. Ms. Clark requested information about costs to homeowners in addition to the connection fee and annual service fee in 2001 and 2002. Tr. 66-69, 958.

41. Residents of the Township other than Ms. Clark asked questions about costs to homeowners in addition to the connection fee and annual service fee. Tr. 250.

42. In response to the questions from residents, the Township Supervisors directed the Township Engineer to prepare generic estimates of Private Costs to be presented at the September 4, 2002 Meeting. Tr. 306, 478-79.

43. Township Supervisors Hallesky and Vail were aware that property owners were

responsible for Private Costs. Tr. 158-59, 478-79.

44. The Department employee who reviewed the 2002 Plan, Patrick Devitt, was aware that Private Costs were not included in the estimated cost of the 2002 Plan when he reviewed the 2002 Plan. Tr. 614, 669.

45. As part of his review of the 2002 Plan Mr. Devitt considered the connection fee and the annual service fee to be charged to homeowners and compared those fees to fees under other official plans he has reviewed and found the connection fee and annual service fee similar to other public sewer projects he reviewed. Tr. 617, 668-69.

46. Based upon his review, Mr. Devitt determined the 2002 Plan was "clearly implementable." Tr. 721.

47. On April 24, 2003, the Department approved the 2002 Plan. Stip. ¶12.

48. The 2002 Plan included a model ordinance entitled "Connections to the Scott Township Sanitary Sewer Collection & Conveyance System" that would require owners of Improved Property within one hundred and fifty feet of the sewer system to connect to the system. C-Ex 15, § 3.

49. As of the date of the trial, the Township had not adopted an ordinance requiring connection to the centralized system or providing any exemption from connection to the centralized system. Tr. 519-20.

50. In theory, if enough exemptions to the requirement to connect to the centralized system are granted, the exemptions could "have an effect on the actual cost." Tr. 826.

51. Lakeland School, which is located in the general proximity of Chapman Lake, has its own sewer treatment system that provides service to the school. Tr. 118-19, 185.

52. The sewage treatment facility located at Lakeland School is owned and operated by

the school, not by the Sewer Authority. Tr. 172.

53. The estimated cost for the selected alternative in the 2002 Plan was calculated including 40-50 EDUs attributed to the Lakeland School. Tr. 261.

54. The sewage treatment facility at Lakeland School is old and nearing the end of its useful life. Tr. 185, 262.

55. The capital recover factor in the cost estimates presented in the 2002 Plan were developed using a 1% interest rate for a 20 year loan. Tr. 991.

56. The 2002 Plan description of funding methods available to finance the selected alternative indicates that per discussions with a PENNVEST employee, a loan was potentially available with a "maximum rate of 1.38% for the first five years and 2.7% for an additional 15 years." Ex. A-2 at 31.[7]

DISCUSSION

Burden of Proof and Standard of Review

Appellants bear the burden of proof in this matter and must establish their case by a preponderance of the evidence. 25 Pa. Code § 1021.122. Preponderance of the evidence has been defined by the Board "to mean that the evidence in favor of the proposition must be greater than that opposed to it. ...'It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established.'" *Bethenergy Mines, Inc. v.* DER, 1994 EHB 925, 975 (quoting *Midway Sewerage Auth. v. DER*, 1991 EHB 1445, 1476). The Board conducts a *de novo* trial of the matter and is tasked to determine on the evidence adduced at the *de novo* hearing whether DEP's approval of the 2002 Plan "was inappropriate or otherwise not in

[7] The Pennsylvania Infrastructure Investment Authority is commonly known as PENNVEST. PENNVEST is an independent authority under the Governor's jurisdiction. PENNVEST is capitalized by state funds and federal revolving loan funds and uses that money to provide financial assistance for drinking water, wastewater and storm water projects in the Commonwealth. *Pennsylvania Infrastructure Investment Authority Annual Report 2002-2003*, at 4.

conformance with the law." *Moosic Lakes Club v. DEP*, 2004 EHB 396, 404; *Smedley v. DEP*, 2001 EHB 131, 160. Thus, Appellants must present evidence that DEP's approval of the 2002 Plan was not appropriate or did not conform with the applicable law and that evidence must be greater than the evidence showing that the approval was appropriate or conformed to the applicable law.

Pennsylvania Sewage Facilities Act and Applicable Regulations.

As mentioned previously, summary judgment was granted to the Department and the Township on some issues raised by Appellants in their NOA and was denied with regard to other issues raised by Appellants. With regard to the issues that remained in this appeal, we held:

> Moreover, we cannot say that, as a matter of law, consideration of costs and economics is off-limits in an Act 537 Plan appeal. Section 5 of the Clean Steams Law identifies "[t]he immediate and long-range economic impact upon the Commonwealth and its citizens" as an issue the Department must consider when taking action pursuant to the Clean Streams Law. 35 P.S. § 6915(a). Regulations promulgated under the SFA and the Clean Streams Law set forth the Department's responsibility to review and act upon official plans and official plan revisions. 25 Pa. Code § 71.32. Subsection (d) of Section 71.32, outlines issues the Department "will consider" when reviewing an official plan or an official plan revision, and requires, in part, that the Department consider:
>
> > (2) Whether the municipality has adequately considered questions raised in comments, if any, of the appropriate areawide planning agency, the county or joint county department of health, and the general public.
> >
> > ...
> >
> > (4) Whether the official plan or official plan revision is able to be implemented.
>
> 25 Pa. Code § 71.32(d)(2) & (d)(4). We cannot conclusively determine now whether the Department properly determined that Scott Township adequately considered questions from the general public which may have related to cost issues. Nor can we conclusively determine now whether the 2002 Plan Revision is able to be implemented from a fiscal standpoint.

Summary Judgment Opinion, 2004 EHB 712, 724-25 (footnote omitted). Thus, these issues which were left open by our disposition of the summary judgment practice form the parameters of our inquiry in this Adjudication.

The SFA requires that every municipality in the Commonwealth submit to the Department an official comprehensive plan for providing sewage services within the municipality, 35 P.S. § 750.5, and that the Department approve or disapprove official plans and official plans revisions in accordance with the SFA and regulations promulgated under the authority of the SFA. 35 P.S. §§ 750.5(e), 750.10. Regulations adopted pursuant to the SFA and the CSL outline the responsibilities of municipalities regarding review, adoption and implementation of official plans, 25 Pa. Code § 71.31, the content of official plans, *Id.* § 71.21, and the Department's review of official plans and revisions of official plans. *Id.* § 71.32. These statutory and regulatory provisions provide a road map against which Appellants' challenges to the Department's approval of the 2002 Plan will be judged.

Feasibility of 2002 Plan

The crux of Appellants' challenge to the 2002 Plan is that there was insufficient consideration of the "true costs" of the selected alternative. The essence of the complaint dating back to the earliest piece of litigation involving the 1993 Plan was that costs were too high. So before we get into the details of this particular litigation as it relates to that claim regarding the 2002 Plan, it is worth noting that the Township's 2002 Plan which does not call for the construction of a sewage treatment plant in the Township has a project cost estimate of $13.9 million compared to the 1993 Plan's vision of an in-Township sewage plant estimated project cost of $18.1 million. Thus, from the "forest" point of view, the 2002 Plan represents a cost decrease of $4.2 million from the scenario of the 1993 Plan. Mr. Hallesky agreed that the

2002 Plan is "substantially cheaper" than what the 1993 Plan calls for. Tr. 166. Now for the "trees" point of view regarding the challenge to the 2002 Plan.

Appellants argue that "DEP failed to properly review and approve the 2002 Plan in accord with the Pennsylvania Clean Streams Law and the Sewage Facilities Act requirements to consider and to determine whether the Plan is feasible to be implemented and the socio-economic impact on the citizens of the Commonwealth." *Appellants Reply Brief to the Post Hearing Briefs of the Department of Environmental Protection and Scott Township (Appellants' Reply Brief)* at 19. Appellants' base their claim on several sub-parts as follows:

- the cost estimate provided by the Township and considered by DEP in its approval did not include the individual private costs to homeowners to install lateral lines from their house to the sewer right of way, decommission or remove existing on-lot systems and make any internal plumbing changes required to convert to the selected alternative (we will refer to this basket of costs as Private Costs);

- uncertainty whether the Township will adopt any setback exclusions regarding the selected alternative;

- uncertainty whether the Lakeland School might be required to connect to the system provided for in the selected alternative rather than continue to use the private system it currently operates; and

- whether the 1% interest rate presented in the 2002 Plan will be available to finance the construction of the selected alternative.

In Appellants' view, all of these factors impact the "true cost" of the project. The first item involves the costs to each individual homeowner of connecting to the new system and decommissioning the old on-lot systems. The second and third items involve potential swings in the number of participants and EDUs in the new system and, thus, financing base for the system. The fourth item involves a question about whether financing for the system would be available at the interest rate assumed by the proposed plan in its calculations. Appellants claim that without the information on Private Costs being factored in and without hard final information on the last

three items, DEP could not have conducted a review that met the statutory directives and its approval therefore was illegal.

Statutory and Regulatory Background

Initially it is important to review the statutory and regulatory requirements with regard to the issue of cost of an official plan or official plan revision and the Department's obligations when reviewing a proposed official plan or official plan revision. Section 5 of the CSL establishes that when taking action pursuant to the CSL, DEP shall "consider, where applicable ... [t]he immediate and long-range economic impact upon the Commonwealth and its citizens." 35 P.S. § 691.5(a)(5). It is clear that this criteria is broader than just the economic impact on the residents of Scott Township or even the cost to the Township. *Lower Towamensing Township v. DER*, 1993 EHB 1442, 1472.[8] Also, as noted above, the Department is authorized by the SFA to approve or disapprove official plans and official plan revisions in accordance with the SFA and regulations promulgated under the authority of the SFA. 35 P.S. §§ 750.5(e), 750.10.

When preparing an official plan or official plan revision, a municipality is required to "evaluate alternatives available to provide for adequate sewage facilities," 25 Pa. Code § 71.61(a), and to include in that evaluation "cost estimates for the construction, financing, ongoing administration, operation and maintenance" of the alternatives, *Id.* § 71.21(a)(5)(iv), and "funding methods available to finance all aspects of each of the proposed alternatives,

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[8] In *Lower Towamensing* this Board noted:

> Indeed, the statute mentions economic impact, not to [Lower Towamensing's] residents alone but the impact to all of the citizens of Pennsylvania and to the Commonwealth itself. Thus, [Lower Towamensing's] costs are only a factor in such an economic evaluation. Further, such an evaluation of economic impact is more than the cost comparison of two alternatives and includes the economic impact to Pennsylvania of the degradation of waters of the Commonwealth which are not currently contaminated, the costs to our residents of providing no sewage treatment and other factors.

1993 EHB at 1472 n. 5.

establishment of the financial alternative of choice and a contingency financial plan to be used if the preferred method of financing is not able to be implemented." *Id.* § 71.21(a)(5)(v).

In reviewing proposed sewage plans, the Department is to consider, among other criteria, "whether the plan or revision meets the requirements of the [SFA, the CSL] and this part," 25 Pa. Code § 71.32(d)(1), "whether the official plan or official plan revision is able to be implemented[,]" *Id.* § 71.32(d)(4), and under the subchapter on official plan requirement for alternative evaluations, the Department's approval "shall be based on ... [t]he feasibility for implementation of the selected alternative in relation to applicable administrative and institutional requirements." *Id.* § 71.61(d)(2).[9]

The Department is also to consider whether the official plan is "able to be implemented" and base its approval on the "feasibility for implementation" of the selected alternative. 25 Pa. Code § 71.32(d)(2) & (d)(4). Certainty of implementation is not the standard, rather capability of implementation is the standard. *See Montgomery Township v. DER*, 1995 EHB 783 (the Department need not determine that the proposed plan or plan revision is certain of being able to be implemented, only that implementation is feasible). In *Montgomery,* the feasibility issue focused on technical feasibility and the appropriateness of the siting of spray irrigation facilities. The Board's discussion regarding feasibility is instructive to our analysis of the appeal *sub judice*:

> The Department's use of the term "feasibility" suggests that the Plan Revision need not be absolutely certain. *See, Webster's Ninth New Collegiate Dictionary* (the term "feasible" is defined as "capable of being done"). This position is supported by other provisions within the Department's planning regulations. For example, under 25 Pa.Code §71.21(a)(5)(vi), a plan revision must, among other things, determine whether each of the discussed alternative methods of sewage treatment and disposal are able to be implemented. Similarly,

[9] Clause (1) of subsection 71.61(d) establishes that "[a]pproval of official plans and revisions shall be based on [t]he technical feasibility of the selected alternative in relation to applicable regulations and standards." 25 Pa. Code § 71.61(d)(1). Appellants do not challenge the technical feasibility of the selected alternative in the 2002 Plan.

> under 25 Pa.Code. §71.32(d)(4), the Department must consider, in approving or disapproving an official plan revision, whether the revision is able to be implemented. Given the express language of the Department's planning regulations and the fact that site selection occurs at the first stage of the sewage facilities process, the Board finds that in order to gain plan approval, a proposed spray irrigation facility must be capable of satisfying the technical regulations and standards applicable to spray irrigation facilities.

Id. at 522. *See also Lehigh Township v. DEP*, 1995 EHB 1098, 1112 (DEP's consideration of the feasibility of implementation "does not mean that plan approval must conclude that the project is 100% certain of implementation as a final matter").

Appellants' Challenges Analyzed Against the Statutory and Regulatory Framework

Appellants have not proven that the 2002 Plan is not economically feasible to be implemented. In fact, at trial their counsel admitted they could not do so when he said, "[o]ur position is, Your Honor, that we are not in a position to prove that it's not economically feasible at this time." Tr. 36. That alone could end our inquiry in the Department's favor but we will discuss in more detail the basis of our conclusion that Appellants lose on their essential claim.

Also, Appellants have not proven the Department did not meet its legal obligations regarding review and approval of the 2002 Plan based upon the argument that the 2002 Plan as submitted by the Township did not include certain of the information highlighted in the four bullets above. In short, Appellants "true costs" argument fails as a factual matter and as a legal matter.

Private Costs.

The estimated costs for the selected alternative in the 2002 Plan do not include Private Costs, i.e., the cost to install lateral pipes from the house or building to the right of way line, Tr. 236-37; Ex. A-2, Attachment O; Ex. C-6, the cost of any internal plumbing work, Tr. 294; Ex. A-2, Attachment O; Ex. C-6, or the cost to decommission any existing on-lot system. Tr. 295-96;

Ex. A-2, Attachment O; Ex. C-6. To be clear, Private Costs are costs paid by each individual homeowner affected by the plan, not the municipality. Private Costs for lateral lines and plumbing are not uniform for each individual in a municipality, they vary depending upon the topography of the property, the location of the structure on the property, Tr. 75, 293, 307, 439-40, 915. As for on-lot decommissioning, these costs also vary depending on the exact nature of the on-lot system existing on the property and the personal preference of the homeowner with regard to removing the features of the existing on-lot system. Tr. 75, 293-94.[10] Appellants argue that the Private Costs should be included in the cost estimates for the alternatives identified and evaluated in the 2002 Plan because this information is needed to fully inform the public of the "true costs" of the proposed plan and to examine properly the feasibility of the selected alternative and the economic impact on the Commonwealth and its citizens.

Appellants have not proven that DEP's approval of the 2002 Plan was inappropriate or not in accordance with the law on account of the Private Costs not having been included in the estimated costs of the selected alternative, or for any of the alternatives examined. First, there is no requirement in the law or the regulations which mandates that these private costs be included. The Department employee who reviewed the 2002 Plan, Patrick Devitt, was aware that Private Costs were not included in the estimated cost of the 2002 Plan when he reviewed the 2002 Plan. Tr. 614, 669. Mr. Devitt testified that the Department does not include Private Costs in the review of cost analysis of alternatives in an official plan or plan revision. Tr. 614. As part of his review of the 2002 Plan Mr. Devitt considered the connection fee and the annual service fee to be charged to homeowners and compared those fees to fees under other official plans he has

[10] Regarding removal of the features of an on-lot system, for example, a homeowner with a septic tank could choose to remove the tank or fill the tank in place while a homeowner with a sand mound could choose to remove the sand mound or level grade the sand mound on site, Tr. 295-96, or leave the sand mound in place. Tr. 987-89. Each choice has a different cost to the homeowner. Tr. 295-96.

reviewed. Tr. 617, 668. He found the connection fee and annual service fee similar to other public sewer projects he reviewed. Tr. 669. Ultimately Mr. Devitt determined that the 2002 Plan is able to be implemented. Tr. 721.[11]

Even Appellants' expert witness, Mr. Shoener, the former Regional Director of DEP's Wilkes-Barre Office, admitted that:

> traditionally DEP reviewed and approved sewage plans without including Private Costs, Tr. 465;
>
> he personally approved the 1993 Plan which did not include Private Costs, Tr. 437, 448; and
>
> he knew of no Act 537 plan or plan revision that included Private Costs in the estimated cost for the analysis of the identified alternatives. Tr. 448-49, 460.

These admissions leave his testimony that it is not possible to evaluate the immediate and long-term economic impact on citizens without including Private Costs in the estimate as not credible.

None of this should be surprising. Cost estimates for sewage plans do not as a matter of normal industry practice include such costs. The parties stipulated that the industry practice is to not include Private Costs in the estimated total cost for the project. Tr. 561.[12] The Township

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[11] Mr. Devitt testified:

> Q. In the context of your review, Mr. Devitt, did you determine whether the Scott Township plan is able to be implemented?
>
> A. Yes. I believe that was a common theme of my review.
>
> Q. And what was that determination?
>
> A. I believe the plan appeared to be clearly implementable.
>
> First, from an administrative standpoint, they have the authority in place.
>
> And, environmentally, it seemed certainly implementable.
>
> And, economically, it appeared to be in line with other similar projects that I have reviewed.

Tr. 721.

[12] Michael Gallagher, an employee with the Pennsylvania Infrastructure Investment Authority, suggested three reasons the industry practice does not include Private Costs in total project costs: the costs cannot be accurately determined, the costs are not the responsibility of the utility and it is generally more cost effective to have

Engineer testified that Private Costs are not typically taken into account because they are not a cost funded by the municipality. Tr. 310. Moreover, the public was aware that individual property owners would incur costs above the connection fee and the annual service fee prior to the September 4, 2002 Meeting. *See* Tr. 66-69 (Clark asked questions about additional costs to homeowners from 2001 forward), 958 (Noll heard Ms. Clark ask many times during the summer of 2002 what the Private Costs would be), 250-51, 158-59, 479. In response to questions from Ms. Clark and other residents the Township Engineer presented generic estimates regarding the Private Costs at the September 4, 2002 Meeting. Tr. 67-68, 250, 478-79; Ex. A-2, Attachment O; Ex. C-6. Appellant Clark addressed the issue in her written comments submitted to the Township on September 5, 2002. Ex. A-2, Attachment O, Ex. C-7.

Aside from the fact that not including Private Costs does not violate a legal requirement and is standard industry and DEP practice, there is no evidence that, in this case, the approved Plan is not able to be implemented for failure to include Private Costs in the estimate. At most Appellants presented speculation that some residents of the Township may be unable to afford the connection fee, the annual service fee and the Private Costs required to implement the selected alternative. Both Appellants testified that, give each one's stage of life and health issues, it would be difficult for them to afford the connection fee, the annual service fee and the Private Costs necessary to connect each Appellant's house to the system. Tr. 112-15 (Clark), 945-47 (Noll). However, neither Appellant had obtained an estimate of the Private Costs she or he would incur to connect her or his house to the community system; they both used the generic estimates provided by the Township at the September 4, 2002 Meeting. Tr. 73 (Clark), 917 (Noll). Nor did either Appellant present evidence beyond oral testimony without specific income or expense figures that based on their annual income and expenses they could not afford the connection fee,

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that type of work done by local plumbers rather than the contractor installing the municipal system. Tr. 563.

the annual service fee and the Private Costs. *See* Tr. 111-114 (Clark), 945-47 (Noll). Even had Appellants proven they individually could not afford the Private Costs as to them, the Board has commented before that such proof would not equate to showing that the Department acted improperly in approving the plan selected by the Township. *Holiday Pocono Civic Ass'n. v. DER*, 1976 EHB 1.[13]

Setback Exclusions.

Appellants argue that the true cost of the selected alternative is not known in part because the Township has not established who will and will not be required to connect to the system, in other words, the Township has not identified whether there is any setback exemption. Without knowing who may be exempt from connecting to the system, the actual number of EDUs cannot be calculated and thus the actual cost to each person is not known.

The Township included in the 2002 Plan a model ordinance entitled "Connections to the Scott Township Sanitary Sewer Collection & Conveyance System" that would require owners of Improved Property within one hundred and fifty feet of the sewer system to connect to the system. C-Ex 15, § 3.[14] By its nature this connection requirement creates a setback exemption for

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[13] *Holiday Pocono* involved a third party appeal from the issuance of a construction permit for the construction of a sewage treatment plant to serve Kidder Township. Similar to Ms. Clark's and Mr. Noll's objections, the Holiday Pocono Civic Association alleged that the cost of the permitted facility created a financial burden for the Township residents. 1967 EHB at 3. Responding to this argument the Board held:

> With regard to the issue of financial burden of the proposed facility upon the residents of the township, section 4(5) of The Clean Streams Law of June 22, 1937, P.L. 1987, as amended, *35 P.S.§ 691.5*, places the responsibility on DER to consider, where appropriate, the immediate and longrange economic impact upon the Commonwealth and its citizens of the grant of the permit in question. Appellant has not shown that DER failed to take the economic impact of the grant of the permit into consideration. All that it produced at the hearing was speculation as to what the cost of the facility would be to the permanent residents of Kidder Township. Even if appellant had submitted more factual substantiation of these alleged high costs, that, in and of itself, would not be sufficient to show that DER did not adhere to its responsibilities under section 4(5) of The Clean Streams Law, supra.

Id. at 4.

[14] "Improved Property" is defined in the model ordinance as "Any property upon which there is erected a

Improved Property located more than one hundred and fifty feet away from the sewer system. However, as of the date of the trial, the Township had not adopted an ordinance requiring connection to the system or providing any exemption from the requirement to connect to the system. Tr. 519-20. Mr. Devitt did agree, in theory, with a statement from Appellants' counsel that if enough exemptions to connection are granted, the exemptions could "have an effect on the actual cost." Tr. 826. The problem for Appellants is that the theory does not translate into fact in this case. There is no evidence showing that the selected plan is not able to be implemented in this case on the basis of set-back exclusions, even using the model ordinance as the standard. Moreover, that DEP had no definitive answer to the setback "question" when it approved the Plan is not a basis to reverse DEP's approval.

Lakeland School.

Appellants raised a question about the impact to the feasibility of the Plan based on whether or not the Lakeland School is required to connect to the community system. The school represents 40-50 EDUs and these EDUs were included to develop the estimated costs for the selected alternative in the 2002 Plan. Tr. 261-63. It was not clear whether the school would or would not be required to connect to the system. Mr. Noll raised questions regarding the impact of the cost to taxpayers on the overall socio-economic impact on the community in the event the school is required to connect to the system. Tr. 908-14.

Again, although they raised questions regarding what impact there might be depending on whether Lakeland School is or is not required to connect to the system, Appellants failed to produce evidence that this unresolved issue, either way, would render the selected alternative not

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structure intended for continuous or periodic habitation, occupancy or use by human beings or animals and from which structure Sanitary Sewage and/or Industrial Wastes shall be or may be discharged." C-Ex. 15, § 2.

capable of being implemented. That DEP does not know the answer to the question is not grounds to reverse its approval in this case.

Financing Rate.

Appellants also raised questions regarding whether the Township can obtain financing to construct the system with the 1% interest rate used to develop the cost estimates in the 2002 Plan.[15] According to Appellants, the use of the 1% interest rate when there is no firm commitment to that rate makes that portion of the cost estimate factually untrue and puts in doubt the entire cost estimate and the Department's ability to make a determination that the 2002 Plan is able to be implemented. On the other hand, according to the Department, use of the 1% interest rate in determining the estimated costs of the selected alternative was not inappropriate. There was testimony that 1% loans are available from PENNVEST, Tr. 993-95, and the 2002 Plan description of funding methods available to finance the selected alternative indicates that per discussions with a PENNVEST employee, a loan was potentially available with a "maximum rate of 1.38% for the first five years and 2.7% for an additional 15 years." Ex. A-2 at 31.

Appellants presented no testimony establishing that the 1% interest rate was not available to the Township. Further, there is no evidence that if an interest rate other than 1% had been used to develop the cost estimates in the 2002 Plan or even if an interest rate other than 1% is ultimately applicable to a loan to the Township for the construction of the community system, the selected alternative is not capable of being implemented. Thus, Appellants have not met their burden of proof on this issue.

In summary, Appellants have not proven by a preponderance of the evidence either that the 2002 Plan is not feasible to be implemented or that the Department did not meet its legal

[15] Pursuant to 25 Pa. Code § 71.21 governing the content of official plans, if applicable to the specific planning needs of the municipality, the official plan submitted to DEP shall include a section presenting "funding methods available to finance all aspects of each of the proposed alternatives[.]"

obligations regarding review and approval of the 2002 Plan. Appellants raised questions regarding the ability of DEP to make a determination of the feasibility of the 2002 Plan and the immediate and long-range impact of the 2002 Plan on the Commonwealth and its residents based on the information not included in the cost estimates and some unknown information regarding the number of EDUs used to develop the cost estimates, but did not present evidence to substantiate their claims.[16]

Notice and Public Comment

Pursuant to the governing regulations, municipalities are required to publish notice regarding proposed official plans and official plan revisions in a local newspaper and allow for a 30-day public comment period. 25 Pa. Code § 71.31(c).[17] DEP, in the process of approving or disapproving an official plan or plan revision "will consider ... [w]hether the municipality has adequately considered questions raised in comments, if any, of the appropriate areawide planning agency, the county or joint county department of health, and the general public." *Id.* § 71.32(d)(2). The notice regarding the 2002 Plan was published in the August 6, 2002 edition of the *Scranton Times*. The notice described the general nature of the plan, provided the estimated

[16] Appellants also presented some testimony at trial about certain other sewage alternatives that were not considered but should have been among the considered alternatives in the 2002 Plan Revision. Among the alternatives they talked about were a "disbursed alternative" in which several smaller sewage treatment plants would be used and use of existing plants such as the one at the school. Appellants did not show that the Township's not including such alternatives among those considered was required by law or amounts to legal error justifying our overturning the Department's approval of the Plan with its selected alternative.

[17] 25 Pa. Code § 71.31(c) states:

> A municipality shall submit evidence that documents the publication of the proposed plan adoption action at least once in a newspaper of general circulation in the municipality. The notice shall contain a summary description of the nature, scope and location of the planning area including the antidegradation classification of the receiving water where a discharge to a body of water designated as high quality or exceptional value is proposed and the plan's major recommendations, including a list of the sewage facilities alternatives considered. A 30-day comment period shall be provided. A copy of written comments received and the municipal response to each comment, shall be submitted to the Department with the plan.

capital costs, connection fees and annual operating costs per EDU and announced that written comments would be accepted by the Township for 30 days. *Id.*[18]

Appellants challenge the adequacy of the notice published by the Township including the amount of time provided for public comment. They also allege that the Township failed to adequately consider the comments submitted by Ms. Clark and Mr. Noll.

As noted earlier in this Adjudication, Appellants argue that the public notice regarding the 2002 Plan published by the Township was not adequate because the notice did not fully inform the public about the "true costs" of the selected alternative since the Private Costs were not included in the cost estimates in the 2002 Plan. Appellants also argue that because the public received information and general estimates regarding Private Costs the evening before the end the public comment period, the public comment period was too short and should have been extended.

We previously discussed that the cost estimates for the alternatives identified and evaluated in the 2002 Plan did not include estimates of the Private Costs and that this does not constitute error in this case, *supra* at 17-21. It would be anomalous, then, if public notice which did not include the Private Costs was infirm on that basis. Appellants point to no statutory, regulatory or decisional law as support for their argument that the public notice published by the Township does not adequately inform the public because the Private Costs are not included in the cost estimates provided.

Appellants' expert testified as to the importance of the participation of a fully informed public in the governmental decision-making process, Tr. 435-36 ("the basic tenant of our democracy is that the public be able to give comment before the decision-making as to what the project is going to be."), and opined that "the public would be better informed if they understood

[18] The exact language of the notice is provided in Finding of Fact 16, *supra* pp. 5-6.

both the municipal costs and the private costs." Tr. 454. This expert testimony and opinion fall far short of meeting Appellants' burden to prove that DEP's approval of the 2002 Plan was inappropriate and not in accordance with the law because the public notice here did not include the Private Costs.

Even so, as we have noted, the public process included information that there would be such Private Costs associated with the selected alternative and some estimated figures on the Private Costs. Both Appellants complained, however, that they wanted additional time to evaluate the 2002 Plan and the Private Costs generic estimates provided at the September 4, 2002 Meeting prior to providing written comments. Tr. 126 (Clark), 935 (Noll). Although Ms. Clark did raise Private Costs issues in her written comments, Ex. A-2, Attachment N; Ex. C-7, she testified she would have appreciated more time to evaluate the Private Costs information. Tr. 126. Because we have found that Appellants have not met their burden to prove that lack of Private Costs in the estimated cost made DEP's approval of the 2002 Plan inappropriate or not in accordance with the law and did not render the notice provided by the Township inadequate, it is not difficult to conclude that Appellants have not proven that the 30-day public comment period provided by the Township was inadequate or that the public comment period was illegally truncated.

There was no error in any other components of the public notice and participation process. The evidence shows that over the years the Township considered the issue of its sewage needs, the issue was discussed at many meetings of the Board of Supervisors, Tr.168-69, 303-06, 499-500, at which the public, including Appellants provide comments and input. Tr. 60-61, 66-67, 948-52, 960-61. The Township made changes to the plans it considered in response to the

comments received from the public. Tr. 184-87, 197-99, 214-15.[19] Both Appellants reviewed the 2002 Plan in response to the notice published by the Township. Tr. 61, 76. The Township Engineer considered the written comments received and provided written response and counsel to the Township Supervisors regarding the written comments. Tr. 298. In fact, the generic estimates of Private Costs provided by Mr. Kutch at the September 4, 2002 Meeting were prepared and presented at the Township's request in order to respond to questions and comments received from residents regarding the Private Costs. Tr. 306, 478-79.

As part of its review of the 2002 Plan the Department read the written public comments received by the Township, the response prepared by the Township Engineer and made a determination that the public comments were adequately considered. Tr. 637-41, 676-78. Appellants elicited testimony that showed specific requests in Ms. Clark's September 5, 2002 letter were not adopted by the Township, and that DEP was aware that the Township did not adopt the requested action; for example that Private Costs be included in the 2002 Plan, Tr. 639, and that the public comment period be extended. Tr. 641. However, the fact that requests or comments are not adopted does not mean they are not considered. *See Thorp Property Owner's Ass'n v.* DEP, 1998 EHB 618, 624 (regarding public notice and comments submitted to DEP under the municipal waste regulations in 25 Pa. Code § 271.141(a), this Board noted: "The Department is not required to adopt the comments, but it is required to consider them."). Appellants present only conclusions that the public comments received by the Township were not considered, not factual evidence. Appellants have not met their burden with regard to this issue in the appeal.

[19] For example, the Township Supervisors examined a plan that called for construction of several sewage treatment plants in the Township, but did not pursue that plan as a viable alternative in part due to public input regarding location of sewage treatment plants near their residences. Tr. 184-87, 197-99. Also, the Township cut down on the number of interceptors in the plan in response to public input. Tr. 214-15.

This Board has addressed issues regarding the adequacy of public notice and participation in the process of developing official plans or revisions of official plans before and stated:

> The seminal case on this issue which both parties refer to is *Green Thornbury Committee v. DER*, 1995 EHB 636. Both parties agree that the test under *Green Thornbury* for whether there has been adequate public notice and participation in the module review process is "whether [an appellant actually had access to the module[] to comment on it.

Ainjar Trust v. DEP, 2001 EHB 927, 980; *aff'd* 806 A.2d 482 (Pa. Cmwlth. 2002). Given the number of meetings over several years at which sewage issues were discussed by the Township Supervisors and the public, including the Appellants, the written comments submitted by both Appellants and the review of the actual plan by the Appellants prior to adoption of the plan, it is clear that the test set forth in *Green Thornbury* and reiterated in *Ainjar Trust* has been met in this case.

CONCLUSIONS OF LAW

1. Appellants bear the burden of proof in this matter and must establish their case by a preponderance of the evidence. 25 Pa. Code § 1021.122.

2. Appellants have not proven that the 2002 Plan is not economically feasible.

3. Appellants have not met their burden to prove that the Department did not meet its legal obligations regarding review and approval of the 2002 Plan based upon the argument that the 2002 Plan as submitted by the Township did not include certain information needed to determine the true cost to implement the selected alternative and whether the selected alternative is able to be implemented.

4. Appellants have not proven by a preponderance of the evidence that the Department's approval of the 2002 Plan was inappropriate or not in accordance with the law because the Private Costs were not included in the estimated costs of the selected alternative, or for any of the alternatives examined.

5. The test for whether there has been adequate public notice and participation in the process is whether an appellant actually had access to the Act 537 plan or plan revision to comment on it.

6. Appellants have not met their burden to prove that the Department erred in determining that the Township adequately considered the public comments received by the Township.

7. Appellants have not met their burden of proof to establish that the Township and the Department did not consider alternatives in 2002 Plan which should have been considered.

8. Appellants have not met their burden to prove that the Department erred in determining that the public notice and the public's participation in the Township's process of developing the 2002 Plan was adequate.

Based on the foregoing Findings of Fact, Discussion and Conclusions of Law, we conclude that the Appellants' appeal cannot be sustained and we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DON NOLL AND STEPHANIE CLARK	:	
	:	
v.	:	**EHB Docket No. 2003-131-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 20th day of May 2005, it is hereby ORDERED that the appeal of Don Noll and Stephanie Clark is dismissed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 20, 2005

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JUDITH ACHENBACH and GREG and DEBRA BISHOP	:	
v.	:	**EHB Docket No. 2004-202-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LANDIS W. and EDNA G. WEAVER, Permittee	:	**Issued: May 25, 2005**

OPINION AND ORDER
ON AMENDED PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

An Amended Petition for Supersedeas is denied where the petitioner fails to demonstrate that it will suffer irreparable harm if its petition is denied; where the petitioner fails to establish that it is likely to succeed on the merits of its appeal; and where the denial of a supersedeas is not likely to cause injury to the public.

OPINION

On September 10, 2004, Judith Achenbach and Greg and Debra Bishop (collectively, Appellants), filed a Notice of Appeal with the Board, challenging a September 3, 2004, NPDES General Permit issued by the Department of Environmental Protection (Department). On September 28, 2004, Appellants filed a Petition for Supersedeas. On October 7, 2004, the Department filed an Answer to Appellants' Petition for Supersedeas and a Memorandum of Law

in support thereof. On October 8, 2004, Landis and Edna Weaver (Permittees), filed an Answer to Appellants' Petition for Supersedeas and a Memorandum of Law in support of their Answer. The Board issued an Order on October 12, 2004, denying Appellants' Petition for Supersedeas.

On November 16, 2004, Appellants filed an Amended Petition for Supersedeas and Memorandum of Law in support of their Amended Petition. Upon consideration of Appellants' Amended Petition for Supersedeas, on November 17, 2004, the Board issued an Order scheduling a supersedeas hearing. On November 23, 2004, the Department filed an Answer to Appellants' Amended Petition for Supersedeas. On November 29, 2004, the Permittees filed an Answer to Appellants' Amended Petition for Supersedeas. The Board held a hearing on Appellants' Amended Petition for Supersedeas on December 1, 2004.

At the close of the hearing, the Board asked counsel to brief specific issues and then assigned a briefing schedule. On January 20, 2005, the Department submitted a letter to the Board requesting the denial of Appellants' Amended Petition for Supersedeas, because Appellants' Post-hearing Brief was not filed by January 18, 2005, the date set forth in the briefing schedule. However, Appellants did file a Post-hearing Brief on January 21, 2005, so the issue was deemed moot. On January 26, 2005, the Permittees filed a Post-hearing Memorandum of Law in opposition to Appellants' Amended Petition for Supersedeas. The Department filed its Post-hearing Memorandum of Law on February 1, 2005.

In their Amended Petition for Supersedeas, Appellants ask the Board to revoke the Department's approval of a NPDES General Permit for stormwater discharges associated with construction activities on the Permittees' property. Supersedeas is an extraordinary remedy, which will not be granted absent a clear demonstration of appropriate need. *Oley Township v. DEP*, et al., 1996 EHB 1359. In granting or denying a supersedeas, the Board shall be guided by

relevant judicial precedent and the Board's own precedent. Section 4(d)(1) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. § 7514 (d)(1); 25 Pa. Code § 1021.78 (a). The Board shall consider: 1) irreparable harm to the petitioner; 2) the likelihood of the petitioner prevailing on the merits; and 3) the likelihood of injury to the public or other parties, such as the permittee in third party appeals. *Id.* Therefore, a party seeking a supersedeas of a Department order must satisfy all of the aforementioned criteria. Furthermore, the Board will not grant a supersedeas in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. § 7514 (d)(2); 25 Pa. Code § 1021.78(b).

I. Irreparable Harm to the Petitioner

Appellants argue that the Department's issuance of a NPDES General Permit to the Permittees will cause them irreparable harm because the discharge of stormwater from the Permittees' property will deposit silt and nutrients into an impaired waterway that traverses Appellants' property.[1] Appellants maintain that this discharge is violative of the Clean Water Act and existing water quality standards. *See* 33 U.S.C. 1251 *et. seq.* Further, Appellants contend that the discharge of stormwater from the Permittees' property will negatively impact the designated use of the waterway that traverses Appellants' property.

At the December 1, 2004 hearing, Dr. Hugh V. Archer (Archer), President of Mavickar Environmental Consultants, testified that the discharge of stormwater from the Permittees' property is depositing silt into the waterway located on Appellants' property. (N.T. at 41.)[2]

[1] Appellants testified that they use the waterway that traverses their property as a source of drinking water for their animals. (N.T. at 23, 29.)

[2] Archer's opinion regarding the presence of silt in the discharge of stormwater from the Permittees' property is based on the appearance of the waterflow depicted in the photos of the waterway that were presented at the hearing. (N.T. at 41.) Archer did not conduct a survey of the waterway that traverses Appellants' property.

According to Archer, the discharge of stormwater from the Permittees' property is violative of the Clean Water Act and existing water quality standards, because water that contains silt is being discharged into a waterway that is already impaired. (N.T. at 37-38, 52.)[3] Therefore, Archer testified that the Department erred in issuing a NPDES General Permit to the Permittees for the discharge of stormwater from their construction project. (N.T. at 37.) Archer also testified that he had no opinion regarding whether the discharge of stormwater from the Permittees' property would cause immediate and irreparable harm to the waterway that traverses Appellants' property. (N.T. at 60.)

To refute Appellants' allegations of irreparable harm, the Department presented the expert testimony of Robert Schott (Schott), a water pollution biologist for the Department, who was directly involved in the review and approval of the NPDES General Permit provided to the Permittees. (N.T. at 113-114.) Contrary to Archer's testimony, Schott testified that the waterway that runs between the Permittees' property and Appellants' property does not flow into either of the impaired unnamed tributaries. (N.T. at 116.) According to Schott, the project site is located farther eastward of the two impaired tributaries than was depicted in Archer's expert report. (N.T. at 116.) Therefore, Schott asserted that the water that flows from the Permittees' property enters a different unnamed tributary. (N.T. at 116.) Based on his evaluation and sampling of the stream, Schott opined that the unnamed tributary that runs between the Permittees' property and

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(N.T. at 41.) Accordingly, Archer was unable to provide an opinion regarding the amount of sediment in the waterway before and after the discharge of stormwater from the Permittees' property. (N.T. at 42-43.) In addition, although Archer testified to having visited the site, he was unsure about whether the Best Management Practices (BMPs) applicable to the construction phase of the Permittees' project were implemented. (N.T. at 73-75.)

[3] Archer opined that any contribution of silt to an impaired waterway, irrespective of its amount, which occurs without a Total Maximum Daily Load Allocation, will contribute to the impairment of the waterway, and is violative of the Clean Water Act and existing water quality standards. (N.T. at 52, 62.)

Appellants' property is not impaired. (N.T. at 120.)[4] Further, Schott testified that the unnamed tributary does not flow into a waterway that is identified by the Department as impaired. (N.T. at 121.)

With respect to Archer's testimony regarding general water quality criterion, Schott testified that the appropriate standard of assessment in determining whether a discharge of stormwater is permissible is set forth in 25 Pa. Code § 93.6 (a). (N.T. at 122.)[5] Based on this standard and his survey of the stream, Schott testified that he does not believe that the discharge from the Permittees' property will violate the general water quality criterion. (N.T. at 124.) Schott also opined that it is impossible to determine whether the concentration of silt in the discharge will be greater than that which is present in the waterway, without conducting a survey of the waterway. (N.T. at 141.) Further, Schott testified that the construction and operation of the chicken barns on the Permittees' property would result in the improvement of the water quality of the waterway. (N.T. at 123-124.)[6]

Appellees also provided the expert testimony of Karl Kerchner (Kerchner), an erosion and sedimentation pollution control specialist for the Lebanon County Conservation District. (N.T. at 153.) Kerchner testified that several BMPs were implemented in order to prevent

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[4] Schott visited the site approximately 3 days after a rainstorm and did not observe the presence of sediment in the waterway. Schott conducted a survey of the waterway to determine that the waterway was not impaired. (N.T. at 120, 148-150.)

[5] 25 Pa. Code § 93.6 (a) states:

> Water may not contain substances attributable to point or nonpoint source discharges in concentration to amounts sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant, or aquatic life.

[6] Schott opined that the change in land use from cropland to the prospective use would result in less sediment being discharged into the waterway. He also asserted that any sediment that is currently in the waterway would eventually be infiltrated. (N.T. at 124.)

sediment from entering the unnamed tributaries. (N.T. at 171.)[7] Upon his visit to the site, Kerchner did not observe the presence of sediment leaving the waterway. (N.T. at 182.)[8] Further, Kerchner testified that during normal rainstorms, there would not be a significant amount of sediment in the waterway. (N.T. at 182-183.)

Raymond Zomok (Zomok), a civil engineer manager for the Department, provided additional expert testimony for the Appellees. (N.T. at 194.) Zomok testified that he visited the Permittees' property and determined that the BMPs identified in the NPDES General Permit were implemented. (N.T. at 201.) According to Zomok, the implementation of these BMPs will result in: a reduction in the presence of nutrients in the waterway, increased filtration of the stormwater contained in the waterway, and the enhancement of the water quality of the waterway. (N.T. at 201.) Although Zomok acknowledged that there is a minor amount of silt being discharged into the waterway, he testified that there would not be a significant amount of sediment or nutrients in the waterway after the construction of the chicken barns on the Permittees' property. (N.T. at 215-216, 227.)

Appellants argue that the discharge of stormwater from the Permittees' property will cause irreparable harm to the waterway that traverses their property. However, Appellants have failed to provide us with sufficient evidentiary support upon which we can draw such a conclusion. *See William Penn Parking Garage Inc. v. City of Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975.) First, Appellants have not established that the discharge from the Permittees' property is entering an impaired body of water. Although Appellant's expert, Dr. Archer, asserted that the discharge from the Permittees' property was entering an impaired waterway, he did not conduct a

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[7] Kerchner visited the Permittees' property and determined that the BMPs were implemented. (N.T. at 181.)

[8] Based on his observation of the photos of the waterway, Kerchner testified that he was unable to determine whether the waterway contained silt. (N.T. at 193.)

survey of the water to determine that it was actually impaired. Similarly, we are not persuaded by Appellants' testimony asserting that the discoloration of the waterway evidences its impairment. Without providing us with any evidence that the waterway in question is actually impaired, we cannot make such a determination based solely on Appellants' observations. Furthermore, Appellants' expert witness even testified that he was unable to formulate an opinion regarding whether the discharge of stormwater from the Permittees' property would irreparably harm the waterway that traverses Appellants' property. (N.T. at 60.)

Appellants also allege that the Department erred in issuing a NPDES General Permit to Appellees, because the discharge of stormwater from the Permittees' property is violative of the NPDES regulations provided for under the Clean Water Act. However, Appellants confuse the requirements contained in this Act. Pursuant to §122.4 (i) of the NPDES regulations, NPDES permits may not be issued for new sources of pollutant discharge, "if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." 40 CFR § 122.4 (2004). As expressed above, Appellants have not provided us with any credible evidence indicating that the discharge of stormwater from the Permittees' property is in violation of existing water quality standards.

Appellants also failed to demonstrate that the discharge from the Permittees' property is violative of the general water quality criterion contained in § 93.6 (a) of the Pennsylvania Code (Code). Specifically, Appellants failed to establish that the alleged concentration of silt and nutrients in the discharge coming from the Permittees' property is "sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant, or aquatic life." 25 Pa. Code 93.6 (a). Further, Appellants failed to prove how the discharge from the Permittees' property has negatively impacted the designated use of their stream, *ie*. actual harm to the animals that use the

stream as a source of drinking water. Ultimately, we are not convinced that Appellants will be irreparably harmed by the discharge of stormwater from the Permittees' property.

II. Likelihood of Success on the Merits

Appellants argue that they are likely to succeed on the merits of their appeal before the Board. A petitioner's chance of success of the merits must be more than speculative, but the petitioner is not required to establish the claim absolutely. *Pennsylvania Fish Commission v. DER*, 1989 EHB 619. Rather, the petitioner must garner a *prima facie* case showing a reasonable probability of success. *Id.* In order to succeed on the merits of their appeal, Appellants would have to show that the Department abused its discretion by acting arbitrarily or capriciously, by acting without a reasonable basis, or by failing to act in accordance with applicable law. *Concerned Residents of the Yough, Inc. v. DER*, 1995 EHB 41. The Board also has a duty to determine if the Department's action can be sustained or supported by the evidence taken by the Board. *Id.*

Appellants contend that they are likely to succeed on the merits of their appeal because the Department erred in its issuance of a NPDES General Permit authorizing the discharge of stormwater from the Permittees' property. The Department argues that Appellants are not likely to succeed on the merits because Appellants have failed to establish: that the Permittees are discharging into an impaired waterway and that the discharge from the Permittees' property is in violation of the general water quality criterion contained in the Code.

We agree with the Department. Appellants have failed to demonstrate: that they have been irreparably harmed by the discharge from the Permittees' property, that the Permittees are discharging into an impaired waterway, and that the Permittees' discharge is violative of the water quality requirements of the Clean Water Act and Code. Therefore, Appellants have not

shown that they are likely to succeed on the merits of their appeal.

III. Likelihood of Injury to the Public

Appellants argue that, should the Board not grant a supersedeas, the Permittees will continue to illegally discharge stormwater into the unnamed tributaries in the Little Swatara Creek watershed and impaired surface waters that traverse their property. Appellants also contend that granting a supersedeas will not interfere with the Department's administration of the NPDES stormwater management program; rather, they assert that it will require the Department to "clean up its act" and apply closer attention to the NPDES permits it grants. *See* Appellants' Memorandum of Law in Support of the Amended Petition for Supersedeas, at page 3. We are not convinced by these arguments. As indicated in the discussion above, Appellants have presented *no evidence* of irreparable harm or a likelihood of succeeding on the merits of their appeal. Furthermore, the Board's granting of a supersedeas would unduly interfere with both the Department's administration of the NPDES stormwater management program and the Permittees' construction and operation of chicken barns on their property.

In light of the foregoing, Appellants' Amended Petition for Supersedeas is denied.

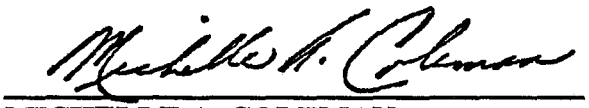
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JUDITH ACHENBACH and GREG and DEBRA BISHOP	:	
v.	:	**EHB Docket No. 2004-202-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LANDIS W. and EDNA G. WEAVER, Permittee	:	

ORDER

AND NOW, this 25th day of May 2005, IT IS ORDERED that Appellants' Amended Petition for Supersedeas is **denied**.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 25, 2005

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

UMCO ENERGY, INC., Appellant, and UNITED MINE WORKERS OF AMERICA, Intervenor	:	
v.	:	**EHB Docket No. 2004-245-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor	:	**Issued: June 15, 2005**

OPINION AND ORDER ON MOTIONS IN LIMINE

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

Synopsis:

In consideration of motions in limine, the Board declines requests to preclude expert testimony, but grants a request to postpone the hearing on the merits due to the opposing party's failure to provide timely responses to expert interrogatories.

OPINION

Currently pending before the Board are two motions in limine, one filed by the Department of Environmental Protection (the "Department") and the other filed by Citizens for Pennsylvania's Future ("PennFuture"). The motions are opposed by UMCO Energy, Inc. ("UMCO"), and to the extent that the motions seek exclusion of testimony, the Intervenor, United Mine Workers of America ("UMWA"). Time is of the essence because the hearing on the merits in this appeal had been scheduled to begin on June 20, 2005. We held conference

calls on June 13 and again earlier today to discuss the motions in particular and further proceedings in the case in general.

The Department and PennFuture note in their motions that all discovery, including expert discovery, was to have been completed by May 20, 2005 pursuant to a Board Order. As of that date, however, UMCO had failed to designate any expert witnesses, provide any expert reports, or otherwise respond to the Department's expert interrogatories. In fact, it appears that UMCO did not designate any of its expert witnesses until it filed its prehearing memorandum on June 13, less than one week before the beginning of the hearing on the merits. UMCO designated for the first time nine outside experts and two employee experts. UMCO attached expert reports for five of the outside experts to its prehearing memorandum. One of those reports is dated June 10 and appears to involve a voluminous, comprehensive hydrogeological investigation of the stream at issue.

In addition, the Department and UMCO are concerned that UMCO did not supply some of the data compilations and other factual documents underlying the proposed expert testimony until June 10 or later. The Department and PennFuture credibly state that it would be impossible for them, and in particular their experts, to digest and respond to all of this new material in the three or four business days that remained before the anticipated commencement of the hearing. They ask in their motions that we issue an order precluding UMCO from presenting any expert testimony or relying upon any of the newly produced documents at the hearing. UMCO has submitted papers in opposition to the motions, but its arguments, which will be addressed below, have no merit.

The Department and PennFuture conducted proper, timely discovery. Regardless of whatever agreements the parties may or may not have thought that they had regarding discovery,

this Board unambiguously (and only after a period of frustration because the parties were unable to agree upon a case management schedule on their own) ordered that *all* discovery in this matter, including expert discovery, was to have been completed by May 20. UMCO clearly did not comply with that order with respect to expert discovery or seek an extension from this Board.

Arguably, the operative rule *requires* exclusion.[1] Even if exclusion is not *required*, the law would unquestionably support an order precluding UMCO from presenting any opinion testimony from the experts who were not disclosed in a timely manner as a matter of discretion. Pa.R.Civ.P. 4003.5(b); *DEP v. Land Tech Engineering, Inc.*, 2000 EHB 1133, 1140-41. Nevertheless, in the interests of adjudicating this appeal based upon a full and fair hearing on the merits, we will decline to impose that sanction. The question, then, becomes what to do about the hearing originally scheduled to begin next week.

During the conference call on June 13, counsel for UMWA suggested that the best approach might be to postpone the hearing for a short period of time to allow the Department and PennFuture an opportunity to digest the new information and conduct any new discovery necessitated by the recent disclosures. UMWA memorialized this suggestion in a letter to the Board on June 14. We suggested during the June 15 call that the hearing could proceed on June 20 as to nontechnical witnesses, but none of the parties (except UMWA) were in favor of that approach. In lieu of excluding the evidence, the Department initially asked for a postponement until late fall/early winter, but revised that suggestion during the June 15 call to a suggestion of a

[1] Pa.R.Civ.P. 4003.5(b) reads as follows:

> (b) An expert witness whose identity is not disclosed in compliance with subdivision (a)(1) of this rule *shall* not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief (emphasis added).

postponement to early September. Although we would have preferred to move forward with some of the evidence next week, the parties' resistance to that that idea is well taken. Instead, we will go with UMWA and the Department's suggested approach of a short extension to conduct the hearing in its entirety.

UMCO opposes a postponement in the strongest of terms, but we are nevertheless postponing the hearing based upon several considerations. First, there is simply no doubt whatsoever that UMCO has failed to comply with the Board's Orders and the rules of discovery. As far as we can tell, the Department and PennFuture come to the Board with clean hands on this issue. There is no indication that they themselves have failed to comply with applicable requirements or failed to follow proper procedures in seeking disclosure of the information from UMCO.

It would be manifestly unjust and prejudicial to require the Department and PennFuture to go to hearing next week in light of UMCO's important, voluminous, late disclosures, particularly with regard to its expert opinion evidence. To the extent that we had any hesitation on this issue, all doubt has dissipated now that we have seen the expert reports in question. The information at issue is hardly collateral; it is expert testimony that goes to the heart of the matter. Expert opinion is extremely important in complex EHB appeals. Accordingly, we generally insist upon full and complete compliance with the rules of discovery regarding experts. *See, e.g., Land Tech Engineering,* 2000 EHB at 1140.

UMCO pushed for expedited proceedings in this appeal. A party cannot have it both ways. Where a party demands and obtains extraordinary proceedings, it is particularly inappropriate for that party to ignore deadlines and fail to provide full and complete discovery responses. *Pennsylvania Trout v. DEP*, 2003 EHB 354, 356-57.

UMCO has insisted repeatedly in this and in several other fora that this is a very important case with broad policy implications. Assuming, *arguendo*, that UMCO's characterization is correct, it is incumbent upon us to prepare the best record that we possibly can. We owe it to ourselves, the parties, the appellate courts, and indeed, the citizens of this Commonwealth to do so. It is not hard to imagine that the Commonwealth and Supreme Courts have rejected UMCO's attempts at interlocutory and extraordinary appeals because a woefully incomplete factual record has been developed in this appeal to date.

All of these considerations might have fallen by the wayside if there were compelling reasons to rush forward next week with the hearing. There are none. The Department points out that the mine has been closed down, parts of the mine have been abandoned, and that UMCO has now formally applied to permanently seal the mine. Indeed, the Department argues that this matter is moot, which remains an open issue in the case. UMCO vigorously disputes that the case is moot, but putting that issue aside, UMCO has failed to show us that the exigencies that originally compelled us to schedule expedited proceedings continue to exist, at least to the same extent as they once did. One of the primary factors driving our original decision to expedite proceedings was our concern for the miners who have been caught in the middle of a controversy not of their making. UMCO, however, has not committed to reopen the mine if it obtains a favorable result in this litigation. In various filings and discussions UMCO has referred to the value of its asset, its desire to obtain closure on the legal issues, and a theoretical possibility of reopening the mine, but it has stopped well short of a commitment to reopen. We are not criticizing that business decision; we are simply pointing out that this matter does not appear to us to demand urgent action to the same extent that it once did.

UMCO's excuses for failing to fulfill its discovery obligations have no merit. It first argues that DEP knew that some of the individuals in question existed. Assuming this to be true, however, they were not designated as experts in accordance with the rules. It is that designation that makes all the difference in terms of trial preparation. Second, UMCO seems to have been under the mistaken impression that its compliance with the Board's rule regarding pre-hearing memoranda sufficed or somehow relieved it of its entirely separate obligation to comply with the rules of discovery and this Board's orders regarding discovery.

UMCO argues that new data is being generated every day. This argument misses the point entirely. There is no doubt that data is continuously revised, and there is no doubt that this Board's review is *de novo*, but that does not excuse compliance with the rules and our orders based upon the information available at the time of the applicable deadline.

UMCO argues that the Department has the burden of proof, and that it, therefore, followed that it had no obligation to supply expert discovery until weeks after the Department supplied its discovery responses. Again, this is a *non sequitur*. Furthermore, in this appeal, due to the expedited nature of the proceedings and the parties' inability to devise a mutually acceptable case management schedule, we simply established one clear deadline--May 20--for *all* discovery by *all* parties to be completed. UMCO's assumption that it could somehow ignore our orders based upon its own ideas of the most favorable order of discovery from its perspective was ill-advised, at best. In short, UMCO has not provided us with any extenuating circumstances or any basis whatsoever for doing anything other than excluding all of the expert testimony referenced in its prehearing memorandum.

Instead, in light of all of the foregoing considerations, we will follow the Department and UMWA's suggestion and postpone the hearing. Accordingly, and after discussion of these matters on today's conference call, we enter the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UMCO ENERGY, INC., Appellant, and UNITED MINE WORKERS OF AMERICA, Intervenor	:	
v.	:	**EHB Docket No. 2004-245-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor	:	

ORDER

AND NOW, this 15th day of June, 2005, it is hereby ordered as follows:

1. The hearing previously scheduled to begin on June 20, 2005 is postponed until **September 19, 2005**;

2. All additional discovery (necessitated by UMCO's recent disclosures) shall be completed on or before **August 19, 2005**;

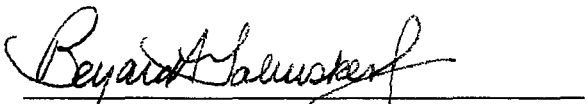
3. Any amendments to the prehearing memoranda shall be filed on or before **September 2, 2005**;

4. The parties shall file proposed joint stipulations, which shall address among other things what parts of the supersedeas record can be used in lieu of further testimony at the merits hearing, on or before **September 2, 2005**;

5. The parties shall attend a prehearing conference at **10:30 a.m.** on **September 8, 2005**; and

6. In the event of mutual agreement, the parties need not seek Board permission to conduct expert depositions.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: June 15, 2005

Via Fax and First Class Mail

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MON VALLEY TRANSPORTATION CENTER, INC.	:	
v.	:	**EHB Docket No. 2005-049-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 17, 2005**

OPINION AND ORDER ON
MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where a number of legal issues remain in dispute, the Board orders the Department to file a reply to the Appellant's response to its motion to dismiss.

OPINION

This matter involves an application for a coal mining permit renewal for the Glassport Tipple, which is operated by Mon Valley Transportation Center, Inc. (Mon Valley Transportation). On February 10, 2005, the Department of Environmental Protection (Department) notified Mon Valley Transportation that it had completed its technical review of the permit renewal application and requested the company to submit a reclamation bond in the amount of $ 390,369.57 in order for the Department to complete its review of the application. Mon Valley Transportation filed an appeal from the bond request.

On May 2, 2005, the Department filed a motion to dismiss the appeal, contending that the bond request was not a final action and, therefore, not appealable to the Board. The Department contends that the bond request is simply one step in the permit review process and that if the applicant fails to submit the bond as requested, the next step is for the Department to issue a "Notice of Intent to Deny" letter which states that the Department intends to deny the permit if the applicant fails to submit the bond and provides the applicant with an opportunity to meet and discuss the application and bond with representatives of the Department. Only after the Notice of Intent to Deny is sent and the applicant has had an opportunity to meet with Department personnel does the Department make what it considers to be its final decision on the application. If the Department's decision is to deny the permit, the Department then sends another letter stating that the Department has completed its review of the application and has denied the permit. It is this letter that the Department considers to be a final, appealable action.

In response, Mon Valley Transportation points to the following language contained in the bond request letter:

> We have completed our technical review of your application to renew the existing permit for the above referenced operation. Before a permit can be issued you must provide the following:
>
> Mining and Reclamation Bond in the amount of $390,369.57
>
> I have enclosed the following materials to help you complete the process: an instruction sheet, bond forms, a bond submittal form and any other forms that may apply.
>
> The completed bond submittal form and the completed bond forms are to submitted to the Division of Licensing and Bonding by March 10, 2005. *Failure to submit them by that due date will result in permit denial.*

(Exhibit A to Response, emphasis added)

Mon Valley Transportation contends that the language of the letter is clear – the permit

renewal application will be denied if the bond is not submitted. Based on this language, it argues that the letter is a final, appealable action. By letter dated June 6, 2005, the Department advised the Board it did not intend to file a reply.

A motion to dismiss may be granted only where there are clearly no material factual disputes and the moving party is entitled to judgment as a matter of law. *Cooley v. DEP*, 2004 EHB 554, 558 The motion must be reviewed in the light most favorable to the non-moving party. *Id.*

In ruling on the motion, we have also considered the exhibits submitted with the motion and response. Our review reveals that a number of legal issues remain in dispute. Therefore, Department is ordered to file a reply addressing the following issues:

1) The Department states in its memorandum in support of its motion that when an applicant receives a Notice of Intent to Deny letter it is provided with an opportunity to meet with representatives of the Department. At this meeting, is the applicant provided with an opportunity to dispute the bond amount required by the Department in its bond request letter? If the applicant successfully disputes the bond amount requested by the Department, does its permit application move on to the next step of the permit review process?
2) Mon Valley Transportation asserts that the language of the bond request letter shows it is a final action since it clearly states a failure to submit the requested bond *will*, not *may*, result in permit denial. Is the applicant provided with any opportunity for its permit application to receive further consideration if the bond is not submitted?

We enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MON VALLEY TRANSPORTATION CENTER, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-049-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 17th day of June 2005, the Department of Environmental Protection is ordered to file a reply on or before **July 7, 2005** addressing the issues set forth in this opinion.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: June 17, 2005

c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOSEPH A. BENACCI	:	
	:	
v.	:	**EHB Docket No. 2002-243-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 22, 2005**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where the evidence demonstrates that petroleum contamination from underground storage tanks exists at a site, the registered owner of the tanks can be required to perform a site characterization to determine the extent of the contamination. Even though the former Regional Director of the Department office handling this matter concluded that records submitted by the appellant showed that no releases from the tanks had occurred post-1995, his written communications with the appellant did not represent that the Department could not take any action in the future should further evidence indicate that a suspected release had occurred. Moreover, the Department cannot be equitably estopped from carrying out its statutory duties. Finally, we find that testimony offered by the Department did not support a civil penalty in the amount assessed by the Department and, therefore, we lower the penalty amount accordingly.

BACKGROUND

This matter involves an appeal filed by Joseph A. Benacci from an Order and Assessment of Civil Penalty issued by the Department of Environmental Protection (Department) on September 13, 2002. The Order directed Mr. Benacci to take corrective action at property located in Millcreek Township, Erie County (the property). The Assessment of Civil Penalty was in the amount of $4,000 for alleged failure to comply with the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101 – 6021.2104.

Mr. Benacci was the owner of the property from 1976 to 1997. In 1977 four underground storage tanks were installed on the property, two of which contained diesel fuel, one gasoline and one motor oil. Mr. Benacci registered as the owner of the tanks. Between 1982 and 1992, Ryder Rental Trucks (Ryder) leased the property from Mr. Benacci for the operation of a truck terminal. A leak of diesel fuel was discovered in the Fall of 1987, and Ryder took responsibility for the cleanup. As part of the cleanup, several wells were drilled on site. Remediation ceased in 1995.

In 1997, the property was transferred by gift to Transportation Investment Group, a partnership formed by Mr. Benacci's five children. Mr. Benacci and his son, Raymond, are the general managers of Transportation Investment Group.

The underground storage tanks were taken out of service in 1997 and a closure report was filed with the Department. After a number of communications back and forth between the Department and Mr. Benacci, the Department's Regional Director of the Northwest Office, Stephen Beckman, sent a letter to Mr. Benacci on December 21, 2000 stating, *inter alia*, as follows:

> If you are able to satisfactorily demonstrate through tank tightness testing and/or inventory reconciliation documents that there were

> no spills post-1995, the Department is prepared to take no further action at the site.

(Appellant's Ex. 2)

This was followed by a similar letter on April 23, 2001. (Appellant's Ex. 3) Copies of the April 23, 2001 letter were sent to Department Regional Counsel Donna Duffy and Department compliance specialist Joe Williams.

Mr. Benacci submitted records to the Department, and by letter dated August 24, 2001, Regional Director Beckman notified Mr. Benacci as follows:

> We have reviewed the information you provided regarding diesel tanks at your West 17th Street facility. While this information does not specifically meet our tank requirements, it is sufficient to demonstrate that there were no post 1995 diesel spills at your site.
>
> However, our records indicate that in addition to your diesel tanks, you also had motor oil and gasoline tanks at your property. You have provided us with no information on the post 1995 status of these tanks. Please provide us with any information you may have regarding the status of these tanks. We request that you provide us with this information by September 14, 2001. Once we receive any information you provide us, we will review this matter further to determine what, if any, actions may be required at the site.

(Department Ex. 6)

The letter goes on to state that Mr. Beckman was leaving the Department and that future correspondence should be sent to the Acting Regional Director, Jim Rozakis. Copies of the letter were sent to Regional Counsel Duffy, compliance specialist Williams and Acting Director Rozakis. Mr. Benacci submitted information regarding the motor oil and gasoline tanks by letter dated September 18, 2001 and considered the matter closed.

Following the departure of Mr. Beckman, Mr. Benacci was contacted by Acting Director Rozakis and Department compliance specialist Susan Vanderhoof in September and October 2001, stating that Mr. Beckman's conclusion that the information submitted by Mr. Benacci

demonstrated there had been no post 1995 releases had been incorrect. By letter dated October 22, 2001, the Department notified Mr. Benacci that the fuel use tax reports for the site indicated a suspected release from one of the storage tanks. (T. 65-66) Following a series of meetings between Mr. Benacci and representatives of the Department, W.J. Smith Associates was retained to install three monitoring wells and perform a limited site characterization. Results of sampling done in 2002 indicated the presence of petroleum products in the groundwater on the Benacci site and possible migration off the site.

On September 13, 2002, the Department issued the Order and Assessment of Civil Penalty that is the subject of this appeal. The order requires Mr. Benacci to hire a professional geologist and perform a site characterization. The assessment of civil penalty is in the amount of $4,000 and alleges Mr. Benacci failed to comply with 25 Pa. Code § 245.309 (dealing with site characterization) and §§ 245.452 and 245.243 (dealing with tank closure).

Based on the record we make the following findings of fact:

FINDINGS OF FACT

1. The Department is the Commonwealth of Pennsylvania agency with the duty and authority to administer the Land Recycling and Environmental Remediation Standards Act, Act of May 19, 2995, P.L. 4, 35 P.S. §§ 6026.101-6026.908 ("Land Recycling Act"); and to administer and enforce the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021,101-6021,2104 ("Storage Tank Act"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1-191.1001 ("Clean Streams Law"); and the rules and regulations thereunder ("Regulations").

2. Joseph A. Benacci is an individual residing at 7005 West Pine Gate Road, Fairview, Pennsylvania. Hereinafter, Joseph A. Benacci shall be referred to as Mr. Benacci, unless

otherwise noted. (Stip.)[1]

3. Between 1976 and 1997, Mr. Benacci and Berit I. Benacci owned the property located at 3025 West 17th Street, Millcreek Township, Erie County, Pennsylvania. (Tr. 25, 34)[2]

4. The Benacci property is bordered on the West by Marshall's Run Creek, on the North by 17th Street, and on the South and East by commercial and industrial buildings in an industrial area of Millcreek Township. (Tr. 20)

5. Lake Erie is located approximately 1.3 miles north of the property, and groundwater at the property flows in a north-northwest direction towards Lake Erie. (Tr. 307)

6. The groundwater at the property is a "water of the Commonwealth," as that term is defined in Section 1 of the Clean Streams Law, 35 P.S. § 691.1. (Stip. 4)

7. The Millcreek Superfund Site, a.k.a. the Harper Drive Superfund Site, a former U.S. Environmental Protection Agency National Priority List cleanup site, is located west of the property on the opposite side of Marshall's Run Creek. (Stip. 2; Tr. 80, 103, 336)

8. The Millcreek Superfund Site is hydraulically side-gradient or down-gradient of the property and groundwater from the Millcreek Superfund Site would not flow onto the property. (Tr. 336)

9. When the property was purchased by Mr. Benacci in 1976, piles of wood, debris, tar paper, foundry sand, and metals existed on the property. (Tr. 80)

10. When excavating for a foundation in 1976, drums, railroad ties, and rubbish were encountered on the property. (Tr. 70)

---

[1] The parties stipulated to certain facts prior to the hearing. Stipulated facts shall be noted herein as "Stip."

[2] References to the Transcript of the hearing shall be noted herein as "Tr." References to Exhibits shall be noted herein as follows: Appellants' Exhibits ("Ex. A-[Exhibit No.]"); and Commonwealth Exhibits ("Ex. C-[Exhibit No.]").

11. The property contains fill material such as foundry sand, bricks, and shingles. (Tr. 80; Ex. C-39 at p. 75)

12. In 1977, four underground storage tanks were installed at the property. (Tr. 27)

13. Two of the tanks contained diesel fuel, one contained gasoline and one contained motor oil. (T.26-27)

14. Diesel fuel, motor oil, and gasoline are "regulated substances," as that term is defined in Section 103 of the Storage Tank Act, 35 P.S. § 6021.103. (Stip. 3)

15. Between 1982 and 1992, Ryder Rental Trucks (Ryder) rented the property from Mr. Benacci for the operation of a truck terminal. (Tr. 82-83)

16. Mr. Benacci discovered a suspected diesel leak in the fall of 1987. Ryder Truck was determined to be responsible for the leak and subsequent clean up. (Tr.83-84)

17. As part of Ryder's clean up, several wells were drilled, which were tested periodically and pumped. (Tr. 38)

18. Remediation ceased in 1995 following receipt of a letter from the Department dated May 17, 1995. (Tr. 38-40)

19. The May 17, 1005 letter state that contamination still existed at the site but the Department considered the contaminant concentrations "to be minimal and is requiring no further action at this time." (Ex. C-5)

20. The May 17, 1995 letter also stated it did not release the tank owner or operator, or landowner or occupier form liability arising form any past, present or future contamination at the site. (Ex. C-5)

21. In 1997, the poperty was transferred by gift to Transportation Investment Group, a Pennsylvania partnership formed by Joseph A. Benacci's five children. (Tr. 23-25)

22. Mr. Benacci is the general manager of Transportation Investment Group and, along with his son, Raymond Benacci, directs the day-to-day operation of partnership. (Tr. 23-24)

23. On August 6, 1990, Mr. Benacci filed with the Department a completed "Registration/Permitting of Storage Tanks" form changing the listed contents of two of the tanks and certifying that he was the owner of the tanks. (Tr. 31, 114-115; Ex. C-3)

24. On November 6, 1992, Mr. Benacci filed with the Department a "Registration/Permitting of Storage Tanks" form changing the facility name to T.S. Inc. and certifying that he was the owner of the tanks. (Tr. 33-34, 116; Ex. C-4)

25. Department records indicate Mr. Benacci is the current registered owner of the tanks. (Tr. 117)

26. In 1998, Mr. Benacci hired United Environmental to close the tanks. (Tr. 510)

27. The Department's technical guidance document on "Closure Requirements for Underground Storage Tanks" requires that soil samples be taken when tanks are being closed in place. (T. 143; Ex. C-8)

28. At the time the tanks were closed in December, 1998, Mr. Benacci testified that he instructed United Environmental not to take soil samples around the tanks. (T. 49)

29. Pursuant to 25 Pa. Code § 245.452(a), owners or operators of underground storage tanks are required to provide the Department with at least 30 days notice prior to beginning closure of the tanks. 25 Pa. Code § 245.452(a).

30. The purpose of the 30 days notice requirement is to allow Department personnel to observe the closure. (T. 146-47)

31. According to his testimony, Mr. Benacci did not provide the Department with 30 days prior notice before beginning closure of the tanks. (T. 51-52)

32. On December 23, 1998, Mr. Benacci signed the "Underground Storage Tank System Closure Report" for the tanks, certifying he was the owner of the tanks and that the information contained in the Closure Report was true and correct. (Tr. 52-53; Ex. C-9)

33. In October 2000, Mr. Benacci met with the Regional Director of the Department's Northwest office, Steven C. Beckman. (Tr. 89) Following the meeting Mr. Beckman sent Mr. Benacci a letter dated December 21, 2000, that stated if Mr. Benacci were able to satisfactorily demonstrate through tank tightness testing, inventory reconciliation documents, or other means that there were no spills post – 1995, the Department was prepared to take no further action at the site. (Tr. 90; Ex. C-2)

34. Copies of the Mr. Beckman's letter were sent to Mr. Gorniak at the Governor's office and Mr. Lobins with the Department. (Tr. 90)

35. Mr. Beckman wrote a similar letter to Mr. Benacci again on April 23, 2001, stating: "*If you are able to satisfactorily demonstrate through tank tightness testing, inventory reconciliation documents or other means that there are no spills post-1995, we are prepared to take no further action at the site.*" Copies of the letter were sent to Department regional counsel Donna Duffy and compliance specialist Joe Williams. (Ex. A-3)

36. Based on the representations contained in the letters from the Regional Director, Mr. Benacci compiled records which he believed showed there were no post–1995 spills. These records were submitted to Mr. Beckman. (Tr. 92- 94)

37. By letter dated August 24, 2001, Regional Director Beckman notified Mr. Benacci as follows: "*We have reviewed the information you provided regarding diesel tanks at your West 17th Street facility. While this information does not specifically meet our tank requirements, it is sufficient to demonstrate that there were no post-1995 diesel spills at your site.*"

(Department Ex. 6)

38. On September 18, 2001, Mr. Benacci sent the Department the information requested by Mr. Beckman. (Ex. A- 4) At this point, Mr. Benacci believed the matter was closed. (Tr. 95)

39. In October 2001, Mr. Benacci was contacted by the Department stating they did not agree with Mr. Beckman's conclusion and the data indicated a suspected release. (Tr.65-66)

40. W. J. Smith Associates was hired to install three monitoring wells on the property. (Tr. 67)

41. The samples met the state standards for non-residential property but indicated a presence of separate phase liquid (SPL). (Tr. 326)

42. In 2002, Mr. Benacci contracted with W. J. Smith & Associates to perform a limited site characterization of the Property. (Ex. C-39 at pp.12-13)

DISCUSSION

In an appeal of an order or assessment of civil penalty, the Department carries the burden of proof. 25 Pa. Code § 1021.122 (b) (1) and (4). Therefore, the Department must prove by a preponderance of the evidence that its order and assessment were reasonable and appropriate under the law. Our review in this matter is *de novo*. *Smedley v. DEP*, 2001 EHB 131, 156. Therefore, we make our own findings of fact based solely on the record developed before us. *Id.*

In his post hearing brief, Mr. Benacci raises three objections to the Department's order and assessment: First, he argues that he is not the proper party to the Department's order and assessment since he is no longer the owner of the tanks. Second, he argues that the Department failed to meet its burden of proving that the order and assessment are in accordance with the law. Finally, he asserts that even if the Department has met its burden of proof, it should be equitably estopped from ordering Mr. Benacci to perform a further site characterization and assessing him

a civil penalty based on the representations made by its former Regional Director Stephen Beckman.

Proper Party

Section 245.1 of the Storage Tank regulations defines a "responsible party" as including the owner or operator of a storage tank. 25 Pa. Code § 245.1.

Mr. Benacci acknowledges that at one time he was the owner of the storage tanks in question but the ownership was transferred to Transportation Investment Group in 1997. He contends that after the property was transferred to Transportation Investment Group on September 1, 1997, a Registration of Storage Tanks was subsequently filed, reflecting the change of ownership of the tanks from Mr. Benacci to the partnership. A copy of the Registration was introduced into evidence as Appellant's Exhibit 7, and it shows that ownership of the tanks was transferred from Mr. Benacci to Transportation Investment Group on September 1, 1997. The form indicates it was signed by Raymond A. Benacci on December 31, 1997. There is no indication, however, that the Registration was ever filed with the Department, and the Department contends that it was not.

Departmental administrative assistant Susan Frey testified that the Department has no record showing that registration was ever transferred. (Tr. 117-18) Additionally, on the Closure Report Form for the tanks, which was prepared by Mr. Benacci on December 23, 1998 and filed with the Department on February 22, 2000, Mr. Benacci is listed as the owner of the tanks. (Department Ex. 20)

Based on Ms. Frey's testimony and the information contained in the Closure Report Form, we must conclude that Mr. Benacci is the registered owner of the storage. As such, he is a proper party to the Department's order and assessment.

Did the Department meet its burden of proof with regard to the 2002 Order?

The evidence clearly demonstrates there are petroleum products in the groundwater at the Benacci site and possible migration off-site. Testing done at the site in 1997 and in 2002 showed the presence of petroleum in the groundwater. The presence of contamination is certainly an indication that a release has occurred. 25 Pa. Code § 245.304. In the case of a release, the Department has the authority to order the responsible party to conduct a site characterization. *Id.* at § 245.309.

There is no question that petroleum products are present in the groundwater at the Benacci site. The question is whether and what type of corrective action may be required. Mr. Benacci points out, and the Department admits, that the level of the constituents in the groundwater meets the non-residential standard under the Land Recycling and Remediation Standards Act, Act of May 19, 1995, P.L. 4, 35 P.S. §§ 6026.101 – 6026.908. (Tr. 326) In response, the Department points to the testimony of their expert, geologist Craig Lobins, who observed petroleum product floating on the water at the sampling locations. Mr. Lobins testified that heavier petroleum products such as diesel and motor oil would not dissolve in the water in any appreciable amount. In other words, these petroleum products commonly float on the water as separate phase liquids, but are not found in the water to any appreciable degree. (T.322-28) Section 245.306(a)(3)(ii) of the regulations authorizes the recovery of free product where it is present. This section also requires the responsible party to prevent further migration of the product.

In addition, the regulations, at 25 Pa. Code §§ 245.452 and 245.453, set forth specific requirements for the closure of underground storage tanks. Based on his own testimony and that of Department personnel, Mr. Benacci did not follow these requirements. (F.F. 27-31) He did

not notify the Department at least 30 days before closure of his intent, as required by 25 Pa. Code § 245.452(a). Based on his failure to have soil samples taken, he also did not perform a proper site assessment in accordance with 25 Pa. Code § 245.453. The Department is well within its authority to require Mr. Benacci to close his storage tanks in accordance with the regulations.

We find that the Department acted in accordance with the statute and regulations in ordering corrective action at the Benacci site and in ordering proper closure of Mr. Benacci's storage tanks.

Equitable Estoppel

Mr. Benacci argues that the Department is equitably estopped from requiring him to take corrective action on the property based on the communications he had from former Regional Director Stephen Beckman.

Equitable estoppel is a doctrine of fundamental fairness designed to preclude a party of "depriving another of the fruits of a reasonable expectation when the party inducing the expectation knew, or should have known, that the other would rely." *Department of Commerce v. Casey*, 624 A.2d 247 (Pa. Cmwlth. 1993). The doctrine may be applied against a governmental agency where the agency has "intentionally or negligently misrepresented some material fact and induced a party to act to his or her detriment, knowing or having reason to know that the other party will justifiably rely on the misrepresentation." *Ambler Borough Water Department v. DER*, 1995 EHB 11, 26. As the party asserting the claim of estoppel, Mr. Benacci bears the burden of proving it. *Id.*; 25 Pa. Code §1021.122(a).

Thus, in order to invoke the doctrine of equitable estoppel, Mr. Benacci must establish that the Department did the following:

1) intentionally or negligently misrepresented some material fact;

2) knew or had reason to know that the other party would justifiably rely on the misrepresented fact; and

3) induced the party to act to its detriment because of a justifiable reliance upon the misrepresented facts.

Id.; Attawheed Foundation, Inc. v. DEP, 2004 EHB 858, 879.

It is Mr. Benacci's contention that the representations made by the Department's former Regional Director Stephen Beckman meet the elements of equitable estoppel. The Department counters that Mr. Benacci has not demonstrated the third element of estoppel, i.e. that he acted to his detriment in reliance on Mr. Beckman's representations. In reply, Mr. Benacci states that he spent considerable funds and effort demonstrating there were no post-1995 releases in reliance on Mr. Beckman's letter. He also asserts that if he had not relied on Mr. Beckman's letter that only post 1995 releases were of concern, he would have initiated an action against Ryder Truck and it is too late to do so at this time.[3]

We find that the Department may not be equitably estopped from ordering a site characterization and proper closure of the storage tanks. While it may have been reasonable for Mr. Benacci to rely on Mr. Beckman's letters as an indication he had satisfied Mr. Beckman's request for information regarding post 1995 spills, there is nothing in the letters to indicate that no further action could be taken if further evidence of contamination were discovered. In fact, in his final letter of August 24, 2001, Mr. Beckman clearly states that the information submitted by Mr. Benacci did *not* meet the Department's tank requirements. It also requests further information with regard to motor oil and gasoline.

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[3] Whether any suspected releases occurred after 1995, as opposed to before 1995, is not determinative of liability. The significance of the "1995" date relates solely to Mr. Benacci's conversations with former Director Beckman and Mr. Benacci's argument regarding estoppel.

Moreover, the Department cannot be estopped from carrying out its statutory duties. *Altoona City Authority v. DER*, 1993 EHB 1727, 1742-43, citing *DER v. Philadelphia Suburban Water Co.*, 581 A.2d 984, 990 (Pa. Cmwlth. 1990). Thus, if contamination were discovered at the site, as it subsequently was, the Department is authorized to order corrective action to be taken, regardless of whether the Department or any of its staff had previously made an incorrect judgment regarding the matter.

2002 Civil Penalty Assessment

In addition to its order, the Department assessed Mr. Benacci a penalty in the amount of $4,000 for failure to comply with the site characterization and closure requirements of the regulations. Civil penalties may be assessed pursuant to Section 1307 of the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, 35 P.S. §§ 6021.101 – 6021.2104, at 6021.1307. Factors to be considered are the willfulness of the violation, damage to natural resources, cost of restoration and abatement, savings resulting to the violator, deterrence of future violations and any other relevant factors. *Id.*

We find the Department's decision to assess a penalty in this matter to be appropriate. Following former Department Regional Director Beckman's departure in August or September 2001, the Department provided Mr. Benacci with plenty of opportunity to bring the site into compliance with the storage tank regulations. When there were still ongoing violations at the site one year later, the Department issued its order and assessment of civil penalty.

Craig Lobins, the regional director of the Department's oil and gas program, provided testimony as to how the penalty was calculated. However, his testimony conflicted to some degree with his actual calculations. Mr. Lobins emphasized a number of times that the penalty was not his main objective with regard to the Benacci site and that he simply wanted to assign "a

very basic penalty" or "a very minimal penalty." (Tr. 344-47) Yet, his calculations resulted in more than a basic or minimal penalty. First, when faced with the option of assigning this penalty a low, medium or high risk, he chose medium based on the potential for release to the environment. According to the Department's penalty assessment matrix for storage tank violations, the penalty range for medium risk violations is $1,000 to $3,000. In contrast, a low risk penalty carries a range of $100 to $1,500. Second, he chose the middle of the medium risk range at $2,000 per violation. (Tr. 345) He provided no compelling reason for doing so, other than it was "in the middle of the road" and he could have assigned a higher risk.

Finally, Mr. Lobins determined there were two violations – failure to follow the closure requirements of the Storage Tank Act and failure to remove the separate phase liquid – and assessed each at $2,000. (Tr. 347-48) He assessed one day of violation for each, resulting in a total penalty amount of $4,000.

Based on Mr. Lobins' stated intention of assessing a very basic or minimal penalty here, we do not find that the Department has met its burden of proving that a penalty of $4,000 is warranted. Though we find that the assessment of a penalty in some minimal amount is appropriate, the evidence does not support a penalty in the amount of $4,000. If we accept Mr. Lobins' assignment of a medium risk to the violations in question, and assess the minimum amount for a medium risk violation – i.e., $1,000 – this results in a total penalty amount of $2,000 for both violations. We find this to be an appropriate penalty given Mr. Lobins' testimony.

We, therefore, make the following conclusions of law:

CONCLUSIONS OF LAW

1. The Department has the burden of proving by a preponderance of the evidence that its

Order and Assessment of Civil Penalty are not an abuse of discretion and are in accordance with the law. 25 Pa. Code § 1021.122 (b) (1) and (4).

2. Mr. Benacci is the person deemed responsible for the storage tanks that are the subject of this appeal since the Department's records show him as the owner.

3. The party asserting a claim of equitable estoppel has the burden of proving its elements. *Ambler Borough v. DER, supra.*

4. The Department may not be estopped from carrying out its statutory duties. *Altoona City Authority, supra.*

5. The Department met its burden of proving that its 2002 Order was not an abuse of discretion and was in accordance with the law.

6. The Department did not meet its burden of proving that the 2002 Assessment of Civil Penalty in the amount of $4,000 was appropriate and we, therefore, reduce it to $2,000.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSEPH A. BENACCI	:	
	:	
v.	:	**EHB Docket No. 2002-243-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 22nd day of June, 2005, we ***uphold*** the Department's Order. We reduce the amount of the Assessment of Civil Penalty to $2,000.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2002-243-R

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **June 22, 2005**

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MOUNTAIN WATERSHED ASSOCIATION, INC. and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2004-102-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KAISER REFRACTORIES, Permittee	:	**Issued: June 23, 2005**

OPINION AND ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where the Department does not dispute certain deficiencies in the renewal of an NPDES permit and the permittee files no response, summary judgment is granted to the Appellants. The permit renewal is voided and the matter is remanded to the Department. As to the bonding issue raised by the Appellants, we cannot decide that issue at this time since questions of material fact exist.

OPINION

This appeal involves a noncoal surface mine known as the Potato Ridge Mine located in Stewart Township, Fayette County. The permittee, Kaiser Refractories (Kaiser), previously mined clay at Potato Ridge, but clay extraction ended in the early 1980's. Following the

completion of mining, Kaiser treated and continues to treat pollutional post-mining discharges at the site. Following treatment, the post-mining drainage is discharged into a nearby stream, Laurel Run. Kaiser holds a National Pollutant Discharge Elimination System (NPDES) permit for the discharges. On November 20, 2003, the Department of Environmental Protection (Department) renewed the NPDES permit. Mountain Watershed Association, Inc. and Citizens for Pennsylvania's Future (collectively the Appellants) appealed the permit renewal

The matter before the Board is a motion for partial summary judgment filed by the Appellants, contending as follows: 1) the permit renewal was barred by Kaiser's ongoing violation of the permit's effluent limits; 2) by allowing the discharge of aluminum, the permit renewal is inconsistent with the EPA-approved total maximum daily load (TMDL) for the stream into which the discharges flow; 3) the permit fails to contain weight-based limits and certain mandatory NPDES conditions; and 4) the bond is insufficient.

Summary judgment may be granted where the record demonstrates there are no issues of fact and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.1-1035.5; *County of Adams v. DEP*, 687 A.2d 1222, 1224, n. 4; *Brian E. Steinman Hauling v. DEP*, 2004 EHB 846, 848. Even though the motion filed by the Appellants seeks only partial summary judgment, a ruling in their favor on any one of the issues in dispute will result in the permit being voided and the matter remanded to the Department.

Permit Defects Not Disputed by the Department

In its response, the Department does not dispute three of the defects alleged by the Appellants.[1] First, the Department acknowledges that the effluent limits for manganese have not been met at the Potato Ridge Mine. Second, the Department acknowledges that the permit fails to

[1] Kaiser did not file a response to the motion.

contain certain special conditions mandatory to NPDES permits. The Department contends this was due to clerical or mechanical oversight and that such conditions are routinely inserted into NPDES permits.

Third, the Department does not dispute that the permit is not consistent with the TMDL for Laurel Run since the Potato Ridge discharges contain aluminum and the approved TMDL does not allocate any wasteload allocation for aluminum. The Department asserts that this deficiency stems from errors in the TMDL and states that it has begun taking measures to revise the TMDL.

Therefore, summary judgment is granted to the Appellants on the aforesaid issues.

Alleged Permit Defects Disputed by the Department

The Department does dispute the remaining two deficiencies alleged by the Appellant, namely those concerning bonding and weight-based effluent limits. As to the first, the Department argues that bonding is not a requirement of the NPDES program and there are no state or federal provisions requiring or authorizing the Department to require a bond to assure the treatment of a discharge pursuant to an NPDES permit. As to the second issue, the Department contends that weight-based effluent limits are not appropriate for precipitation-influenced discharges such as those at Potato Ridge. Finally, the Department argues that the Board should not even get to the merits of these issues since the Department has admitted to the other deficiencies alleged by the Appellants and, therefore, the appeal must be sustained and the matter remanded to the Department.

In their reply to the Department's response, the Appellants agree to withdraw from consideration the issue of weight-based effluent limits since, according to the Department's response, there appear to be disputed issues of material fact. However, the Appellants argue that

it is appropriate to consider the bonding question at this time. Contrary to the Department's argument that any decision on bonding at this stage of the litigation would simply be an advisory opinion, the Appellants argue that a decision on this issue would be dispositive and would avoid the need for piecemeal litigation. They assert that the parties have devoted discovery and litigation resources to the resolution of the bonding issue and that this issue is certain to recur if the Department issues another renewal of the NPDES permit without changing the bonding amount. Therefore, they assert, deciding the issue at this time would serve both the interests of the parties and the Board's interest in judicial economy.

The amount of the reclamation bond currently posted for the Potato Ridge Mine is $223,400. In its response to the Appellants' motion, the Department acknowledged that after it renewed the permit it determined that the dollar amount of the bond was not sufficient to ensure compliance with the law. (Response to para. 26 of Motion) By letter dated July 29, 2004 the Department notified Kaiser that the bond was inadequate and would have to be increased. (Response to para. 28 of Motion) The Department's initial calculations for the site would have required an increase in the reclamation bond to over $3 million or the posting of a fully funded trust of approximately $1.9 million. (Response to para. 27 of Motion) Based on the alleged inadequacy in the bond amount, the Appellants argue that the NPDES permit should not have been renewed and that the posting of an adequate financial guarantee must be a precondition to future renewal of the permit.

The Department does not dispute that the amount of the bond is inadequate. However, it argues that this issue should not be a consideration in the permit renewal process since bonding is not a requirement of the NPDES program. Rather, the Department contends that bonding is required only as part of the noncoal surface mining program. It asserts that its decision to adjust

the Potato Ridge bond was done pursuant to its authority under the noncoal mining regulations, separate and apart from the NPDES permit renewal.

In contrast, the Appellants argue that the NPDES permit is indisputably a part of the noncoal surface mining permit. The Appellants point to the first page of the NPDES permit, which identifies it as a revision to "Surface Mining Permit 2966BSM50" and the second page of the permit which again lists the surface mining permit number before listing the NPDES number. The Appellants argue that as a "revision" to Surface Mining Permit 2966BSM50, the NPDES renewal must satisfy the requirements applicable to the surface mining permit.

The Appellants further argue that even if the NPDES permit were separate and distinct from the noncoal surface mining permit for the Potato Ridge Mine, the Department would still be required to ensure that the bond amount satisfied all applicable standards. The Appellants argue that such standards include Section 315(b) of the Clean Streams Law,[2] which requires a bond for a mine to be sufficient to ensure there will be no polluting discharge after mining operations have ceased, and the general bonding requirements for a noncoal surface mine set forth in Section 9 of the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Surface Mining Act)[3] and the noncoal surface mining regulations at 25 Pa. Code § 77.202. According to the noncoal surface mining regulations, the standard to be applied in determining the bond amount shall be the estimated cost to the Department if it had to complete the reclamation, restoration and abatement work required under the Noncoal Surface Mining Act, the regulations and the permit conditions.

The Appellants then turn to the regulations governing NPDES permits and specifically Section 92.13, which governs the renewal of such permits. That section says in relevant part that

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[2] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 – 691.1001, at § 691.691.315(b).

an NPDES permit may be renewed only if the permittee is in compliance with all existing Department-issued permits and regulations.[4] The Appellants argue that because the Department had not determined that the bond met the standards of Section 315(b) of the Clean Streams Law, Section 3302 of the Noncoal Surface Mining Act and the bonding requirements of the noncoal surface mining regulations, the NPDES permit could not have been renewed pursuant to 25 Pa. Code § 92.13(b)(1).

It is true, as the Department asserts, that the NPDES regulations do not contain authority for the Department to require a bond in conjunction with the issuance or renewal of an NPDES permit. However, as the Appellants point out, the issuance or renewal of an NPDES permit is dependent upon the permittee being in compliance with any other Department-issued permits or regulations.

We are sympathetic to the Appellants' position that the bonding issue may be a relevant question under the specific facts and procedural posture of this case, particularly since the Department acknowledges the amount of the bond is insufficient and Kaiser has admitted as much by its failure to file a response to the Appellants' motion for summary judgment. [5] However, we simply do not have sufficient facts to conclude at this stage of the proceeding that Kaiser is not in compliance with its NPDES permit based on the bond amount, particularly since the Department has not yet concluded its review as to what a proper bond amount should be. Because questions of material fact remain, we cannot address this issue at this time. We, therefore, enter the following order:

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[3] Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. § 3301 – 3326, at § 3309.
[4] 25 Pa. Code § 92.13(b)(1).
[5] *Sri Venkateswara Temple v. DEP,* EHB Docket No. 2003-385 (Opinion and Order issued February 2, 2005), *slip op.* at 2-3.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MOUNTAIN WATERSHED ASSOCIATION, INC. and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2004-102-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KAISER REFRACTORIES, Permittee	:	

ORDER

AND NOW, this 23rd day of June 2005, after review of the Motion for Partial Summary Judgment filed by the Appellants, the Department's response, and the Appellants' reply, the Appellants' appeal is **sustained**. The NPDES permit renewal that is the subject of this appeal is revoked, and the matter is remanded to the Department for further action consistent with this opinion.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

EHB Docket No. 2004-102-R

GEORGE J. MILLER
Administrative Law Judge
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THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATE: June 23, 2005

Service List: See attached.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2005-069-CP-L**
PATRICK J. BRESLIN, d/b/a CENTURY ENTERPRISES	:	**Issued: July 1, 2005**

OPINION AND ORDER ON MOTION FOR DEEMED ADMISSIONS

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

Synopsis:

The Board grants the Department's unopposed motion for deemed admissions where the defendant failed to file an answer to the Department's complaint for civil penalties for violations of the Clean Streams Law. A hearing will be scheduled to determine liability and the amount of the penalty that should be assessed.

OPINION

On April 18, 2005, the Department of Environmental Protection (the "Department") filed a complaint for civil penalties against Patrick J. Breslin d/b/a Century Enterprises ("Breslin") for alleged violations of the Clean Streams Law, 35 P.S. § 691.1 *et seq.* The Department attached a notice to defend to the complaint. On April 16, 2005, a Department representative, Darrell T. Zavislak, personally served a copy of the Department's complaint and notice to defend on

Patrick Breslin, as evidenced by the sworn Affidavit of Mr. Zavislak. Breslin has never answered or otherwise responded to the complaint.

On May 26, 2005, the Department filed a motion for deemed admissions. The Department served Breslin with a copy of the motion. Breslin has not responded to the motion.

Breslin was required to answer the Department's complaint within 30 days of service. 25 Pa. Code § 1021.74(a). The Board's rules provide as follows:

> A defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts in the complaint may be deemed admitted. Further, the Board may impose any other sanctions for failure to file an answer in accordance with § 1021.161 (relating to sanctions).

25 Pa. Code § 1021.74(d). Section 1021.161 reads as follows:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

25 Pa. Code § 1021.161.

Previously, where no answer has been filed to a Department complaint for civil penalties and the Department has filed an unopposed motion for deemed admissions, the Board has granted the motion and the relevant facts averred in the Department's complaint have been deemed admitted. *DEP v. G & R Excavating and Demolition, Inc.*, EHB Docket No. 2005-022-MG (Opinion Issued May 9, 2005), *slip op.* at 2-3.[1] We see no reason to depart from that practice here.

[1] In cases where the Department has specifically requested a default adjudication in addition to asking that all relevant facts in the complaint be admitted, the Board has not hesitated to issue orders determining liability. *DEP v. Huntsman*, 2004 EHB 594, 595-596 (factual allegations deemed admitted, default judgment entered as to liability

Accordingly, we enter the order that follows.

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and amount of penalty to be determined at hearing); *DER v. Allegro Oil and Gas Company*, 1991 EHB 34 (partial default adjudication as to liability granted where a defendant has failed to file an answer to a complaint); *DER v. Canada-Pa., Ltd.*, 1987 EHB 177 (default judgment is appropriate sanction where there is disregard for the administrative law process). In this case the Department has only sought to have the relevant facts in the complaint admitted.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2005-069-CP-L**
PATRICK J. BRESLIN, d/b/a CENTURY ENTERPRISES	:	

ORDER

AND NOW, this 1st day of July, 2005, the Department's unopposed motion for deemed admissions is granted. All relevant facts set forth in the Department's complaint for civil penalties are deemed admitted. A hearing will be scheduled to determine liability and receive evidence regarding the amount of the civil penalties to be assessed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: July 1, 2005

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MOUNTAIN WATERSHED ASSOCIATION, INC. and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2004-102-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KAISER REFRACTORIES, Permittee	:	**Issued: July 14, 2005**

OPINION AND ORDER ON PETITION FOR RECONSIDERATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board denies a petition by the Appellants seeking reconsideration of an opinion granting summary judgment to the Appellants. Where the Board granted summary judgment to the Appellants on the basis of three of their arguments but declined to rule on the fourth issue at the present time, that does not present compelling and persuasive reasons for reconsidering our decision.

OPINION

Mountain Watershed Association, Inc. and Citizens for Pennsylvania's Future (the Appellants) have petitioned for reconsideration from a decision of the Board granting them summary judgment. The decision involved an NPDES permit that had been issued by the

Department of Environmental Protection (Department) to Kaiser Refractories and had been challenged by the Appellants.[1] The Board granted summary judgment to the Appellants, voided the permit and remanded the matter to the Department.

The Appellants' request for reconsideration is founded on the fact that the Board granted summary judgment on the basis of only three arguments raised by the Appellants in their motion but declined to grant it on the fourth issue, finding that there were questions of material fact pertaining to that issue. The Appellants seek summary judgment on the remaining issue, which involves the adequacy of the permittee's bond in connection with a permit other than the one which is the subject of the appeal.

We note initially that the remedy sought by the Appellants will not change the outcome of this appeal. Summary judgment has been granted to the Appellants and the permit has been voided. As the Department notes in its response to the petition, "[t]he crux of Appellants' disagreement with the Board's decision appears to be that though they won they did not win on enough issues."

Our rules of procedure provide that "[r]econsideration is within the discretion of the Board *and will only be granted for compelling and persuasive reasons*." 25 Pa. Code § 1021.152(a) (emphasis added). One such reason is that "[t]he final order rests on a legal ground or a factual finding which has not been proposed by any party." *Id.* at § 1021.152(a)(1). The Appellants argue that the Board's determination that material facts were in dispute was a finding that was not proposed by either party. The Appellants' argument contains a misunderstanding of summary judgment practice and misinterprets the application of the rule. The legal ground proposed by the Appellants was that summary judgment should be granted on the bonding issue

[1] *See Mountain Watershed Association, Inc. v. DEP*, EHB Docket No. 2004-102-R (Opinion and

because the standard for summary judgment had been met, i.e., that no material facts were in dispute and that the Appellants were entitled to judgment as a matter of law. Pa. R.C.P. 1035.1-1031.5. Simply because the Board did not agree with the Appellants' assertion does not mean that our decision rested on grounds not proposed by any party. The question of whether there are disputed issues of material fact is the fundamental threshold inquiry for a court in its evaluation of every summary judgment motion. Only if there are none does the court then determine whether the moving party is entitled to judgment as a matter of law.

The Department enunciates this matter quite clearly in its memorandum in support of its response:

> While the party seeking summary judgment and perhaps even the opposing party may believe that no issues of material fact exist, the ultimate decision rests with the Board. The Board has the responsibility of making an independent evaluation and reaching its own conclusion about whether there are any issues of material fact. The Board may conclude that it will benefit from additional factual development, or from a fuller record than is available to it on a summary judgment motion in order to decide certain issues. Such determination is within the Board's sound discretion.

(Department's Memorandum, p. 9-10)

The issue for which the Appellants seek reconsideration involves the question of bonding and specifically whether the Department may deny an NPDES permit where bonds posted in connection with other permits, such as a noncoal surface mining permit as was the case here, are inadequate. In this case, the Department acknowledged that the bond covering Kaiser Refractories' (Kaiser) noncoal surface mining permit was inadequate, and it was reviewing the matter to calculate a new, larger bond. This calculation had not been finalized at the time of the Appellants' motion. The Appellants argued that Kaiser's NPDES permit should not have been

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Order issued June 23, 2005).

granted since the bond posted in connection with its noncoal surface mining permit was inadequate. One of the reasons for denying the Appellants' request for summary judgment on the bond question was that it would involve the Board having to rule on the adequacy of a bond that, in effect, did not exist since the final calculations had not been completed. Without having information as to what increased bond amount the Department intended to require, we could not grant summary judgment on this issue.

Even if we accepted the Appellants' premise that no material facts are in dispute, summary judgment still is not warranted. For the sake of argument, if we accept that whatever amount the Department chooses to require for Kaiser's bond is inadequate, we then must address the legal question behind the Appellants' argument, i.e., whether an NPDES permit can be denied if a permittee has an insufficient bond for any other permit it holds. A decision on this issue reaches far beyond the confines of this case, and the Board is entitled to have the issue fully briefed by all parties before ruling on it. That was not done in the present case.

Moreover, what the Appellants are seeking us to do by their petition for reconsideration is to issue an advisory opinion. They are not seeking summary judgment – they have already achieved that. They are not seeking a voiding of the permit – that has already been done. What they are seeking is a ruling from the Board stating that bonds for unrelated permits that are alleged to be inadequate may serve as the basis for denying an NPDES permit. We agree with the Appellants that this is an important issue. However, because of that importance, the issue should be fully developed by adverse parties with an incentive to prevail.[2] Therefore, we decline to reach the bonding question at this stage of the proceeding.

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[2] *Department of Environmental Protection v. Waste Management Disposal Services of Pennsylvania, Inc.*, No. 422 C.D. 2005, slip op. at 5 (Pa. Cmwlth. July 7, 2005).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MOUNTAIN WATERSHED ASSOCIATION, INC. and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2004-102-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KAISER REFRACTORIES, Permittee	:	

ORDER

AND NOW, this 14th day of July, 2005 the Appellants' Petition for Reconsideration is **denied**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2004-102-R

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATE: July 14, 2005

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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Southwest Region

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SECRETARY TO THE BOARD

RAYMOND NEUBERT, DONNA HERBSTRITT, DUANE HERBSTRITT, RITA HERBSTRITT, ANN HERZING, MAUREEN NEWMAND and JOSEPH NEUBERT	:	
v.	:	**EHB Docket No. 2005-103-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and ST. MARYS AREA WATER AUTHORITY, Permittee	:	**Issued: July 15, 2005**

OPINION AND ORDER ON
PETITION FOR SUPERSEDEAS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A petition for supersedeas to stop the construction of a 1.3 million gallon water storage tank is denied. The granting of a supersedeas is an extraordinary remedy that will be issued only where it is demonstrated by a preponderance of the evidence that it is warranted. The Appellants set forth evidence that coal mining took place in the general area of the proposed site for the water storage tank. However, Appellants did not establish the likelihood of success on the merits and the irreparable harm that will be suffered if a

supersedeas is not granted. The Appellants' contention that the Department did not follow its own technical guidance document regarding land use policy was strongly refuted by the Department. Consequently, Appellants did not carry their burden of proof on this issue either.

OPINION

Presently before the Board is the Petition for Supersedeas filed by Appellants Raymond Neubert, Donna Neubert, Duane Herbstritt, Rita Herbstritt, Ann Herzing, Maureen Newmand and Joseph Neubert (Appellants). This Appeal follows the Department of Environmental Protection's (Department) issuance of a Public Water Supply Permit on April 27, 2005 to St. Marys Area Water Authority. The Permit authorizes St. Marys Area Water Authority to construct a seventy foot high, 1.3 million gallon water storage tank on real property previously owned by Mr. Neubert and now owned by the Authority[1] and near Rosely Road in St. Marys, Elk County, Pennsylvania. The Appellants are neighboring property owners. St. Marys Area Water Authority serves approximately 22,000 people in St. Marys, Fox Township, and Jay Township, Pennsylvania. The manager of the Authority is Mr. Dwight Hoare, a civil engineer. St. Marys Area Water Authority draws its water from a reservoir built in 1970. It serves a wide area which is divided into nine pressure districts.

In 1995 and 1997 professional engineering studies were commissioned to determine the best site to locate a water storage tank. Mr. Neubert's property was

[1] The St. Marys Area Water Authority obtained the land through eminent domain proceedings. Mr. Neubert continues to operate his farm on his remaining property.

selected as the best of four sites. According to the Authority, it needs to construct this additional water storage tank to better improve its service to its customers and the community. The addition of this water tank should improve the water pressure to this part of its service area, allow for better fire protection, and afford additional services to its customers.

Appellants seek a supersedeas. They want the Board to enter a stay of the recently issued Public Water Supply Permit authorizing the construction of the water storage tank. They contend that there are mine voids under the site where the water storage tank will be constructed. They argue that neither the Department nor St. Marys Area Water Authority have fully investigated the location of these voids or the engineering issues related to the ability of the ground to support such a large and heavy structure. They also contend that the Department did not issue the permit in conformance with its own technical guidance document and so proper land use planning requirements were not followed. They seek an order from this Board prohibiting the construction of the water storage tank and ordering additional test drilling pending a full hearing on the merits and the issuance of an adjudication.

Their Petition for Supersedeas was filed on June 23, 2005. The Board conducted a two-day Supersedeas hearing in Pittsburgh on June 27, 2005 and June 30, 2005.

Standard for Obtaining a Supersedeas

A supersedeas is an extraordinary remedy that will be granted only where clearly warranted. *UMCO Energy, Inc. v. DEP*, 2004 EHB 979, 802; *Pennsylvania Fish and Boat Commission v. DEP*, 2004 EHB 473, 474; *Oley Township v. DEP*, 1996 EHB 1359,

1361-62. In order for the Pennsylvania Environmental Hearing Board to grant a supersedeas, Appellants must prove by a preponderance of the evidence that: (1) they will suffer irreparable harm if the supersedeas is not granted; (2) they are likely to prevail on the merits of their appeal; and (3) there is no or little chance of injury to the public or other parties if the supersedeas is granted. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797; *Global Ecological Services Inc. v. DEP*, 2000 EHB 829; *Pennsylvania Mines Corporation v. DEP*, 1996 EHB 808, 810; *Hopewell Township v. DER*, 1995 EHB 6890; *Kephart Trucking Company v. DER*, 1993 EHB 314, 317; Section 4(d) of Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. Section 7514(d); 25 Pa. Code § 1021.63. We must balance these factors collectively to determine if a supersedeas should be issued. *Pennsylvania Mines Corporation*, 1996 EHB at 810; *Pennsylvania Fish Commission v. DER*, 1989 EHB 619.

Moreover, in order for the Appellants to win a supersedeas, they are required to make a credible showing on each of these three points. Most importantly, they must make a strong showing that they are likely to succeed on the merits of their Appeal. *Pennsylvania Mines Corporation*, 1996 EHB at 810; *Lower Providence Township v. DER*, 1986 EHB 395, 397. In the final analysis, the issuance of a supersedeas is committed to the Board's sound discretion based upon a balancing of all the above criteria. *UMCO Energy, Inc.*, 2004 EHB at 802.

Hearing Testimony and Evidence

The Appellants contend if the water storage tank is constructed without an adequate foundation it could collapse causing great and potentially catastrophic harm to

their property and person. The Appellants contend that the permit issuance is in violation of the siting requirements set forth in the governing regulation. Section 109.604(a) of the Pa. Code provides:

> a) New facilities shall be located on sites which are not subject to floods, fires, earthquakes, or other disasters which could cause a breakdown of the public water system or facilities. New facilities shall be protected against disasters.

25 Pa. Code § 109.604(a).

The Appellants argue that in addition to the public safety issue, a failure of the water tank would result in a "breakdown of the public water system or facilities" in derogation of the regulation.

Mr. Neubert, testified that his father, in addition to the family's farm, ran a coal business and mined approximately 2/3 of the area under the site where the storage tank is being constructed. Mr. Neubert testified that the mining occurred from the late 1930's to the mid-1950's. It was a small mine that was operated by one of the farm workers. It was operated sporadically. Customers would call in orders which would then be filled.

This was not a conventional modern-day room and pillar mine. There was no testimony that any mining maps were developed or even exist.[2] The coal was mined with a pick and shovel. Rails, which are still piled on the property where they have been quietly resting for fifty years, were constructed so that six rail cars, each weighing half a ton, could be used to load the coal and haul it from the mine. The coal seam was approximately four feet high and six feet wide.

[2] There was an affidavit that mining was done under the Neubert farm with an accompanying

The mine was approximately thirty feet below the surface of the ground. The topography of the surface of the land rises from the mine opening to the water storage tank site. Mr. Neubert testified that the mine also went uphill.

Mr. Neubert testified that by the "mid-50's the coal had lost its gas." Consequently, it would not burn well and the Neuberts stopped mining coal. Mr. Neubert indicated that, in some areas, the mine was supported by wooden timbers. Coal pillars were also initially left in place but then were mined for the coal as the miner retreated from the mine.

Mr. Anthony Talak, a professional engineer and Chief of the Pennsylvania Department of Environmental Protection's Northwest Regional Office Technical Service Section, Water Supply Program, investigated this matter. He found much of Mr. Neubert's information credible regarding the operation of the mine. He also witnessed the partially collapsed mine opening and walked the surface above the mine. The testimony at the hearing led him to conclude that any subsidence and settlement on the site of the proposed water storage tank occurred long ago because it is likely the mine had collapsed years ago. Supportive of this position is the fact that there were no open holes indicative of recent subsidence. Moreover, the fact that the pillars were pulled would seem to support the testimony of Appellant Duane Herbstritt, a neighbor, who indicated the hill on the Nuebert property "is not as steep as it was" fifteen years ago. Mr. Talak also believes that the fact that there is no water leaking from the mine is indicative of the collapse of the mine or that the mining was not as extensive as Mr. Neubert believes.

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map of the area showing the location of the mine.

The Appellants' expert, Mr. Daniel Deiseroth, a professional engineer with Gateway Engineers, Inc., testified that the test drilling that was done did not go deep enough to rule out the existence of mine voids. If such mine voids exist, Mr. Deiseroth is concerned that the foundation of the water storage tank will not adequately support the water storage tank. He is further concerned that if the tank was damaged that the resulting leak would cause harm to Mr. Neubert and/or his property located down the hill from the water storage tank.

Mr. Deiseroth is an articulate and knowledgeable witness. Nevertheless, these contentions were adequately addressed by the Authority's witnesses and documentary evidence. The test drilling performed by Urban Engineers established that the water storage tank will rest on a firm foundation of bedrock.

Moreover, we found the testimony of Mr. Craig Bauer, a professional engineer with KLH Engineering, who sited the water storage tank, very compelling. Mr. Bauer is very familiar with the area having grown up in St. Marys. Furthermore, he has worked in the community throughout his professional career. Mr. Bauer arranged for Urban Engineers, a geo-technical engineering firm based in Erie, to drill four boreholes in the area of the water tank to a depth of ten to fifteen feet. The borings revealed a solid underpinning of bedrock under the proposed site.

Following these drillings, the Department was made better aware by Mr. Neubert of the past mining on the farm. Thereafter, the Department demanded further drillings which, after some back and forth with the Authority, were done. These additional drillings consisted of three more boreholes drilled to a depth of thirty feet. These test

drillings revealed neither evidence of mining nor any voids.

The Appellants now argue before this Board that the mining likely was below the thirty-foot drilling depth which is why, they say, the additional drilling did not reveal any mining. It is somewhat ironic that the Appellants, and especially Mr. Neubert, are now arguing that new test drilling down to at least fifty feet below the surface should take place. In October 2003, Mr. Neubert asked the Elk County Court of Common Pleas for an injunction prohibiting any test drilling. His request, after an evidentiary hearing, was denied. Moreover, Mr. Neubert (or someone acting on his behalf) further told the drillers that the Elk County Common Pleas Court Order prohibited them from drilling more than thirty feet deep (it did not).

After listening to the testimony and reviewing the numerous exhibits several things are evident. First, it is not clear by a preponderance of the evidence presented at the hearing that the mining reached that far up the hill so as to undermine the site of the water storage tank. Second, and more importantly, St. Marys Area Water Authority presented persuasive testimony and exhibits that even if there was mining under the site that it presents no danger to the integrity of the water storage tank. Mr. Bauer testified, that in the extremely unlikely event of mine subsidence, the result would be a small leak which could be easily fixed and posed absolutely no threat to the safety of Mr. Neubert or anyone else. He testified in detail how the tank will be constructed and that it is built to withstand earthquakes that might take place in Pennsylvania. The pressure of the filled tank will be spread over such a large surface area that the force applied to the top of the ground would only equate to approximately 4,500 pounds per square foot. As you move

deeper into the earth, the tank load will be greatly dissipated and reduced. The 1.3 million gallon water storage tank will be a fifty-eight foot in diameter and seventy foot high standpipe. The welded steel walls and roof of the tank will be supported on a ring wall foundation extending about six to ten feet below the existing ground, and the tank floor will be on-grade. We found this testimony, together with the testimony of Mr. Talak and Mr. Hoare and the various documents including the drilling logs, persuasive.

The Appellants argue that the Department did not follow one of its technical guidance documents regarding land use policy. The Department presented strong testimony that it indeed did follow the technical guidance document. It is not necessary to engage in a detailed analysis of the Appellants' argument on this issue now. At this stage of the proceeding, we find that the Appellants have not convinced us that they will win on the merits on this issue.

The Appellants, represented by able counsel, presented as strong a case as their evidence supported. However, it was not strong enough to prove by a preponderance of the evidence either that they would likely win on the merits of their appeal or that they will suffer irreparable harm if the Board does not grant a supersedeas. We certainly agree with President Judge Masson of the Elk County Court of Common Pleas, who appreciated and recognized Mr. Neubert's "affinity for the land he has farmed for more than half a century and which his forbearers farmed for a century before him," while also acknowledging and appreciating that St. Marys Area Water Authority's actions are not the result of any ill-will toward the Appellants but "rather the effort to proceed with its

mandate to provide an essential service to the St. Marys community."[3] Moreover, the St. Marys Area Water Authority presented unrebutted evidence that at least some members of the public will suffer harm by further delays in the construction of the water tank. These individuals have been waiting for the construction of the water storage tank in order to gain the very real benefits of public water to replace their poorly functioning private water wells.

Given the factual record presented at the supersedeas hearing we find that the Appellants did not show by a preponderance of the evidence a high likelihood of success or that they will suffer irreparable harm if we do not issue the supersedeas. The threat of any harm to Mr. Neubert or any of the Appellants seems remote at best. Their argument that catastrophic harm could befall them if St. Marys Area Water Authority is allowed to construct its water storage tank seems to be based mainly on speculation and conjecture as opposed to concrete engineering evidence. The Appellants did not refute Mr. Bauer's testimony nor did they refute Mr. Hoare's testimony on this issue.

The Appellants also did not prove the second prong of the test that they would likely win on the merits of any of their issues. In addition, there was testimony that a further delay would harm some of the Authority's customers. We therefore, find that there would be harm to some members of the public if we granted the Petition for Supersedeas.

The evidence we heard also did not convince us that additional test drillings are

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[3] *Neubert v. St. Marys Area Water Authority*, Docket No. 2003-713, page 4 (Elk County Court of Common Pleas, Opinion filed October 15, 2003). Stipulated Exhibit No. 3.

necessary. We are mindful that such drillings, although certainly affordable by the St. Marys Area Water Authority, would cost approximately $10,000 or more. If we thought such additional test drillings were necessary or warranted by the evidence we would order them. However, the Appellants did not prove the need for a third round of test drilling.

We hasten to add that a supersedeas ruling only offers a prediction of what a future holding of the entire Board might be after the development of a more complete factual record buttressed by discovery. *UMCO Energy, Inc.*, 2004 EHB at 839. Nevertheless, at this stage of the proceedings we are required to make such a prediction in order to rule on Appellants' Petition for a Supersedeas. Considering all of these factors in light of the totality of the evidence, we conclude that the issuance of a supersedeas is not warranted.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RAYMOND NEUBERT, DONNA HERBSTRITT, DUANE HERBSTRITT, RITA HERBSTRITT, ANN HERZING, MAUREEN NEWMAND and JOSEPH NEUBERT	:	
v.	:	**EHB Docket No. 2005-103-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and ST. MARYS AREA WATER AUTHORITY, Permittee	:	

ORDER

AND NOW, this 15th day of July, 2005, after hearing, the Appellants' Petition for Supersedeas is ***denied***.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: July 15, 2005

c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WHITE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-097-R**
	:	
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF ENVIRONMENTAL PROTECTION and GLENDALE YEAROUND SEWER CO., Permittee	:	**Issued: July 18, 2005**

OPINION AND ORDER ON PETITION TO DISMISS NOTICE OF APPEAL

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Permittee's Petition to Dismiss based on not being served with a copy of Appellant's Notice of Appeal "concurrently with or prior to the filing of [the] Notice of Appeal" pursuant to 25 Pa. Code Section 1021.51(g)(3) is *denied* when it is later served. Pursuant to 25 Pa. Code Section 1021.4 "the Board at every stage of an appeal may disregard any error or defect of procedure which does not affect the substantial rights of the parties."

OPINION

Presently before the Board is the Glendale Yearound Sewer Company's Petition to Dismiss Appellant White Township's Notice of Appeal. White Township filed a Notice

of Appeal on or about May 16, 2005 appealing a NPDES permit issued to Glendale Yearound Sewer Company. Although the Appeal was timely filed, the Permittee was not served with a copy of the Notice of Appeal "concurrently with or prior to the filing of [the] Notice of Appeal" as required by our Rules. Consequently, on May 25, 2005, the Board issued an Order directing the Appellant White Township to serve the Notice of Appeal on the Permittee on or before June 14, 2005. Counsel for Permittee entered their appearance on June 14, 2005. On June 17, 2005 the Board stayed proceedings in this Appeal pending disposition of the Motion to Consolidate filed by the Pennsylvania Department of Environmental Protection in the appeal of *White Township and Reade Township v. DEP*, EHB Docket No. 2005-068-R. On June 22, 2005 Permittee filed its Petition to Dismiss the Notice of Appeal. Appellant's counsel filed a proof-of-service with the Board on June 27, 2005 indicating that service of the Notice of Appeal had been sent to counsel for the Permittee. On July 5, 2005, Glendale Yearound Sewer Company filed its Answer strongly opposing the Motion to Consolidate.

It is axiomatic that parties should follow the law which obviously includes our Rules. Certainly, Appellant White Township could have easily mailed a copy of its Notice of Appeal to Glendale Sewer Company at the time the Notice of Appeal was filed. Service would have been easily accomplished. This is not a difficult requirement. It can be done by (1) first class mail, (2) overnight delivery, or (3) personal delivery.

The purpose of the Rule is so the Permittee, whose permit is under attack, can be timely notified and participate in the defense of the action. After all, the Permittee certainly has a vital interest in the matter when its permit is challenged. Moreover, in

practice, the Department usually looks to the Permittee to take the laboring oar in defending third party appeals.

This Appeal is no different. Permittee's counsel attached as an exhibit to its Petition to Dismiss a letter sent to him by the Department's very able attorney requesting the Permittee to assume primary defense responsibility in this litigation. The letter states, in part:

> The Department does not have any vested interest in the many, many projects for which it issues permits. When issuance of a permit is challenged by a third party in this type of appeal, in this case White [Township], the Department expects the permittee [Glendale Yearound Sewer Company] will take the leadership role for defending its permit. The Department may take a limited role in defending this Appeal to accurately present the Department's decision-making process and to present issues which may significantly affect the Department's program. Currently, however, you will have primary responsibility for defending this permit. Department personnel and documents will be made available to you, upon request, as necessary and reasonable for preparing your case.

Department's letter of June 1, 2005 to counsel for the Permittee.

Permittee Glendale Yearound Sewer Company alleges a litany of horribles that it has suffered as a result of it not being timely served with a copy of White Township's Appeal. It alleges that its "due process rights are prejudiced by its continuing uncertain status" of whether it is a party or merely "an interested onlooker."

We will end that uncertain status today. Glendale Yearound Service Company is a party – an appellee – in this Appeal. Section 1021.51(g) of the Pennsylvania Environmental Hearing Board's Rules of Practice and Procedure, 25 Pa. Code Section

1021.51(g) clearly provides as follows:

> The service upon the recipient of a permit, license, approval, or certification, as required by this section, shall subject such recipient to the jurisdiction of the Board as a *party appellee*.

The purpose underlying the Rule is to protect the due process rights of appellees when their permits are challenged. A system which allows third parties to attack permits without providing an opportunity for the Permittee to participate fully in the case would suffer serious constitutional problems.

Glendale Yearound Sewer Company does not argue, nor could it, based on clear Board precedent, that the failure of White Township to serve it prior to or concurrently with the filing of the Appeal deprives the Board of jurisdiction. Indeed, the scholarly opinion of Chief Judge Krancer in *Ainjar Trust v. DEP and McNaughton Company*, 2000 EHB 505,discusses in great detail the history of Board precedent in this area. Chief Judge Krancer concluded that the "Rule regarding service on the recipient of the Department action is not jurisdictional in the same sense as the Rule requiring the appeal to be filed within 30 days of the appellant's notice of the Department action under appeal." 2000 EHB at 509. See also Judge Coleman's opinion in *Thomas v. DEP*, 2000 EHB 598,which reaches a similar result.

As we have repeatedly stated, our Rules of Practice and Procedure should be followed. However, we have also stated just as often that appeals should be decided on their merits. Litigation before the Environmental Hearing Board is not a legal minefield where a procedural misstep can blow your case out of the water. Such a system turns the practice of law into a game rather than a search for justice.

Service of the Notice of Appeal is not some mystical or complicated endeavor. This Appeal was filed just two months ago and it has been stayed since June 17, 2005. Counsel has had a copy of the Notice of Appeal for longer than a month. We see absolutely no prejudice and little or no harm to Permittee by Appellant's violation of the service rule. Permittee is aware of the litigation and has filed an excellent brief setting forth its reasons why it opposes the Department's Motion to Consolidate. The Board is not aware of any depositions that have been taken. The burdens alleged by the Permittee in having to participate in the proceeding are the costs that all Permittees must bear when a third party appeal is filed.[1]

Section 1021.4 of our Rules provides the Board with great latitude to exercise our sound discretion in deciding such questions where procedural missteps have occurred.

> The rules in this chapter shall be liberally construed to secure the just, speedy and inexpensive determination of every appeal or proceeding in which they are applicable. The Board at every stage of an appeal or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

25 Pa. Code Section 1021.4.

Paden v. Baker Concrete Construction, Inc., 658 A.2d 341 (Pa. 1995), supports our decision today. This case stands for the proposition that the trial court has great leeway in deciding whether to disregard any error or defect of procedure which does not affect the substantial rights of the parties under Rule 126 of the Pennsylvania Rules of Civil Procedure. "In that case the trial court chose to "reject the reprieve allowed by

[1] We do not minimize those costs which may at times, may be substantial. We simply wish to

Rule126." 658 A.2d at 344. However, the Pennsylvania Supreme Court points out that "[t]here is little doubt that this is a situation in which Rule 126 might appropriately have been applied, had the trial court deemed it to be required in the interest of justice." *Id.*

Here, we will apply the Board's almost identical rule to allow the reprieve afforded by our Rule in the interests of justice. This litigation is in its infancy. We see absolutely no prejudice to Permitttee in allowing it to participate fully in a proceeding where it will have the unfettered opportunity to defend the attacks on its NPDES permit. The burden and costs it will bear are those borne by all Permittees in defending attacks on their permits.

Appellant should have served Permittee Glendale Yearound Sewer Company in a timely manner. It did not. However, the penalty for such a procedural misstep is not the dismissal of Appellant's Appeal. Such an action would be unduly harsh.

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point out that the costs of litigation are not unique to this case and to this Permittee.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHITE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-097-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and GLENDALE	:	
YEAROUND SEWER CO., Permittee	:	

ORDER

AND NOW, this 18th day of July, 2005, after review of Glendale Yearound Sewer Company's Petition to Dismiss, it is ordered as follows:

1) The Petition to Dismiss is ***denied.***

2) Glendale Yearound Sewer Company is a party appellee in this appeal.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: July 18, 2005

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BENJAMIN A. AND JUDITH E. STEVENS	:	
	:	
v.	:	**EHB Docket No. 2005-198-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY, Permittee	:	**Issued: July 19, 2005**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

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

Synopsis:

The Board denies a petition for supersedeas in an appeal of the Department's approval of a municipal authority's application of biosolids to farmland, where the pleadings lack specific allegations of irreparable harm or injury to the public and show the petitioner has a very low likelihood of success on the merits.

OPINION

Benjamin A. and Judith E. Stevens (the "Stevenses") reside in Waynesboro, Pennsylvania. The Department of Environmental Protection (the "Department") is the agency of the Commonwealth of Pennsylvania authorized to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101, *et seq.*, 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 rules and regulations promulgated thereunder. The Washington Township Municipal Authority ("WTMA") is a municipal entity that operates a sewage treatment facility in the Township that generates sewage sludge. WTMA performs land application of biosolids under general permit PAG008-3538.

Prior Application of Biosolids and Related Appeal

In 1999, the Department granted coverage approval under general permit PAG-08 to WTMA for the land application of biosolids. The coverage approval did not specify that the use of any particular site was authorized. WTMA owns almost 100 acres of farm fields on the north side of Lyons Road next to the Stevenses' property (the "WTMA farm"). On January 24, 2000, WTMA notified adjacent landowners, including the Stevenses, of its intention to land apply sewage sludge to the farm fields. In February 2000, the Stevens filed an appeal and petition for supersedeas with the Board. The Stevenses challenged the Department's grant of approval to WTMA. (Stevens v. DEP, EHB Docket No. 2000-030-L). On May 18, 2000, WTMA submitted a Notice of First Land Application (the "30-day notice") to the Department, which indicated the application areas were "fields 1, 2, and 4" of the WTMA farm. On July 14, 2000 a revised Notice of First land application was filed again indicating that "fields 1, 2, and 4" were the areas of application. On August 8, 2000, WTMA began application of biosolids in conformance with its notices. WTMA had voluntarily employed a 300-foot buffer from the Stevenses' *property line* to any application area. A supersedeas hearing and site view was held on August 15, 2000. On August 16, 2000, the Stevenses' petition for

supersedeas was denied. (*Stevens v. DEP*, 2000 EHB 438). After a full hearing on the merits of the appeal, the Board issued an adjudication dismissing the appeal on March 7, 2002. (*Stevens v. DEP*, 2002 EHB 249).

Current Application of Biosolids and Appeal

On April 5, 2004, the Department renewed WTMA's coverage under the general permit. On July 9, 2004 WTMA submitted an amendment to the notification of first land application of biosolids, which encompassed applications on additional portions of fields 4 and 1 using the Stevenses' house as opposed to the property line as the beginning point for the isolation distance. The land was posted with notices. The Stevenses contacted the Department by phone and through correspondence in July 2004 regarding the postings. On August 30, 2004 the Department wrote to WTMA indicating that the areas proposed were found to be suitable for application. A copy of the August 30, 2004 letter to the WTMA was not sent contemporaneously to the Stevenses. Subsequently, on June 9, 2005, WTMA applied biosolids to the areas outlined in its amended notification of first land application of biosolids including areas within 300 feet of the Stevenses property line.

On June 15, 2005, the Stevenses filed this appeal along with petitions for temporary supersedeas and supersedeas. In this appeal the Stevenses claim that in the prior appeal a contract was created establishing a 300-foot buffer from the Stevenses' property line to the nearest application area on the WTMA farm and that the latest application of biosolids within that 300-foot buffer violates that contract. The Stevenses seek to prevent application of biosolids within 300 foot of their property line.

On June 21, 2005, following oral argument before the Board, we denied the

Stevenses' petition for temporary supersedeas. (Stevens v. DEP, EHB Docket No. 2005-189-L, Order issued June 21, 2005.) Thereafter, the Department and Permittee filed motions to dismiss the appeal or in the alternative, to deny the supersedeas petition. The Stevenses have filed replies to the Department and Permittee's motions to deny the petition for supersedeas.

In this opinion we deal only with the petition for supersedeas and motions to deny the petition for supersedeas. The Department and Permittee's motions to dismiss are taken under advisement and will be addressed at a later date in order to provide the Appellants time for response.

For the reasons articulated below, Appellants' petition for supersedeas will be denied.

Supersedeas

The standards governing the grant or denial of a supersedeas petition are provided at 25 Pa. Code § 1021.63, as follows:

> (a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered:
>
> (1) Irreparable harm to the petitioner.
> (2) The likelihood of the petitioner prevailing on the merits.
> (3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.
>
> (b) A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.

We recently stated in UMCO v. DEP, 2004 EHB 797, 801-02:

A supersedeas is an extraordinary remedy which will not be granted absent a clear demonstration of appropriate need. *Tinicum Township v. DEP*, 2002 EHB 822, 827; *Global Eco-Logical Services v. DEP*, 1999 EHB 649, 651; *Oley Township v. DEP*, 1996 EHB 1359, 1361-1362. Where the mandatory prohibition against issuance of a supersedeas does not apply, the Board ordinarily requires that all three statutory criteria be satisfied. *Global Eco-Logical Services*, 1999 EHB at 651; *Svonavec, Inc.*, 1998 EHB at 420; *Pennsylvania Mines Corporation v. DEP*, 1996 EHB 808, 810. *See also Chambers Development Company, Inc. v. Department of Environmental Resources*, 545 A.2d 404, 407-409 (Pa. Cmwlth. 1988). Although there have been exceptions, in the final analysis, the issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *Global Eco-Logical Services*, *supra*; *Svonavec, Inc.*, 1998 EHB at 420. *See also Pennsylvania PUC v. Process Gas Consumers Group*, 467 A.2d 805, 809 (Pa. 1983).

Likelihood of Success on the Merits

The Stevenses allege in their petition that in their prior appeal, through the testimony of a Department witness, a contract was somehow created that established an invariable permanent 300-foot buffer from their property line to any area on the WTMA farm where biosolids may be applied. They argue that the Department has failed to enforce this restriction, as evidenced by WTMA's application of biosolids within that 300-foot buffer on June 6, 2005, and, it has therefore, acted in violation of the contract. The Stevenses allege that they are suffering irreparable harm as a result of the application of biosolids within that 300-foot buffer.

The relevant regulations provide:

(c) Sewage sludge may not be applied to agricultural land, forest or a reclamation site that is:

(3) Within 300 feet (or 91 meters) from an occupied dwelling unless the current owner there has provided a written waiver consenting to activities closer than 300 feet (or 91 meters). The waiver shall be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver from the current

> owner. This paragraph does not apply to features that may come into existence after the date upon which adjacent landowner notification is given under Chapter 275 or § 271.913(g) (relating to land application of sewage sludge; and general requirements).
>
> (5) Within 300 feet (or 91 meters) of a water source unless the current owner has provided a written waiver consenting to the activities closer than 300 feet (or 91 meters). This paragraph does not apply to features that may come into existence after the date upon which adjacent landowner notification is given under Chapter 275 or § 271.913(g).

25 Pa. Code § 271.915. The setback regulations would have allowed WTMA to apply biosolids as close as 300 feet to the Stevenses' house. But in 2000 WTMA voluntarily employed 300-foot buffer from the property line and went beyond what was required by the regulations.

The Stevenses argue that during the prior appeal's supersedeas hearing, testimony from Department employee Thomas J. Sweeney, Jr. that there would "always" be at least a 300-foot buffer from the Stevenses' property line to the application area amounted to a contract. However, this testimony at our prior hearing did not create a contract. "It is axiomatic that, to form a contract, there must be an offer, acceptance, and consideration." *Reed v. Pittsburgh Board of Public Education*, 862 A.2d 131, 134 (Pa. Cmwlth. 2004); *Schreiber v. Olan Mills* , 627 A.2d 806, 808 (Pa. Super. 1993) (elements of an enforceable contract are offer, acceptance, consideration, or mutual meeting of the minds); RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). It is apparent that the basic elements of contract never existed. No offer and acceptance occurred and there was no consideration. WTMA's use of the 300-foot buffer from the Stevenses' property line was not a bargained for restriction. WTMA voluntarily elected to employ the 300-foot buffer from the Stevenses' property line. The testimony at the supersedeas hearing

was nothing more than an explanation of WTMA's choice. Furthermore, we have little doubt that Mr. Sweeney had no authority to contract on behalf of the Department.

At this point it does not appear that WTMA's voluntary use of the Stevenses' property line as the beginning point for the 300-foot buffer in the prior approval precluded any future expansion of the application area in accordance with the applicable regulations. Other than the contract theory, the Stevenses have not articulated any other basis for granting extraordinary supersedeas relief. The Stevenses' claim that a contract was created establishing a permanent 300-foot buffer from their property line to any application area on the WTMA farm is unlikely to prevail. We discern very little likelihood of success on the merits of this appeal.

Irreparable harm to Petitioner/ Harm to the Public

As to the other standards governing the grant or denial of supersedeas, harm to the petitioner and harm to the public or third parties, the Stevenses' petition is deficient. The Stevenses make one broad assertion that they have suffered irreparable harm but provide no specificity. Mr. Stevens referred to his health problems during oral argument, but there was no suggestion that any credible evidence would be forthcoming regarding a causal relationship between those problems and WTMA's actions. Similarly, there were no promises of evidence to show harm to the public or third parties if a supersedeas does not issue. On the other hand, WTMA has indicated that if a supersedeas is issued it and its ratepayers will suffer harm by incurring costs for storing and/or disposing of waste.

Accordingly, we enter the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BENJAMIN A. AND JUDITH E. STEVENS	:	
	:	
v.	:	**EHB Docket No. 2005-198-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY, Permittee	:	

ORDER

AND NOW, this 19th day of July, 2005, it is hereby ordered that Appellants' petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: July 19, 2005

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ARMY FOR A CLEAN ENVIRONMENT, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-036-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LEHIGH COAL & NAVIGATION, Permittee	:	**Issued: July 28, 2005**

OPINION DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

Appellant's Motion for Summary Judgment, which presents the single issue of whether Section 508(a) of the Solid Waste Management Act, as a matter of law, bars the use of coal ash for mine reclamation, is denied. The statutory construction doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) is not applicable in this matter. The Legislature included the phrase "shall include, but not be limited to" in the statute, indicating its intent that the list following that phrase was not an exclusive list. Appellant has failed to demonstrate that there is no issue of material fact and that it is entitled to judgment as a matter of law that the use of coal ash for mine reclamation is not specifically within one or more of the permissible uses for coal ash set forth in Section 508(a) as constituting beneficial use, reuse or reclamation of coal ash. Moreover, the statutory construction doctrine *ejusdem generis* (of the same kind, class, or nature) does apply to our analysis of this issue. In that regard, Appellant has not demonstrated that there is no issue of material fact and that it is entitled to judgment as a matter of law that the use of

coal ash for mine reclamation is not similar in nature or of the same class as those uses of coal ash enumerated in Section 508(a) as constituting beneficial use, reuse or reclamation of coal ash.

Introduction

This case involves the intended use by Lehigh Coal & Navigation (LCN) of coal ash for mine reclamation at its Springdale Pit located in Schuykill and Carbon Counties and Appellant's opposition to that plan. Before the Board today for disposition is the Motion for Summary Judgment (Motion) of Appellant, Army for a Clean Environment, Inc. (Appellant or ACE). ACE, a nonprofit corporation, filed its Notice of Appeal (NOA) on February 17, 2005 challenging the Surface Mining Permit and the General Permit issued to LCN and the General Permit issued to Northampton Generating Co. by the Department of Environmental Protection (Department or DEP).[1] ACE filed a Corrected and Amended Notice of Appeal on February 23, 2005 and an Amended Notice of Appeal on March 3, 2005 (Amended NOA). The Amended NOA raises various challenges to the permits issued to LCN, including the one at issue in this Motion, i.e., that the Department had no authority, as a matter of law, to allow coal ash to be used for mine reclamation.

Right out of the starting gate of this litigation ACE filed its Motion on April 27, 2005, which was before the first discovery deadline had passed and long before the deadline for summary judgment motions. The Motion is quite simple and to the point. ACE argues that the Department is statutorily prohibited from issuing any permission to use coal ash for mine reclamation purposes. ACE argues that Section 508(a) of the Solid Waste Management Act (SWMA), 35 P.S. § 6018.508

[1] By Order dated April 18, 2005 this appeal was dismissed as it related to claims against Northampton Generating Co. based upon Appellant's withdrawal of its appeal of the General Permit issued to Northern Generating Co.

(Section 508(a))[2], lists the permissible uses for coal ash, and mining reclamation is not one of them.[3]

Thus, we have one issue to deal with: does Section 508(a), as a matter of law, bar the use of coal ash for mine reclamation? Viewed in the context of this Motion, has ACE demonstrated at this point in time that there are no issues of disputed fact regarding its argument and that it is entitled to judgment as a matter of law on the question?

The Board heard oral argument from all parties' counsel on the Motion on July 11, 2005. The Board denied the Motion by oral ruling from the Bench on the record and our reasons for denial were stated on the record. A short Order denying the Motion issued on July 13, 2005. This Opinion is the written explanation of the reasons for the denial as stated on the record from the Bench on July 11, 2005.

Facts

The Amended NOA challenges two permits issued to LCN:

1. Surface Mining Permit No. 54733020C34 (SMP) re-issued on January 19, 2005 authorizing surface coal mining activities on 7,596.4 acres located in Schuylkill and Carbon Counties, NOA, Exhibit A; and

---

[2] Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 – 6018.1003.

[3] The Department filed a Response to the Motion (DEP Response) and Memorandum in Opposition to the Motion (DEP Memorandum) on June 10, 2005. LCN filed a Response to the Motion (LCN Response) and Memorandum in Opposition to the Motion (LCN Memorandum) on June 10, 2005. Also, amicus curiae, ARIPPA, filed a Memorandum in Opposition to the Motion (Amicus Memorandum) on June 10, 2005. We have no indication whether "ARIPPA" is an acronym or, if it is, what the letters stand for. What we do know is that, according to ARIPPA, it is a trade association representing thirteen waste coal-fired generators in Pennsylvania, as well as over 75 associate companies that are vendors or suppliers to the industry. Furthermore, ARIPPA's member plants burn waste coal, commonly referred to as culm or gob, in circulating fluidized bed combustors to generate electricity. These plants produce coal ash as a byproduct of the generation process and beneficially reuse it in reclamation of waste coal piles and banks. According to ARIPPA, virtually all of the coal ash generated by ARIPPA members is beneficially used for mine reclamation. Amicus Memorandum, at 1-2. On June 28, 2005 ACE filed a variety of documents, to wit, its Reply to the DEP Response, ACE's Reply Memorandum to the DEP Memorandum (ACE Reply to DEP), ACE's Reply to the LCN Response, ACE's Reply Memorandum to the LCN Memorandum (ACE Reply to LCN), and ACE's Reply Memorandum to the Amicus Memorandum (ACE Reply to Amicus). On July 7, 2005, ACE filed a Motion for leave to file a Sur-Reply which attached a draft sur-reply that ACE would file if granted permission to do so. By Order dated July 7, 2005, the Board granted LCN's Motion and accepted the attached draft sur-reply brief as LCN's sur-reply without requiring LCN to file it again separately.

2. General Permit for Processing/Beneficial Use of Residual Waste No. WMGR085 (GP 085) issued on March 2, 2004 granting statewide approval for the beneficial use and processing prior to beneficial use of freshwater, brackish and marine dredge material, cement kiln dust, lime kiln dust, coal ash, and cogeneration ash by screening, mechanical blending and compaction. NOA, Exhibit B. [4]

Both permits are at the core of LCN's plan to use coal ash for mine reclamation at the Springdale Pit. The Springdale Pit is a large open pit (61,5000,000 cubic yards) created by the Bethlehem Mines Corporation during mining activities conducted in the 1970's and 1980's. LCN is a successor to Bethlehem Mines. [5] The SMP and the GP 085 operate together to allow LCN to use a mixture of freshwater, brackish and marine dredge material, cement kiln dust, lime kiln dust, coal ash, and cogeneration ash for mine reclamation. NOA, Exhibit A, Notes 23. [6] Specifically, the mixture of freshwater, brackish and marine dredge material, cement kiln dust, lime kiln dust, coal ash, and cogeneration ash may be used for mine reclamation. LCN claims to have first obtained authority to place coal ash in the Springdale Pit for reclamation purposes under Surface Mining Permit No. 5433020(T) issued on June 27, 1990, LCN Response ¶¶ 1, 3, &4; LCN Response, Exhibit A, and it claims to have held that authority under permits issued prior to the SMP. LCN Response ¶ 6; DEP Response ¶ 61.

Standard of Review

The Board's standard of review of a summary judgment motion is well established:

> Our standard for review of motions for summary judgment has been set forth many times before. We will only grant summary judgment when the record, which is defined as the pleadings, depositions, answers to interrogatories, admissions,

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[4] The SMP and GP 085 were attached as Exhibits A and B, respectively, to the NOA, but not to the Amended NOA; thus our citation to the permits will cite to the appropriate NOA Exhibit.

[5] NOA, Exhibit A, Part B Special Conditions or Requirements 2; DEP Response ¶¶ 66, 67.

[6] Note 23 of the SMP states: "This permit is hereby corrected per Application #54733020C34 dated December 15, 2003 to authorize utilization of dredge material, cement kiln dust and lime kiln dust mixed with approved coal ash in the reclamation of the Springdale Pit. This Authorization is an integral part of the General Permit #WMGR085 which was approved on March 2, 2004 (expires March 2, 2014)."

> affidavits, and certain expert reports, show that there is no genuine issue of material fact *and* the moving party is entitled to judgment as a matter of law. *Holbert v. DEP*, 2000 EHB 796, 807-09 *citing County of Adams v. DEP*, 687 A.2d 1222, 1224 n. 4. (Pa. Cmwlth. 1997). *See* Pa. R.C.P. 1035.1. Also, when evaluating a motion for summary judgment, the Board views the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Holbert*, 2000 EHB at 808 (citations omitted).

Goetz v. DEP, 2003 EHB 16, 18-19; *Perkasie Borough Authority v. DEP,* 2002 EHB 764, 770, *Wheelabrator Falls Inc. v. DEP*, 2002 EHB 514, 520.

Discussion

Standing and Administrative Finality

Before addressing the substance of the Motion, we acknowledge two defenses raised by LCN and the Department in their responses to Appellant's Motion. LCN claims that the appeal is not viable due to ACE's lack of standing and by virtue of the operation of administrative finality. The Department also maintains that the appeal is precluded by administrative finality. LCN questions Appellant's standing to bring this appeal and argues that so far in these proceedings Appellant has not demonstrated its standing. As for administrative finality, the Department and LCN claim that the aforementioned earlier unappealed decisions of the Department, which LCN and the Department claim relate to the use of coal ash for mine reclamation at the Springdale Pit, preclude this appeal. Moreover, LCN argues that the statutory authority issue raised by ACE was put into question when the public notice of issuance of GP 085 was published in the *Pennsylvania Bulletin* on March 13, 2004. Having failed to file an appeal within 30 days of the *Pennsylvania Bulletin* notice, ACE is precluded from raising that issue now. The Department also argues that the doctrine of administrative finality precludes ACE's challenge to the use of coal ash for mine reclamation because LCN was authorized to use coal ash for mine reclamation in previous versions of the SMP.

Neither the Department nor LCN has yet filed any motions for summary judgment on the

standing or administrative finality points. This is hardly surprising given that discovery is still ongoing and even the first discovery deadline had not passed when ACE filed this Motion. LCN did file a Motion for Bifurcation on June 10, 2005 seeking an order bifurcating the issues in the appeal thereby limiting initial discovery to the issues of standing and administrative finality. The LCN Motion To Bifurcate also sought the deferral of any ruling on the ACE Motion pending motion practice on the standing and administrative finality issues. ACE opposed the Motion for Bifurcation and DEP took no position on it. At the oral argument of the ACE Motion we indicated that we would deny the Motion for Bifurcation which was done in an Order issued on July 13, 2005.

We can and will deal with the Motion regardless of the standing and administrative finality points which Appellees see as "threshold" issues and, in the case of administrative finality, even a basic jurisdictional issue. First, as noted, there is no motion for summary judgment pending now on these questions. Both LCN and DEP have indicated that they anticipate filing a dispositive motion in this appeal specifically placing the standing and/or administrative finality issues before the Board. Thus, the current attention to standing and administrative finality are, at best, proleptic challenges in the form of defenses to ACE's Motion. These challenges are not yet before us. Second, at least as to standing, the Board has traditionally not been able or willing to address standing questions before the factual record has been closed, which it is not in this case. Even when a motion to dismiss has been brought on standing we often defer such determination until later in the case when a factual record has been developed. As we recently said in *Braxton Cooley v. DEP*, 2004 EHB 554, in denying a motion to dismiss brought on the basis of standing:

> A motion to dismiss made prior to any discovery even having been taken is obviously too early to dispositively determine the question of standing. We have held before that there is not even a requirement that a Notice of Appeal contain allegations as to standing. *Beaver Falls Municipal Authority v. DEP*, 2000 EHB 1026, 1028. The proceedings are far too young procedurally to even discuss the parties' competing views of standing, let alone make any determinations about them.

Id. 559.[7] We will await such motion practice to opine further on the parties' arguments regarding these issues.

In any event, we can decide now the narrow issue presented by ACE's Motion without having to first address the standing or administrative finality questions and we shall do so.

The Statute and Regulations.

Since the issue presented by the Motion centers on statutory construction of Section 508(a) of the SWMA, our analysis begins with a look at the language of the statute. *Commonwealth v. Gilmour*, 822 A.2d 676, 679 (Pa. 2003).[8] Section 508 of the SWMA specifically addresses the beneficial use, reuse or reclamation of coal ash and provides in pertinent part:

> (a) Beneficial use, reuse or reclamation of coal ash shall include, but not be limited to, the following if they comply with subsections (b), (c) and (d):
>
> (1) The uses which are the subject of Federal Procurement Guidelines issued by the Environmental Protection Agency under section 6002 of the Solid Waste Disposal Act (Public Law 89-272, 42 U.S.C. § 6962).
>
> (2) The extraction or recovery of materials and compounds contained

---

[7] In the ACE Reply to LCN filed on June 28, 2005, ACE accurately points out that assertions of standing do not even have to be in a Notice of Appeal. ACE Reply to LCN, at 1 (citing *Valley Creek Coalition v. DEP,* 1999 EHB 935). In Valley Creek Coalition we observed:

> There is no requirement in the Board's rules requiring an appellant to aver facts sufficient to show that it has standing in the notice of appeal. A notice of appeal need only contain the appellant's objections to the actions of the Department. Accordingly, the fact that the notice of a appeal does not demonstrate that the Appellant has standing does not mandate dismissal of the appeal.

Id. at 941. Obviously, then, the motion to dismiss stage would virtually, by definition, be too early to decide a standing challenge outside, perhaps, the bizarre situation where a Notice of Appeal admits that the Appellant has no standing.

[8] The Pennsylvania Supreme Court noted in *Gilmour*:

> The General Assembly has directed in the Statutory Construction Act that the object of interpretation and construction of all statutes is to ascertain and effectuate the intention of the General Assembly. Generally speaking, the best indication of legislative intent is the plain language of a statute. Furthermore, in construing statutory language, "words and phrases shall be construed according to the rules of grammar and according to their common and approved usage. ..."

822 A.2d at 679 (citations omitted).

within coal ash.

(3) Those uses in which the physical or chemical characteristics are altered prior to use or during placement.

(4) The use of bottom ash as an anti-skid material.

(5) The use as a raw material for another product.

(6) The use for mine subsidence, mine fire control and mine sealing.

(7) The use as structural fill, soil substitutes or soil additives.

35 P.S. § 6018.508(a).[9] Coal ash is defined as: "Fly ash, bottom ash or boiler slag resulting from the combustion of coal, that is or has been beneficially used, reused or reclaimed for a commercial, industrial or governmental purpose. The term includes such materials that are stored, processed, transported or sold for beneficial use, reuse or reclamation." 35 P.S. § 6018.103.[10]

---

[9] Subsection (b), (c) and (d) provide:

(b) The department may, in its discretion, establish siting criteria and design and operating standards governing the storage of coal ash prior to beneficial use, reuse or reclamation.

(c) The department may, in its discretion, establish siting criteria and design and operating standards governing the use of coal ash as structural fill, soil substitutes and soil additives. A person using coal ash for such purposes shall notify the department prior to such use.

(d) The department may, in its discretion, certify coal ash that is used as structural fill, soil substitutes and soil additives.

(1) Certification shall issue after the department has considered the following data:

(i) The facility from which the coal ash is originating.

(ii) The combustion and operating characteristics of the facility.

(iii) The physical and chemical properties of the coal ash, including leachability.

(2) Generators of certified coal ash shall notify the department whenever the data referred to in paragraph (1) are or have been significantly altered. At such time, recertification will be required.

35 P.S. § 6018.508(b)-(d).

[10] In its briefing documents and at oral argument, Appellant raises the issue that coal ash, as defined by the SWMA, is not a solid waste and therefore, based on the definition of solid waste, cannot be a residual waste. The SWMA defines "solid waste" as "[a]ny waste, including but not limited to, municipal, residual or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials. The term does not include coal ash or drill cuttings." 35 P.S. § 6018.103. According to Appellant, because the definition of solid waste includes residual waste, but excludes coal ash, coal ash cannot be a residual waste. In LCN's opinion "coal ash unquestionably meets the definition of residual waste." LCN Memorandum, at 14. LCN points to the Department's statutorily listed duties under the SWMA, specifically the duty to "encourage the beneficial use or procession of municipal waste or residual waste when the department determines that such use does not harm or present a threat of harm to the health, safety or welfare of the people or environment of this Commonwealth." 35 P.S. § 6018.104(18). Resolution of this identity question is not necessary to determine whether ACE is entitled to summary judgment on the Section 508(a) question it raises.

ACE claims that Section 508(a) is the embodiment of the legislative prohibition of the use of coal ash for mine reclamation. ACE argues that the use of coal ash for mine reclamation is affirmatively prohibited by Section 508(a) because mine reclamation is neither a use specifically set forth in the list of permissible uses set out in Section 508(a)(1)-(7), nor is it similar in nature or character to any of the uses enumerated in Section 508(a). ACE's arguments bring into play two different maxims of statutory interpretation: *expressio unius est exclusio alterius* meaning "that the expression of one thing is the exclusion of another," *Black's Law Dictionary* 521 (5th ed. 1979); and *ejusdem generis* meaning "[o]f the same kind, class, or nature." *Id.* at 464.

Expressio Unius Est Exclusio Alterius

ACE urges this Board to apply the principal of *expressio unius est exclusio alterius* and read Section 508(a) as presenting the exclusive list of approved beneficial uses of coal ash and hold that, since use for mine reclamation is not one of the enumerated uses in Section 508(a), the use of coal ash for mine reclamation is prohibited by the statute. The plain language of the statute requires us to reject ACE's argument. *Expressio unius est exclusio alterius* simply does not apply in this instance. Section 508(a) plainly states that "[b]eneficial use, reuse or reclamation of coal ash *shall include, but not be limited to*, the following... ." 35 P.S. § 6018.508(a) (emphasis added). If the Legislature intended that the uses listed in Section 508(a) be the only uses of coal ash that constituted beneficial use, reuse or reclamation of coal, they would not have included the emphasized language.

The cases cited by Appellant in support of its *expressio unius est exclusio alterius* argument do stand for the proposition that the inclusion of specific items in a statute implies the exclusion of omitted items. *Chinconella v. Workers Comp. Bd.*, 845 A.2d 932 (Pa. Cmwlth. 2004); *Allegheny County Detective Ass'n v. Allegheny County*, 804 A.2d 1285 (Pa. Cmwlth. 2002), *appeal denied*, 813 A.2d 844 (Pa. 2002); *City Counsel of Hazleton v. City of Hazleton*, 578 A.2d 580 (Pa. Cmwlth.

1990), *aff'd*, 600 A.2d 191 (Pa. 1991). However, none of statutes construed in the cited cases contained language identical or similar to "shall include, but not be limited to." Consequently, these cases either do not support ACE's argument or, alternatively, they actually militate against it.

Ejusdem Generis

ACE cites to the Pennsylvania Supreme Court decision, *McClellan v. Health Maint. Org. of Pa.*, 686 A.2d 801 (Pa. 1996), as support for its position that the phrase "shall include, but not be limited to" in Section 508(a) operates as a phrase of limitation and not expansion. According to ACE the uses of coal ash enumerated in Section 508(a) after the phrase "shall include, but not be limited to" are specific uses and the use of coal ash for mine reclamation is neither similar to nor encompassed within any of the listed uses.

The Department, LCN and ARIPPA offer three responses to ACE's *ejusdem generis* argument. First, the Department posits that *McClellan* is not controlling authority because the Supreme Court was evenly divided on the outcome of the case, thus it is not an opinion of a majority or even a plurality of that court. Second, Appellees argue that Section 508(a) specifically authorizes the use of coal ash for mine reclamation under clause 508(a)(3) according to both and, according to LCN, under clauses 508(a)(6)&(7). Third, and finally, Appellees say that the use of coal ash for mine reclamation is similar in nature, or of the same general nature or class as the enumerated uses. Thus, if the doctrine of *ejusdem generis* is applied, Section 508(a) authorizes the use of coal ash for mine reclamation. We will address each of these three points in order.

Precedential Standing of McClennan

In *McClellan*, the Pennsylvania Supreme Court was called upon to interpret the definition of "professional health care provider" under the Peer Review Protection Act, a definition that contained the phrase "including, but not limited to" and a list of individuals or organizations considered to be

encompassed by the definition. 686 A.2d at 804-05. In the Opinion in Support of Affirmance, Justice Newman described the doctrine of *ejusdem generis*:

> It is widely accepted that general expressions such as "including, but not limited to" that precede a specific list of included items should not be construed in their widest context, but applied only to persons or things of the same general kind or class as those specifically mentioned in the list of examples. Under our statutory construction doctrine *ejusdem generis* ("of the same kind or class"), where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. Where the opposite sequence is found, i.e., specific words following general ones, the U.S. Supreme Court and the courts from several other jurisdictions recognize that the doctrine is equally applicable, and restricts application of the general term to things that are similar to those enumerated.

Id. at 805-806 (citations omitted). Six Justices participated in the *McClennan* decision, three were in favor of affirming the Superior Court decision and three were in favor of reversing the Superior Court decision.[11]

The Department challenges application of the *McClennan* case to this matter because the court was evenly divided and cites *Neil v. Biggers,* 409 U.S. 188 (1972), for the principle that "an affirmance by an equally divided Court [is not] entitled to precedential weight." *Id.* at 192. However, while, technically, *McClellan* may not be directly precedential here, that by no means shows that the doctrine of *ejusdem generis* is not applicable. None of the Justices on either side of the issue in *McClennan* questioned the application of *ejusdem generis* to the question they were dealing with. There was no disagreement from any of the six Justices that participated in the *McClellan* decision that *ejusdem generis* was the proper tool of analysis; it was the outcome of the *ejusdem generis* analysis upon which the Justices were evenly divided. The Justices in favor of reversal of the Superior Court's decision did not even take issue with Justice Newman's description of the doctrine.

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[11] Justices who participated in the *McClennan* case were Justices Flaherty; Zappala; Cappy; Castille; Nigro; and Newman. Justice Newman wrote the Opinion in Support of Affirmance, Justice Flaherty concurred in the result, Justice Zappala filed an Opinion in Support of Reversal in which Justice Castille joined and Justice Nigro filed an

The Justices on both sides of the case simply disagreed on whether the subject in question was or was not of the same kind or class as the ones enumerated. The disagreement was in application of the doctrine to the facts of the case.

The Opinion in Support of Affirmance found that the organization at issue was not of the same nature or class as the enumerated list in the applicable statute, *McClennan*, 686 A.2d at 806-07, while the Justices who favored reversal determined that the organization at issue was of the same nature or class as the enumerated list in the applicable statute. *Id.* at 807 (Zappala) ("I find that the two organizations are of the same general nature or class and that both should be afforded the same protection."); *Id.* at 809 (Nigro) ("I conclude that HMOs are in the same class as health care facility administrators and operators under the Act."). Thus, all six Justices who participated in the *McClennan* case performed the analysis called for by the doctrine of *ejusdem generis*. Consequently, although *McClellan* itself may not be binding, we treat the doctrine of *ejusdem generis* as the proper focal point of analysis because six Justices of the Supreme Court did so in *McClellan.*

Further, Supreme Court precedent before *McClellan*, as well as Commonwealth Court and federal court precedent, is squarely in line with *ejusdem generis* being applicable as the rule in Pennsylvania. *See Indep. Oil & Gas Ass'n v. Bd. Of Assessment Appeals*, 814 A.2d 180, 183-84. (Pa. 2002); *Steele v. Statesman Ins. Co.*, 607 A.2d 742, 743 (Pa. 1992); *Summit House Condo. v. Commonwealth*, 523 A.2d 333, 336 (Pa. 1987); *Shire v. Worker's Comp. Appeal Bd.*, 828 A.2d 441, 444 (Pa. Cmwlth. 2003), *appeal denied*, 842 A.2d 408 (Pa. 2003) (quoting the portion of *Independent Oil & Gas* that quotes *McClennan); Velocity Express v. Pa. Human Relations Comm'n*, 853 A.2d 1182, 1185 (Pa. Cmwlth. 2004); *IU North America, Inc. v. Gage Co.*, 2002 U.S. Dist. LEXIS 10275, *16-*17 (Judge Reed citing and quoting *McClellan* as a pronouncement of

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Opinion in Support of Reversal. Since the opinion notes the Court was evenly divided, Justice Cappy must have joined in Justice Newman's Opinion in Support of Affirmance.

Pennsylvania law on the applicability of the doctrine of *ejusdem generis*). Thus, we think the doctrine is applicable here.

Argument that the Use of Coal Ash for Mine Reclamation Falls Squarely Within the Enumerated Permissible Uses

Both the Department and LCN argue that the use of coal ash for mine reclamation falls directly within the parameters of Section 508(a)(3) because, here, under the SMP and GP 085, the physical or chemical characteristics of the coal ash are altered prior to its placement at the Springdale Pit. Section 508(a)(3) directly provides that "uses in which the physical or chemical characteristics are altered prior to use or during placement" constitute beneficial use, reuse or reclamation of coal ash. 35 P.S. § 6018.508(a)(3). ACE does not dispute that physical or chemical alteration or processing is allowed under the SMP and GP 085, ACE Reply to DEP, at 5, but posits that because some physical or chemical alteration results when coal ash is exposed to air or rain, Section 508(a)(3) could not have been intended by the Legislature to cover any physical or chemical alteration, otherwise the remaining enumerated uses would be superfluous. Further, according to ACE, if the Legislature intended coal ash to be used in mine reclamation it would have specifically listed that use in Section 508.

As the party moving for summary judgment, ACE has the burden to show that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. It is not clear now whether the use of the coal ash at the Springdale Pit is or is not a use which falls directly within Section 508(a)(3). The determination of whether or not the use of coal ash for mine reclamation is one of "those uses in which the physical or chemical characteristics are altered prior to use or during placement" is an issue that requires further development of the record.[12]

[12] For example, a factual record is needed to determine whether, how and to what extent the chemical or physical characteristics of the coal ash used by LCN at the Springdale Pit will be altered prior to or during placement.

LCN also argues that the use of coal ash for mine reclamation is specifically covered by Sections 508(a)(6) and (a)(7), which authorize respectively, "[t]he use for mine subsidence, mine fire control and mine sealing," and "[t]he use as structural fill, soil substitutes or soil additives." As with the application of Section 508(a)(3), there are open factual issues on the potential applicability of Section 508(a)(6) and (7) which preclude awarding summary judgment to ACE at this time.

Argument that the Use of Coal Ash is Similar in Nature, or of the Same General Nature or Class, as the Enumerated Uses

Even if the use of coal ash for mine reclamation does not fall directly within one of the enumerated uses outlined in Section 508(a)(1)-(7), under the statutory construction doctrine of *ejusdem generis*, the use of coal ash for mine reclamation could still fall within Section 508(a) if that use is of the same general nature or class as one of the enumerated uses. ACE maintains that the use of coal ash for mine reclamation is not similar to any of the enumerated uses while the counter-argument from the other side maintains that it is similar in nature to the enumerated uses.

As the party moving for summary judgment, ACE must demonstrate that as a matter of undisputed fact the use of coal ash for mine reclamation is, as a matter of law, not similar to any of the enumerated uses. ACE has not done so. The factual record is too undeveloped at this point to make any such determination, one way or the other.

For example, the Department argues that if the use of coal ash for mine reclamation is not directly described in Section 508(a)(3), its use for mine reclamation is similar to that described in Section 508(a)(3). Also, relying on the affidavit of Roger Hornberger, District Mine Manager in the Department's Pottsville District Office, the Department points out that one use of coal ash for mine sealing as referred to in Section 508(a)(6) is to prevent surface water from reaching deep mine pools and if coal ash is used in accordance with the SMP and GP 085 water may be diverted from mine voids where it otherwise would collect and create a mine pool beneath the Springdale Pit. DEP

Memorandum, at 25. Thus, the use of coal ash for mine reclamation is similar to or of the same nature as the use outlined in Section 508(a)(6). ACE counters by arguing that mine sealing is a term used to describe how an underground mine is closed and is not used in surface mine operations or reclamation; thus, it is not appropriate to contend that statutory authority to use coal ash to seal a mine is the same as authorizing the use of coal ash to reclaim or fill a surface mine pit.

We cannot and will not solve these competing views in a vacuum without a record. Or, put another way, we cannot now conclude that there are no factual issues in dispute on these issues or that ACE is correct on its point as a matter of law.

ARRIPA contends that the use of coal ash for mine reclamation is encompassed within the general types of beneficial uses enumerated in Section 508(a) and briefly describes some elements of reclamation of surface and underground mine operation, then concludes these activities are similar in nature to the uses set forth in Section 508(a)(6)&(7). Amicus Memorandum, at 5-6. Specifically, ARRIPA explains:

> The major elements of reclamation include backfilling, soil stabilization, compaction and grading, and addition of soil amendments and nutrients to assure revegetation. *See e.g.,* 25 Pa. Code. §§ 87.68, 87.100, and 87.141. Reclamation of underground mining operations includes mine sealing. 25 Pa. Code § 89.83. Further, backfilling of voids is part of the subsidence control plans required for underground mining operations. 25 Pa. Code § 89.141.

Id. at 5 (footnote omitted).

ACE counters ARIPPA's argument by arguing that prevention of subsidence, controlling mine fires and sealing mines are safety measures, not mine reclamation. ACE Reply to Amicus, at 2. ACE does not provide us with factual or legal support which would absolutely preclude ARIPPA's view and render ACE's view the required one as a matter of law. Again, we will not decide on these competing views in a vacuum without a record. The regulation on closing of underground mine openings cited by ARIPPA, 25 Pa. Code § 89.83, lists a number of purposes to be achieved by

closing underground mine openings upon completion of mining operations, some that can be described as environmental protection and some as safety measures.[13] We cannot conclude that the use of coal ash for mine reclamation is not similar in nature to the uses enumerated in Section 508(a) based upon ACE's distinction that that prevention of subsidence, controlling mine fires and sealing mines are safety measures, not mine reclamation.

ACE further argues that use of coal ash for mine reclamation is precluded because that use is *a priori* of a different nature that the uses enumerated in Section 508(a) in that the uses described in Section 508(a) involve coal ash as being "marketable," i.e., the coal ash being bought by the user, not the user being paid a fee to take it, as would be the case here.[14] In the matter before us, LCN does not purchase the coal ash; rather it receives a payment from the entities that produce the coal ash. Thus, says ACE, the intended use here is not of the same general nature or character as the uses specified in Section 508(a)(1)-(7) as this does not involve a "marketable" use as do all the uses prescribed in Section 508(a).

We are not prepared now to read this notion or theory of "marketability" as ACE offers it into Section 508(a) such that, as a matter of law, the direction of the flow of money is the absolute litmus

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[13] The regulations states, in part:

> Upon completion of mining, openings, except those approved for water monitoring or otherwise managed in a manner approved by the Department, shall be closed to prevent degradation of surface and groundwaters; to assist in returning the groundwater as near to its premining level as possible; to assist in returning the hydrologic balance as near to its premining condition as possible; to prevent underground mine fires; to prevent access to underground workings; and to ensure the safety of people, livestock, fish and wildlife. Prior to closing an opening, the plan for the closing shall be approved by the Department.

25 Pa. Code § 89.83(a).

[14] ACE points to statements made by one legislator during debate regarding a rider that some legislators attempted to add to the bill that included Section 508 as evidence of legislative intent that uses of coal ash covered by Section 508 be marketable uses. We are not persuaded these statements support Appellant's argument that the Legislature intended that Section 508 preclude the use of coal ash for mine reclamation. Further, we note, as did the Department and ARIPPA, that while a statement by an individual legislator may be evidence of legislative intent, it is not dispositive on the issue. *DEP v. Crown Recycling and Recovery, Inc.*, 1997 EHB 459, 464.

test of whether the use of coal ash for mine reclamation is or is not of the same nature as the uses enumerated in Section 508(a). We do not see ACE's theory as being a required conclusion to be extracted from the language of Section 508(a). Also, we do see that the SWMA defines "beneficial use" as:

> Use or reuse of residual waste or residual material derived from residual waste for commercial, industrial or governmental purposes, where the use does not harm or threaten public health, safety, welfare or the environment, or the use or reuse of processed municipal waste for any purpose, where the use does not harm or threaten public health, safety, welfare or the environment.

35 P.S. § 6018.103. This definition focuses on the nature of the use as determining whether a use is a "beneficial use," not on the economic structure of a transaction between the producer and user of the material or whether there is economic gain to the producer.

So at this stage of the proceedings we cannot adopt ACE's argument that, as a matter of undisputed fact and of law, use of coal ash for mine reclamation is of a different nature and character compared to the uses enumerated in Section 508(a). Nor can we absolutely reject as factually and legally impossible the counter-argument that the use of coal ash for mine reclamation is similar in nature to the uses enumerated in Section 508(a). ACE had the burden to persuade us otherwise and it has not met that burden.[15]

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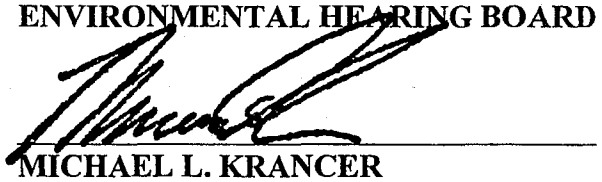
[15] The Motion also challenges DEP's use of 25 Pa. Code § 287.661 and 25 Pa. Code § 287.663 as authority to issue permits that allow the use of coal ash for mine reclamation or the use of residual waste mixed with coal ash for mine reclamation based on the argument that Section 508 prohibits the use of coal ash for mine reclamation. Since we determined that ACE has not proven that Section 508 prohibits, as a matter of law, the use of coal ash for mine reclamation, ACE's challenge regarding these regulations also fails.

Based on the foregoing, the Board entered its Order dated July 13, 2005 denying Appellant's Motion.

ENVIRONMENTAL HEARING BOARD



MICHAEL L. KRANCER
Administrative Law Judge
Chairman

DATED: July 28, 2005

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**EHB Docket No. 2005-072-CP-L**
v.	:	
	:	**Issued: August 9, 2005**
J&G TRUCKING, INC. and JON C. GOLDEN	:	

OPINION AND ORDER ON MOTION FOR DEEMED ADMISSIONS

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

Synopsis:

The Board grants the Department's unopposed motion for deemed admissions where a defendant failed to file an answer to the Department's complaint for civil penalties for violations of the Clean Streams Law and denies the motion as to another defendant where service of the complaint and notice to defend was not complete.

OPINION

On April 21, 2005, the Department of Environmental Protection (the "Department") filed a complaint for civil penalties against J&G Trucking, Inc. ("J&G") and Jon C. Golden ("Golden") for alleged violations of the Clean Streams Law, 35 P.S. § 691.1 *et seq.* The Department attached a notice to defend to the complaint. On April 20, 2005, J&G received a copy of the complaint and notice to defend, as evidenced by a signed certified mail return receipt. (Department Exhibit B). A copy of the complaint and notice to defend was sent to Golden by first class and certified mail. The certified mail was never claimed and was returned

to the Department. The first class mail was never returned. Golden has corresponded with the Department regarding settling the case. Neither J&G nor Golden have answered or otherwise responded to the complaint.

On June 15, 2005, the Department filed a motion for deemed admissions. The Department served J&G and Golden with a copy of the motion. J&G and Golden have not responded to the motion.

The Board's rules regarding service of complaints require that service of complaints be by "personal service or by certified or registered mail." 25 Pa. Code § 1021.71(b). The rules provide further that "[i]n the instance of mail, service shall be complete upon delivery." *Id.*

Service on J&G was completed on April 20, 2005 upon delivery of the complaint and notice to defend by certified mail. Service of the complaint and notice to defend upon Golden, however, was never completed. The Department's attempt to serve Golden by certified mail failed. Golden never claimed the certified mail, which was eventually returned to the Department. Although it is true that the complaint and notice to defend sent by first class mail were never returned, service in accordance with our rules upon Golden was not achieved. The requirements for service clearly state that service by mail must be by certified or registered mail and is complete upon *delivery*. The certified mail was never delivered to Golden. Where, as here, service of the complaint and notice to defend has not been completed, default judgment cannot be entered. *See DER v. U.S. Wrecking, Inc.*, 1990 EHB 1198, 1200 (where a complaint is not properly served, defendant has no obligation to respond); *See also DEP v. Huntsman*, 2004 EHB 594, 595 (Board denied prior motion for default judgment where Department did not

comply with service requirements). Therefore, we must deny the Department's motion for deemed admissions as to Golden.[1]

J&G, having been properly served with the complaint and notice to defend, was required to answer the Department's complaint within 30 days of service. 25 Pa. Code § 1021.74(a). J&G never filed an answer to the Department's complaint. The Board's rules provide as follows:

> A defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts in the complaint may be deemed admitted. Further, the Board may impose any other sanctions for failure to file an answer in accordance with § 1021.161 (relating to sanctions).

25 Pa. Code § 1021.74(d). Section 1021.161 reads as follows:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

25 Pa. Code § 1021.161.

Recently we held that where no answer has been filed to a Department complaint for civil penalties and the Department has filed an unopposed motion for deemed admissions, the relevant facts averred in the Department's complaint shall be deemed admitted. *DEP v. Breslin*, EHB Docket No. 2005-069-L (Opinion issued July 1, 2005), *slip op.* at 2; *see also DEP v. G & R*

[1] The fact that Golden has corresponded with the Department concerning settlement is of no import. The Board's rules are clear that service of the complaint and notice to defend must be accomplished through specific means. Absent compliance with those requirements default judgment cannot be entered.

Excavating and Demolition, Inc., EHB Docket No. 2005-022-MG (Opinion Issued May 9, 2005), *slip op.* at 2-3.[2] We follow that precedent here.

Accordingly, we enter the order that follows.

[2] In cases where the Department has specifically requested default adjudication in addition to asking that all relevant facts in the complaint be admitted, the Board has not hesitated to issue orders determining liability. *DEP v. Huntsman*, 2004 EHB 594, 595-596 (factual allegations deemed admitted, default judgment entered as to liability and amount of penalty to be determined at hearing); *DER v. Allegro Oil and Gas Company*, 1991 EHB 34 (partial default adjudication as to liability granted where a defendant has failed to file an answer to a complaint); *DER v. Canada-Pa., Ltd.*, 1987 EHB 177 (default judgment is appropriate sanction where there is disregard for the administrative law process). In this case the Department has only sought to have the relevant averments in the complaint admitted.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**EHB Docket No.: 2005-072-CP-L**
v.	:	
J&G TRUCKING, INC. and JON C. GOLDEN	:	

ORDER

AND NOW, this 9th day of August, 2005, the Department's unopposed motion for deemed admissions as to Jon C. Golden is denied.

The Department's unopposed motion for deemed admissions as to J&G Trucking is granted. All relevant facts set forth in the Department's complaint for civil penalties regarding J&G Trucking are deemed admitted.

ENVIRONMENTAL HEARING BOARD

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Chairman

GEORGE J. MILLER
Administrative Law Judge
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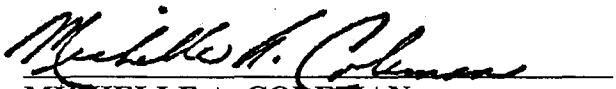
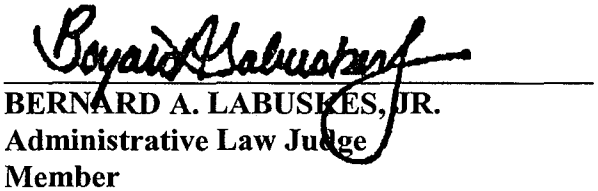
THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: August 9, 2005

c: **DEP Bureau of Litigation**
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TED SEMAK	:	
	:	
v.	:	**EHB Docket No. 2004-190-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 9, 2005**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where there are material facts disputed by both parties to this appeal, the appellant's motion, which we treat as a motion for summary judgment, must be denied. We further caution the appellant that he assumes the risk of proceeding in this matter without the benefit of counsel.

OPINION

This matter involves the appellant Ted Semak's application for renewal of an NPDES permit for a privately owned sewage treatment plant. Mr. Semak operates the sewage treatment plant in connection with a mobile home park owned by him and his wife in the Borough of Economy, Beaver County. By letter dated July 15, 2004, the Department denied the application and advised Mr. Semak that he was required to connect to Economy Borough's Sewickley Creek sanitary sewer system. Mr. Semak appealed and on May 18, 2005 filed a "motion" which the

Board construed as a motion for summary judgment. The Department filed an answer, and Mr. Semak, who is proceeding *pro se*, was granted an extension to file a reply, which he did on July 25, 2005.

In his motion, Mr. Semak sets forth a number of statements regarding the Economy Borough Municipal Authority (the Authority), its sanitary sewer system, and the system operated by Mr. Semak. In its answer, the Department agrees with only a few of the statements made by Mr. Semak. As to the remainder of his allegations, the Department either does not agree or states it is without sufficient information to either admit or deny the allegation. The Department also argues that a number of the statements made by Mr. Semak are not relevant to this appeal and would be more appropriately raised in a separate cause of action against the Authority.

Summary judgment may be entered where the record demonstrates there are no material facts in dispute and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2; *Brian E. Steinman Hauling v. DEP*, 2004 EHB 846, 848. In other words, if there are facts that are material to a ruling on the matter which are disputed by either party, summary judgment may not be entered. In such a case, the matter must proceed to trial, where the parties can present witnesses and exhibits to set forth the facts of their case.

In this case, the Department agrees with only a few of the facts alleged by Mr. Semak. For example, the Department admits that the tap constructed by the Authority for Mr. Semak's use is on adjoining property. However, the Department denies Mr. Semak's claim that he must trespass in order to hook up to the system. The Department points out that Mr. Semak could connect at any point on which the interceptor for the line crosses his property; he could also negotiate with the owner of the adjoining property to connect at the tap constructed by the Authority. Mr. Semak also raises a number of disputes he has with the Authority and its sewer

system. The Department does not admit or deny these allegations but says it is without sufficient information to form a conclusion. It further contends that a number of these disputes cannot be addressed in this appeal but only in a separate lawsuit brought against the Authority.[1] In any case, there are simply too many facts disputed by Mr. Semak and the Department to grant summary judgment.

Therefore, the next step in this matter is to proceed to a trial. At this stage, Mr. Semak will have an opportunity to present the testimony of witnesses and introduce relevant exhibits in connection with his appeal. In order to succeed he will need to present a preponderance of evidence demonstrating that the Department erred under the law in denying his application for a renewal NPDES permit and ordering him to connect to the Authority's sewer system. 25 Pa. Code § 1021.122(c)(1).

To establish one's case by a "preponderance of the evidence" means that "the evidence in favor of the proposition must be greater than that opposed to it." *Noll v. DEP*, EHB Docket No. 2003-131-K (Adjudication issued May 20, 2005), *slip op.* at 11 (citing *Bethenergy Mines, Inc. v. DER*, 1994 EHB 925, 975 (quoting *Midway Sewerage Authority v. DER*, 1991 EHB 1445, 1476)). In other words, Mr. Semak's evidence must tip the scales in his favor, as opposed to that presented by the Department. Furthermore, if Mr. Semak wishes to prove any technical issues, he is obliged to come forward with technical evidence, which may or may not involve the testimony of someone who is an expert in the field sought to be addressed.

We further caution Mr. Semak that he takes a great risk by proceeding without the benefit of an attorney. As we have cautioned in the past, laypersons who choose to proceed without counsel assume the risk that their lack of legal expertise may prove their undoing. *See e.g., Van*

[1] The Board would have no jurisdiction over such an action, which would need to be filed in the

Tassel v. DEP, 2002 EHB 625; *Taylor v. DER*, 1991 EHB 1926, 1929. An unfamiliarity with the law and the legal process can severely impair a party's ability to present his case. *Welteroth v. DER*, 1989 EHB 1017 (citing *In re Ciaffoni*, 556 A.2d 504, 506 (Pa. Cmwlth. 1989)). Therefore, we again urge Mr. Semak to seek counsel to represent him in this matter.

For the reasons set forth herein, the motion for summary judgment is denied. A separate order will be issued setting this matter for trial.

Beaver County Court of Common Pleas.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TED SEMAK

v.	:	**EHB Docket No. 2005-049-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 9th day of August 2005, Mr. Semak's motion for summary judgment is **denied**, and this matter will proceed to trial.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: August 9, 2005

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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v.	:	**EHB Docket No. 2002-269-R**
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF ENVIRONMENTAL PROTECTION and QUALITY AGGREGATES , INC., Permittee	:	**Issued: August 10, 2005**

ADJUDICATION

By: Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Pennsylvania Environmental Hearing Board dismisses an appeal from the Pennsylvania Department of Environmental Protection's issuance of a non-coal mining permit where the Appellants failed to sustain their burden of proof with credible testimony, including expert testimony, that the Permittee's mining operation would adversely affect the environment or that the issuance of the permit was inappropriate,

unreasonable or contrary to law.

Introduction

This appeal challenges the issuance of a non-coal surface mining permit issued by the Pennsylvania Department of Environmental Protection to Quality Aggregates. The permit allows the operation of a limestone mine in Lawrence County, Pennsylvania. Following the completion of discovery and a site view, a five day hearing was held in Pittsburgh, Pennsylvania before Judge Thomas W. Renwand. Twenty-six witnesses testified. The record consists of an 876 page transcript and numerous exhibits.

FINDINGS OF FACT

1. This Appeal is from the issuance of a non-coal surface mining permit for a limestone mine (the "Permit") No. 37010301 issued by the Pennsylvania Department of Environmental Protection ("Department") on September 25, 2002 to Quality Aggregates, Inc. (App. Ex. 13)

2. The mining will take place in close proximity to McConnell's Mill State Park ("McConnell's Mill" or "Park"). McConnell's Mill is a geologic, biologic, and scenic gem. The most prominent features of the Park are the 400 foot Slippery Rock Creek Gorge, an historic picturesque grist mill, and a beautiful covered bridge. (App. Exs. 25, 29(b) – (h); 2)

3. The appeal was filed by Robert Shuey, Robert Veltri, Stanley M. Stein, William Keane, Slippery Rock Stream Keepers, the League of Women Voters of Lawrence County, Bartramian Audubon Society and Friends of McConnell's Mill State Park.

(Notice of Appeal)

McConnell's Mill State Park

4. The Slippery Rock Creek Gorge is one of the most beautiful geologic formations in Pennsylvania. Almost 400 feet deep in some places, the Slippery Rock Creek Gorge is home to a plethora of botanical and animal species. (N.T. 116-118)

5. As a Park visited by more than 225,000 people a year, McConnell's Mill retains as its fundamental character the beauty and peacefulness peculiar to undisturbed forest, flowing water, and the sound of wildlife. (N.T. 231, 251)

6. The activities for which it is most known and used include hiking along its many trails, kayaking, fishing, bird watching, rock climbing, and other recreational activities. The noise levels of these activities are very low. At many locations, the most significant sound is the sound of flowing water in Slippery Rock Creek. (N. T. 152, *et seq.*; N. T. 228, *et seq.*; N. T. 603, *et seq.*; N. T. 715, 728-729)

7. Although there is a picnic area on the east side of Slippery Rock Creek Gorge, and although there are roads that cross the stream at various locations and which are miles apart, there is not a lot of noise from human activity such as playgrounds, dirt bikes, RV's, rifle ranges or other sources of noise inconsistent with the noises of nature that prevail. (N.T. 157-166, 251)

8. Rock-climbing activities take place along the fractured sandstone cliff walls on the west wall of the Slippery Rock Creek Gorge immediately to the east of the mining activity. (N. T. 152, 228)

9. Approximately 9,000 people visit the Park to rock climb. There are two areas in the Park used for rock climbing – one area is the Rim Road area, (App. Ex. 29 a), and the second is the Breakneck Bridge area. The climbing area is one of the few places in the region where rock climbing is available to the public. (N.T. 239; App. Ex. 25)

10. About 21,000 people use the Park for picnicking, about 57,000 people use the Park for pleasure driving, approximately 8,000 people use the Park for boating, which includes rafting, kayaking and canoeing, approximately 32,000 people use the park for environmental education, approximately 16,000 people use the Park for hiking, approximately 1,300 people use the Park for bicycling, approximately 1,900 people use the Park for hunting, and approximately 2,600 people use the Park for sledding and other winter sports. (N.T. 235-236)

11. The uncontested testimony, as well as the Board's site visit to McConnell's Mill and the photographs (App. Exs. 29 b-h) entered into evidence, reveal the cliff walls to be fractured, prone to rock slides, and potentially dangerous to McConnell's Mill State Park users, many of whom climb the cliff walls immediately to the east of the blasting sites. (N.T. 202-204) According to the uncontradicted testimony, rockslides occur at various points along the Slippery Rock Creek Gorge even without blasting in the immediate vicinity. (N.T. 603, *et seq.*)

12. The North Country National Scenic Train runs through the Park. The Park was designated as a State Park natural area in 1998 and was dedicated as a national natural landmark in 1974. (N.T. 236, 238)

13. The Park management expressed concerns about dust, noise and blasting to the Department during the permit review period and preferred that the mining stay as far away from the Park as possible. The Department of Conservation and Natural Resources did not appeal the Department's issuance of the Permit. (N.T.241, 246; App. Ex. -25)

14. Quality Aggregates met with representatives of the Park before mining began and worked with representatives of the Park to develop an informational brochure explaining the mine and mining activities and to develop a protocol for notifying the Park when blasting was going to occur. (N.T. 247-248)

15. The Park has not heard from any visitors that those visitors are now avoiding the Park or certain areas of the Park because of the mining activities. (N.T. 254)

16. Mr. Obadiah Derr, the Park Manager, has observed dust from Rim Road and from the Kildoo Picnic Area. Those dust conditions existed before the Quality Aggregates mine began operating. (N.T. 256-257)

17. The mine is not visible from the Park. There is a tree barrier approximately 250 to 300 feet wide between Rim Road, the western boundary of the Park, and the Quality Aggregates mine. The only physical feature of the mine that is visible from Rim Road is the outslope of Sedimentation Pond A. (N.T. 352; Permittee Ex. 3)

RETTEW Report

18. In November 1995, Rettew Associates prepared a report titled "Strategic Plan for the Protection of Slippery Rock Creek and Slippery Rock Creek Gorge." (RETTEW

Report) Mr. James Kooser was the senior scientist involved in the study. Mr. Kooser also was the primary author of the RETTEW Report. The Report was prepared for the Pennsylvania Department of Conservation and Natural Resources, Bureau of State Parks, and the Pennsylvania Department of Environmental Protection, Bureau of Mining and Reclamation. (N.T. 615-616; App. Ex. 8)

19. The purpose of the study was to locate and map important resources of the Park and surrounding area; identify and map potential threats to the Park's ecosystem, suggest strategies to manage any threats to the Park; and develop an ecological management plan for the Park. (N.T. 644; App.Ex. 8 Introduction) The study area included the Slippery Rock Creek watershed and began in late 1994. The area of the watershed that is the Quality Aggregates mine is a very small portion of the entire Slippery Rock Creek watershed. (N.T. 617, 623, 636-637)

20. The RETTEW Report provides a snapshot of conditions in the Slippery Rock Watershed as they existed in 1994-1995 and does not include any data from after 1995. The RETTEW study did not evaluate the Quality Aggregates mine. The study was not designed to evaluate the threats of any specific proposal or specific mine in the area. (N.T. 636, 639, 644)

21. As of 1950, the area where the Quality Aggregates mine is now located was primarily crop land and pasture. Any forests which might have existed in that area were gone by that time. (N.T.636-638; App. Ex. 8, Figure 2-4)

22. The RETTEW Report identified three threats to the Park: mining, development,

and internal threats. The threat to the Park from mining included poor reclamation practices, including not reclaiming mined land back to forest, and limestone dust. The RETTEW Report acknowledged that while mining had been a threat to the Park in the past, that threat had lessened due to the change from coal mining to limestone mining and changes in reclamation practices. The RETTEW Report also noted that limestone mining is probably not the greatest threat to the Park and that residential development probably posed the greater threat. (N.T. 629-631, 641, 644-645; App. Ex. 8, pp. 55-57)

23. The RETTEW REPORT recommended a one-half mile buffer zone because it essentially, although not exactly, tracked the watershed boundary and was therefore easy to locate and would be understood by the citizenry. (N.T. 626-627)

24. Mr. Kooser admitted that in terms of forest fragmentation, the Quality Aggregates mine was not going to create further forest fragmentation. (N.T. 638)

25. Mr. Kooser acknowledged that modern reclamation practices decreased potential threats from mining to McConnell's Mill State Park. (N.T. 641)

26. Mr. Kooser testified that residential development is a greater threat to the park than limestone mining. (N.T. 644-645)

27. Neither Mr. Kooser's testimony nor the RETTEW Report provide any basis for concluding that the Quality Aggregates mine operation will cause damage to McConnell's Mill State Park.

The Application Process and Permit

28. The application which resulted in this permit was filed by Quality Aggregates in

February, 2001. (N.T. 12)

29. The Permit encompasses 197 acres of land, of which 141 acres are planned to be affected by the mining. (App. Ex. 13)

30. The initial authority to conduct mining activities was granted for an area of 51.5 acres. (App. Ex. 13)

31. The Application included eighteen (18) different modules covering various aspects of the proposed operation. (N.T. 13)

32. Two public hearings followed. At those public hearings, significant and vocal opposition to the permit was heard. (App. Ex. 13; N.T. 689-690)

33. That opposition came, in part, from a number of people who have spent many years trying to preserve the natural beauty of the Slippery Rock Creek Gorge and McConnell's Mill from repeated projects of mining companies and landfill operators. (N. T. 154-155)

34. Questions concerning the blast plan, noise, dust pollution, water pollution and other issues were raised before the Pennsylvania Department of Environmental Protection's staff who were reviewing the application. (N.T.13, 16, 44-45, 60)

35. Although the Department of Environmental Protection granted the permit in general, the land to be mined was divided into three parts, identified as Phase A1, Phase A2 and Phase II. (Site Map, Permittee Ex. 3)

36. Although the permit as a whole was granted, the Permittee was limited in its mining activities to Phase A1 and was required to re-apply for permission as a major revision to the Permit to extend mining activities into Phase A2 and Phase II. (App. Ex.

13)

37. The Department required Quality Aggregates to provide "a demonstration that the proposed mining activities would not impact McConnell's Mill State Park, Old Mill and Slippery Rock Creek Gorge." (App. Ex. 14; N.T. 23-24)

38. During its review of the Permit application, the Department gave added scrutiny to the application specifically because the Quality Aggregates mine is close to the Park and because of the concerns raised by Appellants. (N.T. 32, 86)

39. The Quality Aggregates mine application was one of the most complex and detailed permit applications the Department's Knox District Mining Office had reviewed in terms of the scientific information reviewed and the scope of the issues involved. The application included complex dust modeling, and the issues related to dust, noise, and blasting were given much more scrutiny and detailed study than usual. The permit was also controversial because of the degree of public opposition to the permit. (N.T. 68-69; 96)

40. The period for public comment in this case was extended by the Department based on a request from members of the public. (N.T. 690)

41. Mr. Chris Yeakle was the lead reviewer for the Permit application and was responsible for reviewing Module 1, Module 2, Module 4, Module 9 and portions of Module 14, bonding, and the information about noise submitted by Quality Aggregates. Modules 1 and 2 include general information about the permit; Module 4 contains property and landowner information; Module 9 contains the operations plan; and

Module 14 includes information about fugitive dust and air quality. (N.T. 15-16; 18-19)

42. Significant substantive changes were made to the permit application following the February 28, 2002 meeting between Quality Aggregates and the Department staff in Harrisburg. (N.T. 78-81; 151; Commonwealth Ex.3)

43. After the February 28, 2002 meeting, Quality Aggregates changed the order of the mining sequence and provided numerous safety protocols and procedures to address safety, noise and dust concerns. (N.T. 150-151)

44. Appellants have failed to produce any evidence of impropriety in the Department's review of and action on the permit application. There is no evidence that any decision of the Knox Office was overruled by Deputy Secretary Roberts or any other official.

Blasting

45. The Permit includes an approved Blast Plan, which describes how blasting will be conducted at the Quality Aggregates mine and establishes terms and conditions under which blasting may occur at the Quality Aggregates mine. (N.T. 14; App. Ex. 13) Those terms and conditions include the following: an area of at least 500 feet around the blast area will be cleared and secured by Quality Aggregates; all roads within a 800-foot blast area will be blocked five minutes before each blast; the Park management will be notified one hour before each blast; blasting will be conducted only between sunrise and 10 a.m. Monday through Friday; there will be no blasting on holidays or weekends; two seismographs will be set to record the ground vibration for every shot; and there will be a minimum of six feet of overburden left on top of the limestone for

matting before drilling starts. (App. Ex. 13)

46. There are two main components of blasting – the individual blast hole and the blast pattern of several holes that make up the blast. (N.T. 523-524) The blast holes at Quality Aggregates mine are drilled through the overburden into the Van Port Limestone. The holes are not cased. The hole is then filled with a primer, which is a detonator sensitive material with a cast booster. The cast booster is a highly sensitive explosive. The powder column is placed above the primer followed by the stemming, which is an inert material, and then overburden. The stemming is placed within the limestone so that all the explosive energy is limited to the limestone. (N.T. 523-529: Board Ex. 1, 2)

47. The blast pattern is the number of holes in the grid over a particular area. At the Quality Aggregates mine, the blast pattern used has ten feet of spacing between each hole and between each row of holes. (N.T. 532-534; Permittee Ex. 21; Board Ex. 1,2)

48. In blasting, most of the blast vibration energy travels at the surface. A relatively small portion of the blast energy will migrate downward. With respect to the potential for blasting to affect either the dam or the Mill, the wave energy from the blast as measured at the dam will be less than .01g ("g" is the unit of measure for acceleration). With respect to the Mill building, the wave energy form the blast will have died out by the time it reaches the Mill which is located on the eastern side of the Slippery Rock Creek Gorge. (N.T. 274-275, 277, 299) Blasting should not affect the dam or Mill building because of the vertical and horizontal distance between the areas where

blasting will occur. (N.T. 491-492)

49. Mr. Richard Lamkie and Mr. William Foreigner were responsible for reviewing the Blast Plan and other information submitted with respect to the blasting to be conducted at the site. Mr. Foreigner was primarily responsible for reviewing the Blast Plan with respect to the potential for blasting to affect structures, fly rock, notification to the Park, and road closings. Mr. Lamkie was primarily responsible for reviewing the Vibra Tech Studies and evaluating the potential for blasting to affect the cliffs and rocks in Slippery Rock Creek Gorge. (N.T. 16-17; 110-112; 116-117)

50. Mr. Lamkie is the Chief of the Department's Explosives and Safety Section. Mr. Lamkie evaluates and conducts investigations related to blasting, conducts ground vibration and related studies, develops regulations and policies, and is an instructor and speaker at state and national conferences. Most of his blasting responsibilities are associated with mining activities. (N.T. 468; Commonwealth Ex. 1)

51. Before becoming Chief of the Explosives and Safety Section, Mr. Lamkie worked as blasting and explosives inspector for the Department for 2½ years. As an inspector, Mr. Lamkie inspected surface mine sites, reviewed blasting records, observed blasts, did special studies with regard to ground vibration, and investigated citizen complaints. (N.T. 469; Commonwealth Ex. 1)

52. Before becoming a blasting and explosives inspector, Mr. Lamkie worked for the Department as a mine conservation inspector over a period of nine years, first from 1982-1988, and then from 1994-1997. As a mine conservation inspector, Mr. Lamkie

inspected blasting operations at surface mine sites, monitored compliance with state regulations, reviewed blast records and assisted with citizen blasting concerns. While in the private sector, Mr. Lamkie assisted in blast design, blast loading, and blast monitoring. (N.T. 470-471; Commonwealth Ex. 1)

53. Mr. Lamkie testified that it was his opinion, which he holds with a reasonable degree of scientific certainty, that the acceleration limits and the peak particle velocity limits in the Permit are adequate to protect the cliff sides in the Slippery Rock Creek Gorge and the boulders that are resting on the slopes. Mr. Lamkie's opinion is based on the fact that the ground movement associated with blasting will not be strong enough to cause the cliffs or boulders to fall. (N. T. 493)

54. Mr. Lamkie, based on his experience in blasting and in doing ground vibration studies, and after review of the permit application and reports, reasonably concluded that very little energy from the blasting would reach either the dam or the mill building. (N.T. 492)

55. Mr. Lamkie reasonably determined that the minimal movement caused by blasting will not exceed the elastic limits of the system, which includes the boulders resting on the slopes and the cliff face. He determined that there would be no permanent displacement beyond 15 feet from the boreholes, and reasonably concluded that blasting would not adversely affect the cliff face 500 feet away. (N.T. 493)

56. Mr. Lamkie based his review and approval of the blasting aspects of the permit application in part upon his experience and knowledge of how vibrations from blasting

affect the ground, and his having performed ground vibration studies and observations of blasting effects over the years. The findings of the VibraTech Report of April 30, 2001 (App. Ex. 9) were consistent with his knowledge and past experience with regard to vibration from blasting. (N.T. 120-121)

57. Although Mr. Lamkie, as the principle reviewer of the vibration aspects of the permit, believed that the second VibraTech report dated July 30, 2002 represented a more realistic scenario, he preferred the conclusion of the earlier report dated April 30, 2001 because it was more conservative and provided a greater safety factor. The recommendation in the first report (App. Ex. 9) that the acceleration limit at the permit boundary be set at .18g was the limit that was included within the permit as issued. We find Mr. Lamkie's testimony credible. (N.T. 123-126)

58. Appellants offered one expert witness to testify about blasting. Dr. Roman Kyshakevych is a partner in a consulting firm, Allegheny Geoquest, which conducts environmental assessments. The Quality Aggregates mine Permit Application was the first environmental assessment Dr. Kyshakevych performed. (N.T. 186, 190)

59. Dr. Kyshakevych visited the mine site three times, in May and July 2001, and reviewed geological survey maps prepared by the Commonwealth of Pennsylvania and a geological profile. Dr. Kyshakevych could not identify the person or the source who prepared the geologic survey map or geologic profile. (N.T. 198-199, 211)

60. Dr. Kyshakevych did not conduct any specific analysis of the blasting to be conducted at the Quality Aggregates mine or the ground movement associated with the

blasting, and did not do any calculations as to the potential for vibration to affect the Homewood Sandstone. (N.T. 215-216, 221)

61. Dr. Kyshakevych did not consider the Blast Plan, nor did he consider the specific explosives charges to be used. (N.T. 216)

62. Dr. Kyshakevych has no familiarity with Chapter 77 of the Department's regulations, which is the chapter regulating non-coal surface mining. (N.T. 192-193)

63. The opinion testimony of Dr. Kyshakevych that the mining activity would increase runoff to Slippery Rock Creek was based on an incorrect assumption that the entire area mined would be deforested. (N.T. 209-210)

64. Dr. Kyshakevych's testimony was not based on a review of the final permit application as it existed as of September 2002. (N.T. 212)

65. Dr. Kyshakevych did not know what the post-mining land use would be, nor what the reclamation plan called for. (N. T. 217)

66. Dr. Kyshakevych has no experience with regard to blasting except that he happened to have observed a blast in connection with road construction thirty (30) years prior to the hearing in this matter. (N.T. 193-194)

67. Dr. Kyshakevych testified that through natural erosion irrespective of blasting, the sandstone blocks would eventually fall. (N.T. 206-207)

68. Dr. Kyshakevych was not aware that blasting would be prohibited closer than 500 feet from the Slippery Rock Creek Gorge and gave his testimony incorrectly assuming that blasting would take place within 300 feet. (N.T. 212-213)

69. Appellants failed to provide any evidence that blasting at the levels authorized in the Permit would cause harm or a likelihood of harm in general to the McConnell's Mill State Park or specifically to Slippery Rock Creek Gorge or the rock climbing area.

70. After the February 28, 2002 meeting, Quality Aggregates proposed and included in the permit application a requirement to monitor vibration with accelerometers at locations SP1 and SP2, which are located along Rim Road between the mining operation and the McConnell's Mill Park. This type of monitoring is not mandated by regulation, but was proposed by Quality Aggregates. The accelerometers monitor directly for acceleration rather than velocity. These monitors provide a more accurate way to measure acceleration, and directly measure acceleration rather than rely on a calculation based on other data. (N.T. 333)

71. Quality Aggregates maintains two accelerometers which measure acceleration at SP-1 and SP-2, which are located along Rim road about fifty (50) feet west of the Slippery Rock Creek Gorge. These locations were chosen in order to measure acceleration from the blasts at a location nearest the climbing area. Measurements of acceleration will be higher at SP-1 and SP-2 than at the Slippery Rock Creek Gorge due to the attenuation of ground movement over distance. (N.T. 302, 332-333; Permittee Ex. 3)

72. In addition to the accelerometers, Quality Aggregates maintains two seismographs. One is located at the structure closest to the mining and the second is a permanent seismograph located at an old unoccupied barn. (N.T. 333)

73. The blast report includes information from the seismograph located at the structure closest to the mining, which at this time is the Crist dwelling. The information includes peak particle velocity and frequency for the blast and a printout showing the peak particle velocity and frequency. (N.T. 340-341, 344-346; Permittee Ex. 2, 21)

74. The accelerometer is set to measure ground vibration above .02g. If the accelerometer was set to measure ground vibration below .02g, the device could measure background effects of traffic, thunder or someone stomping their feet next to the accelerometer. (N.T. 389-390)

75. Quality Aggregates adopted a protocol under which it will stop blasting and evaluate the blasting protocol if any measurements of ground movement at the accelerometer exceed .13g. Quality Aggregates will also evaluate any trends in accelerometer readings. (N.T. 370, 391-393)

76. Mr. Mohammad Sharif, an expert witness retained by Quality Aggregates, who performed the analysis in support of the vibration limit set forth in the permit, is a highly qualified, nationally recognized expert on vibration. His previous experience includes setting vibration limits necessary to protect and prevent damage to the United States Capitol, the Lincoln Memorial, the Smithsonian Institute, and the Philadelphia Museum of Art. (N.T. 261-271)

77. Mr. Sharif calculated the amount of vibration, measured in terms of acceleration, that would cause the boulders along the Slippery Rock Creek Gorge to be dislodged.

His initial calculation, in the April 18, 2001 report, was an acceleration rate of .18g. In making his initial calculation, Mr. Sharif assumed all the vibration force from the blast would be a static force applied to the boulders along the side of the Slippery Rock Creek Gorge that would act to push the boulders downward. (N.T. 281; App. Ex. 5) Mr. Sharif chose to measure the effects of vibration in terms of acceleration because acceleration was the most accurate and direct measure of ground movement (N.T. 333)

78. In his July 2002 Report, Mr. Sharif reconsidered his assumptions and recalculated the amount of force needed to move the boulders on the side of the Slippery Rock Creek Gorge. In his July 2002 analysis, he took into account the dynamic, rather than the static, forces acting on the boulders. He also considered the fact that the boulders are partly embedded in the ground, and the angle of inclination. Based on these factors he revised the amount of force needed to move the boulders from .18g to .21g. (N.T. 281-283, 303; App. Ex. 6)

79. The vibration limits in the April 30, 2001 Report are more conservative than the limits in the July 2002 Report. The April 2001 limits also assume that the boulders are lying on the surface of the ground and that there is a smooth surface between the boulders and the ground. (N.T. 283, 286)

80. Using factors based on the typical blast used at the Quality Aggregates mine, Mr. Sharif calculated amplitude of .18g and applied that value to the base of the cliff overhang and then calculated the stress level at different locations for the rock formation. He concluded that at a force of .18g, the rock formation would be at 25%

of its sheer strength. A sheer strength of 25% at .18g means that the force would have to be increased four times that level in order for the rock structure to break or fail. (N.T. 284-285)

81. Mr. Sharif concluded that blasting at the Quality Aggregates mine within the permit limit of .18g for acceleration will not cause damage to the boulders along the Slippery Rock Creek Gorge or to the rock overhang. Even in the case of a boulder with a vertical crack, given the mass of the boulder and sheer strength, the amount of force needed to move the boulder exceeds 18g. (N.T. 287, 307-308)

82. All the accelerometer readings have been at or below .02g. (N.T. 368)

Noise

83. The Department's primary reviewer of the noise issue in the permit application was Mr. Yeakle. (N.T. 18-19)

84. Mr. Yeakle using noise equipment confirmed that the report submitted on behalf of Quality Aggregates appeared to be accurate with regard to ambient noise. (N. T. 59-60)

85. Evaluating potential noise impacts of the mining operation, Mr. Yeakle based his review on whether the noise would interfere with the public's reasonable use of the property in question. He considered the surrounding area where the mine is proposed to be located, the time of day noise would be generated, as well as the decibels above background ambient noise levels. (N.T. 73-74)

86. In considering noise impacts, the Department looked at the noise generated from

blasting; from the tracks on the dozers; the haul trucks; the drilling rigs; all the equipment and the back-up alarms. The Department also considered the duration of the noise, in that a short loud noise would be less of a nuisance then a loud noise that extends for a longer period of time. (N.T. 74-75)

87. The decision to orient the face of the pit walls away from McConnell's Mill State Park will reduce the noise because the sound will propagate away from the park rather than toward the park. (N.T. 326)

88. In order to help control the noise of the mining operation, a modified block procedure is used, which keeps the operation in the pit to the maximum extent practicable. This keeps the equipment effectively in a hole, and sounds generated in the hole do not propagate out laterally. (N.T. 351)

89. Haul roads are either totally or partially incised or behind a berm separating the road from the park, and this feature acts as a noise buffer. (N.T. 351-352)

90. The common practice regarding bulldozers is to put them in high gear when moving in reverse, which normally would cause a clanking noise. To reduce this noise, Quality Aggregates maintains a policy that bulldozers at the mine will only use first gear when moving in reverse, which practice eliminates most of the clanking noise. (N.T. 353)

91. The expert witness on noise for Quality Aggregates, Ms. Janice Reed, has extensive experience with evaluating noise from various industrial and mining activities, including evaluating the potential effects of noise on the communities

involved. This experience includes evaluating the noise impacts of blasting. (N.T. 694-697)

92. As part of a sound study conducted using a sophisticated sound level meter in January of 2004, Ms. Reed recorded the sound level from a typical blast at the quarry, which had a maximum sound level of 64.5 dBA, at the Kildo picnic area restroom. (N.T. 702-703)

93. A blast lasts only between .1 and .4 second, which is a very short duration. The level of 64.5 is only slightly higher than the level of a typical conversation between two people approximately 5 feet apart. (N.T. 703-704)

94. Ms. Reed's reading of the blast was taken in a worst case scenario, i.e., there were no leaves on the trees, and no noise whatsoever from park traffic or park users at the time of the blast. (N.T. 704)

95. The noise from a passing pickup truck, 125 feet from the recording location, produced a sound level of 48.8 dBA. Technicians walking on the frozen snow produced a sound level of 59.2 dBA. (N.T. 706)

96. The projected sound levels of a dozer at 400 feet would be 27 dBA which is barely within the audible hearing range of a typical person. (N.T. 711)

97. The ambient sound levels at McConnell's Mill during the January 2004 sound study, where the only thing Ms. Reed was able to hear was the water in Slippery Rock Creek, was 48.1 to 48.6 dBA. (N.T. 712)

98. The ambient level during the sound study at a second location in the park was

between 37.1 and 37.9. (N.T. 712)

99. During summer months when the park is in use and leaves are on the trees, there would be more attenuation of sound from the quarry then occurred during the sound study. (N.T. 713)

100. The sound of water at the mill building during the January 2004 sound study registered 69.7 dBA. (N.T. 715-716)

101. Ms. Reed concluded that it is possible and probable at some locations that some sound from the quarry activities would be heard. She believed that the blasting would most likely be heard or be audible, but the duration of the blasting is such that if there were five blasts in a week, the total time that the blast would be heard would be less than 2 seconds. If there are people in the park engaged in typical activities, its quite probable that these activities would actually be a more significant sound source than the drill, which is the loudest piece of mining equipment. (N.T. 720)

102. There has been no drop in park attendance or park usage since the mining operation began. (N.T. 247)

Dust Control

103. Dust control measures incorporated into the Permit include watering the haul roads, and the maintenance of monitoring stations to routinely and continuously monitor dust around the operation. (N.T. 348)

104. There are four dustfall monitoring locations. The locations were selected in order to be downwind from the prevailing westerly wind and to be as close to the Park as

possible without being located within the Park under the tree canopy which could affect the accuracy of the dustfall, and to be permanent locations to consistently measure dust fall during different phases of mining. (N.T. 409-10, 418, 433: Permittee Ex. 3) The results of the monthly dust monitoring are sent to Mr. Joseph Pezze of the Hillcrest Group who then sends a copy of the report and results to the Knox District Mining Office. (N.T. 410-411)

105. The dustfall jars are collected every month and analyzed by Air Quality Services for the standard dustfall analysis – total particulates, insoluble and soluble portion. (N.T. 411)

106. Mr. Robert Dolence, an engineering consultant retained by Quality Aggregates with vast experience in environmental matters, makes routine visits to the mining site at least weekly to review dust control and other aspects of the mining for compliance with the permit. (N.T. 351)

107. The dust fall sampling program established for the Quality Aggregates Mine was designed by Mr. Pezze, a highly qualified environmental professional in the area of air quality, who established the program to evaluate possible impacts to McConnell's Mill State Park. (N.T. 410; Permittee's Ex. 6)

108. The dust from the quarry has also met the monthly Pennsylvania dust fall standard of 1.5mg/cm^2 except for March 2003 for sites no. 3 and 4. (Permittee's Ex. 24) Site 4 (the background site) had a significant amount of recreational dirt bike and quad traffic around it, at this time, which contributed to its high reading. (N.T. 415)

Site 3 also had impacts from quad and dirt bike traffic around it during the March 2003 timeframe. (N.T. 414)

109. In addition to watering frequently to control dust, the berm around the outward site above Rim Road provides a natural wind barrier for any dust which might otherwise be carried off the site. (N.T. 425-426)

110. The Quality Aggregates mine is not a major source of air contaminants under applicable state and federal guidelines. (N.T. 839-840)

111. The air quality dispersion modeling submitted with the permit application, and as reviewed by Department employee Mr. Timothy Leon-Guerrero confirmed that there would be no violation of the national particulate matter standard based on or caused by operation of the Quality Aggregates mine. (N.T. 841-842)

112. Inspector/supervisor Mr. Timothy Vandyke of the Department conducts a formal inspection at the Quality Aggregates mine three or four times a year, and an informal inspection about once a month. During his inspections, he has never seen any dust leaving the permit area. (N.T. 866-868)

113. At no time during any of his inspections has Mr. Van Dyke observed dust leaving the permit area or on the trees along Rim Road. There are only localized areas of dust close to the active areas of the site where trucks are loading. All the erosion and sedimentation controls are functioning and there have been no violations at the Quality Aggregates mine. (N.T. 867-869)

114. There is no evidence in the record that dust from the mining operation or other

potential air pollution from the mining operation will cause or contribute to any harm to McConnell's Mill State Park.

115. The original mining application proposed that mining would start in the northeast portion of the permit area progressing in a southerly direction, ending up in the northwest portion of the permit. This original plan provided for starting at the preferred point of entry into the operation from an economic and engineering perspective. After the February 28, 2002 meeting, the permit application was modified to start at the furthest point from the park boundary. This will allow the operation to develop a history which will be provided to the Department as to the capability of Quality Aggregates to safely operate the mine before the operation reaches the closest point to McConnell's Mill State Park. (N.T. 324-325)

Safety Factors

116. After the February 28, 2002 meeting, the permit application was modified so that the face of the pit wall would never be oriented toward the park. (N.T. 225) This enhances safety because if there ever was fly rock, it would be to the west away from the park. (N.T. 326)

117. After the February 28, 2002 meeting, Quality Aggregates modified the application to keep blasting activity for limestone a distance of at least 500 feet from the park, and to keep overburden blasting, should it be needed, a distance of greater than 800 feet from the park. (N.T. 328-329)

118. After the February 28, 2002 meeting, the Permittee modified the permit

application to specify use of natural matted blasts. A natural matted blast tends to effectively confine the blast and the dust from the blast as compared to conventional blasting methods. (N.T.330)

119. Quality Aggregates developed and trained its personnel to implement a safety protocol and procedure to ensure that no visitors or unauthorized personnel enter the permit area when a blast is scheduled. This includes the protocol of putting a "human fence" around the safety area of the blasting zone, composed of individuals with walkie-talkies who are all in visual sight of one another, so that if anybody would wander into the 500 foot radius around the blasting area the blast could be stopped from going forward. (N.T. 334-337; Permittee's Ex. 20)

120. The permit requires the Quality Aggregates safety protocol to be implemented when blasts occur within 1,000 feet of the park, but Quality Aggregates uses it for every blast. (N.T.335)

121. The park personnel are notified of a proposed blast the business day before a blast is scheduled. (N.T. 334)

122. The Quality Aggregates safety protocol also provides for two-way radios on the frequency used by the park personnel, in event Quality Aggregates should need to contact the park for any reason. (N.T. 336)

123. Before blasting on the mine permit area began, Quality Aggregates had a meeting with the Department of Environmental Protection and the Department of Conservation and Natural Resources and its contractors together with Mr. Dolence, to review the

blasting safety procedures and to obtain comments and input. (N.T. 337)

124. The safety zone is 500 feet. At the closest point of blasting, the McConnell's Mill State Park will not be within the 500 foot safety zone. (N.T. 337)

125. Quality Aggregates keeps a detailed blasting record which is maintained at the Quality Aggregates office for every blast at the permitted operation. (N.T. 339; Permittee's Ex. 21)

126. Quality Aggregates also completes a blasting checklist for each blast, which is not required by state or federal regulations, but which helps insure that all blasts will comply with the permit and regulatory procedures. (N.T. 342-343; Permittee's Ex. 21, p. 2)

127. The graph included with each blasting report (Permittee's Ex. 21, p. 6) comprises a visual record establishing that none of the blasts exceed the federal or state limits regarding peak particle velocity at occupied structures near the mining operation. (N.T. 345-346)

128. Quality Aggregates maintains signs along Rim Road which accomplish the following functions: they warn members of the public when there will be a blast; they advise members of the public when the blasting is allowed to occur; and they inform interested persons of the blast warning signals that are sounded prior to the blast and the all clear signal sounded after the blast. (N. T. 347-348; Permittee's Ex. 22)

129. By sunrise on the date of each blast, the signs along Rim Road are placed in their position to announce that a blast will occur. The time of the blast is also posted so that

anyone in the area would know when the blast was going to occur in advance of the occurrence. (N. T. 348)

130. Quality Aggregates produced a brochure explaining the mine operation, and had a waterproof dispenser made so that a number of brochures could be kept at the park and viewed by visitors who may have a question as they go along Rim Road and see the signs. This brochure, among other things, names the safety director and provides his cell phone number, so that he could be called directly and reached anytime, weekends or weekdays, by anyone with a safety concern. (N.T. 361-352)

131. The initial limiting of the blasting operations to Phase AI of the operation allows blasting to begin at the farthest point from the park, and to be monitored as it progresses closer to the park. This allows Quality Aggregates to do a trend analysis and determine if there are potential problem areas or future concerns that can be addressed in advance with corrective measures taken. (N.T. 362-363)

132. As a result of Mr. Dolence's monitoring of all of the results of SP1 and SP2, he testified that all blasts have fallen well below the permit limits for vibration and acceleration. (N.T. 365-366)

133. Accelerometers at SP1 and SP2 are set with a trigger point of .02g. This trigger point setting is necessary to prevent traffic or people going by the site from activating the device and using up the memory. At the time of the hearing, only a few of the readings measured any vibration above the .02g trigger level. (N.T. 390)

134. The preponderance of the readings at SP1 did not trigger the equipment. This

means that the acceleration level for all of these blasts was less then .02g at SP1 and SP2. (N.T. 368)

135. There have been over 100 readings of less than .02g. There have been several blasts which yielded readings at slightly higher than the .02g at the monitoring stations. (N.T. 368)

136. As data is collected, Quality Aggregates will perform a regression analysis and project when it might approach the .18g limit at SP1 and SP2. Any time the company sees a trend with the data starting to rise, the company will evaluate variables to reduce vibration. (N.T. 370)

137. Quality Aggregates has established .13g level as a quality control level whereby if any blast measures as high as the .13g level, which is 75% of the .18g limit, blasting will stop and a reevaluation will be performed so that changes may be made, including measures to reduce the amount of vibration to ensure there will be no exceedance above the .18g limit. (N.T. 391-392)

138. When the .13g quality assurance level of readings is experienced on SP1 and SP2, Quality Aggregates will also consult with the Department at that point as to actions to take to ensure no violation of the standard. (N.T. 394)

139. The explosive loading parameters at the Quality Aggregates are designed so as to prevent the occurrence of fly rock. (N.T. 517-518)

140. The likelihood of an occurrence of fly rock at the mine is negligible considering all the safety measures that have been incorporated into the blast plan. (N.T. 518)

141. Most cases of fly rock are situations where the hole has either been overloaded with explosives, when the front row of a blast is placed too close to the free face. At Quality Aggregates the blasts are choked. This means that there is material placed directly in front of the face to confine forward energy and reduce the possibility of fly rock. (N.T. 521)

142. Additional overburden on top of the vanport limestone reduces the likelihood of fly rock to a negligible point with respect to the mine. (N. T. 522)

143. Matting involves having natural material in place around the hole to confine the explosive energy within the limestone. (N.T. 538)

Erosion and Sedimentation Controls and Wetlands

144. The reclamation practice using the modified block cut allows grass to be grown on the reclaimed area quickly, establishing a vegetation cover, which better controls erosion, and places the infiltration rate back to the natural rate it was before mining. (N.T. 354)

145. After mining there will be more wetlands with greater diversity then there were prior to mining. There will be an 80% increase in the wetlands post-mining. The replacement wetlands are not only larger by 80%, but also have greater plant diversity. (N.T. 355)

146. Prior to any earthmoving activity on the site in connection with the mining, erosion and sedimentation control facilities and a 1.26 acre constructed wetland were put in place. There has been no uncontrolled runoff or other water releases from the

mining area. (N.T. 356-357)

147. Sedimentation ponds A and D as shown on Permittee's Exhibit 3 will remain in place after mining is completed and after final reclamation. (N. T. 357)

148. The pre-existing, intermittent streams on the property essentially carry runoff as stormwater, and they are scoured by heavy runoff, which causes erosion and sedimentation of downstream areas. Post-mining, the streams affected will be reestablished in a way that will prevent scouring and erosion. (N. T. 358)

149. Keeping ponds A and D as part of the post-mining land use plan will allow them to serve as stormwater surge protection devices, and also as wildlife habitat. (N.T. 359)

150. Keeping the ponds in place as part of the reclamation will ultimately reduce erosion and sedimentation compared to the pre-mining condition, which otherwise could adversely affect Slippery Rock Creek. (N.T. 360)

151. Before the permit application was filed, Mr. Roger Bowman, a mining engineer with responsibility for permit review from the Knox Office, visited the site on two occasions, and on the second occasion was accompanied by representatives of the Pennsylvania Game Commission, Pennsylvania Fish and Boat Commission, and other staff members. (N.T. 553-554)

152. The Department conducted a thorough review of the streams and wetlands on the proposed mining site before the permit application was finalized. (N.T. 554)

153. After the permit was submitted, Mr. Bowman conducted additional field investigations of the site and identified additional intermittent tributaries on the site.

(N.T. 556)

154. There are 14 collection ditches at the mine area to collect water, channel it to the sedimentation ponds, and prevent erosion and sedimentation from leaving the site. (N.T. 561)

155. There are six sedimentation ponds which control erosion and sedimentation on the site. (N. T. 563; Permittee Ex. 3)

156. The drainage system capacity as shown on the permit application and evaluated by the Department will prevent any adverse impacts to the receiving stream. (N.T. 564-565)

157. Considering the mining method employed by Quality Aggregates in the Permit, the maximum disturbed open area during mining will be limited to approximately 20 acres. (N.T. 572-573)

158. Immediately following a very heavy rain of approximately 2½ inches on the previous evening, Mr. James Plesakov, a Department Surface Mine Inspector, inspected the Quality Aggregates mine erosion sedimentation control facilities and found no violations. (N.T. 780-783)

159. The discolored water appearing in the photograph taken by a witness for Appellant Scott Davidson (Appellant's Exhibit 31) was emanating from a wet weather spring that was 75 feet off the Quality Aggregates mine permit area. There was no evidence that the discoloration was caused by any activities of the Quality Aggregates mine. (N.T. 787; Commonwealth Exs. 4a, 4b)

160. The June 18, 2004 discharge from the spring near Tributary 3 had a suspended solids concentration of 74 parts per million; the permit allows a suspended solid discharge of up to 90 parts per million. (N.T. 808; Permittee's Ex. 25)

161. Laboratory analysis confirms that the water in Slippery Rock Creek is much higher in suspended solids than the spring discharging 75 feet off of the Quality Aggregates mine permit area. (N.T. 807-809; Tributary No. 3; Permittee's Ex. 25)

162. The reclamation plan provides that if there were trees in an area before the mining took place, the final reclamation will have trees planted again in that area. If there was a field before mining, it would be returned to a field by the planting of approved grasses. (N.T. 355)

163. At the hearing, Mr. Bruce Hazen was the only Appellant who testified.

164. Mr. Hazen is the President of Slippery Rock Stream Keepers. The Slippery Rock Stream Keepers is a Section 501(C)(3) nonprofit grass roots organization and is an affiliate of the Citizens Environmental Association of the Slippery Rock Area. The group's mission is to promote the preservation and protection of the Slippery Rock Creek watershed with a particular focus on the park and surrounding area. (N.T. 154-155)

165. Mr. J. Scott Roberts is the Deputy Secretary for Mineral Resources Management for the Department. He became Deputy Secretary in February 2002. Before becoming Deputy Secretary, he was the Bureau Director for the Bureau of Mining and Reclamation from February 2000 to February 2002. Mr. Roberts was the Permits and

Technical Services Chief in the Greensburg District Mining Office form 1991 to 2000 and was a hydrogeologist and permit reviewer in the Greensburg District Mining Office before becoming Permits and Technical Services Chief. Mr. Roberts began working for the Department in 1985. (N.T. 655-656)

166. Mr. Javed Mirza is the District Mining Manager for the Knox office and has held that position for twenty-four years. Mr. Mirza made the final decision to issue the Permit to Quality Aggregates and signed the Permit after receiving recommendations from the technical staff. (N.T. 685, 688)

167. Mr. Plesakov is a surface mine inspector for the Knox office. He is responsible for inspecting coal and non-coal mining sites in Butler and Lawrence Counties. (N.T. 775-776)

168. Mr. Van Dyke is an Inspector Supervisor for the Knox office. He became Inspector Supervisor in February 1979. Before becoming Inspector Supervisor he was a Mine Conservation Inspector based in Harrisburg. As Mine Inspector Supervisor he supervises six inspectors and mine sites within Butler, Lawrence, Mercer and Jefferson Counties, and is responsible for reviewing inspection reports submitted by inspectors and conducting weekly inspections. (N.T. 864-866)

169. Mr. Derr is the Park Manager for the Moraine and McConnell's Mill State Park Complex. He has been the Park Manager for ten years. Previously, he was the Park Manager for the Presque Isle State Park for five years. Prior to that he was in the Bureau of State Park's Harrisburg office. As Park Manager, he is responsible for

overseeing the operation of the parks which includes maintenance, administration and budgeting. (N.T. 228-230)

Discussion

The Environmental Hearing Board, as pointed out by the Commonwealth Court in *Warren Sand & Gravel Company v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1978), reviews all Department of Environmental Protection final actions *de novo*. Chief Judge Krancer, in the off-cited case of *Smedley v. DEP*, 2001 EHB 131, clearly set forth our duty in every case:

> We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "[d]e novo review involves full consideration of the case anew. The [EHB], as a reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, Docket No. 99-166-L, *slip op.* at 14 (Adjudication issued January 3, 2001). Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n.19.

2001 EHB at 131.

In this third party appeal, Appellants bear the burden of proving by a preponderance of the evidence that the Department acted unreasonably and in violation of the laws of the Commonwealth in issuing a noncoal mining permit to Quality Aggregates. 25 Pa. Code Section 1021.122(c)(2); *Zlomsowitch v. DEP*, 2004 EHB 756, 780. The permit was issued on September 25, 2002. The permit application was

submitted in February 2001.

The permit encompasses 197 acres of land of which approximately 141 acres will be affected by the mining operation. The application included eighteen different modules covering various aspects of the proposed mining. According to the Department, there was more scientific data submitted with the permit application than with any other limestone mining application submitted to the Department of Environmental Protection's Knox District office within the previous twenty years.

One of the reasons for the intense scrutiny of the permit application by the Department is the close proximity of the mine to McConnell's Mill State Park. McConnell's Mill State Park is a geologic, biologic, and scenic gem. It is known throughout Western Pennsylvania and beyond for the wealth of recreational opportunities it affords to park visitors. One of the most prominent features of the Park is Slippery Rock Creek Gorge; almost 400 feet deep in some places, the Slippery Rock Creek Gorge is home to a plethora of botanical and animal species.

The Park is also home to an historic grist mill and a beautiful covered bridge; both located in a paradise of nature. McConnell's Mill State Park is visited by more than 225,000 people a year and still retains as its fundamental character the beauty and peacefulness peculiar to undisturbed forest, flowing water, and the sound of birds. Various recreational activities take place in the Park, including hiking along its many trails, kayaking, bird watching, and rock climbing. Rock climbing is conducted along the imposing fractured sandstone cliff walls on the west wall of Slippery Rock Creek

Gorge. This is immediately to the east of the mine.

Appellants are individuals and organizations who actively enjoy McConnell's Mill State Park and sincerely believe that the mining operation will result in environmental harm to the Park, watershed, and surrounding area. Appellants raised various objections with their major complaints concentrating on blasting, noise, water quality, air, and erosion.

The mine is not visible from McConnell's Mill State Park. There is a tree barrier approximately 250 to 300 feet wide between Rim Road, the western boundary of the Park, and the Quality Aggregates mine. The only physical feature of the mine that is visible from Rim Road is the outslope of one of the sedimentation ponds.

The Park is open year round from sunrise to sunset although the majority of visitors come to the Park on weekends. The management of the Park, which is managed by the Pennsylvania Department of Conservation and Natural Resources, expressed its concerns about the mining operation to the Department of Environmental Protection during the permit review process. The Department of Conservation and Natural Resources' concerns centered on noise, blasting, and dust. The Department of Environmental Protection addressed these concerns in some of the conditions and modifications it incorporated in the permit that was eventually issued.

Mr. Obadiah Derr, the Park Manager, testified. Except for some dust which also existed prior to commencement of the Quality Aggregates mining operation, there have been no impacts to the Park. The Park has not received any complaints from visitors

that their use or enjoyment of the Park and its facilities have been affected by the mining operations. Although we certainly inferred from his testimony that he is not a proponent of locating limestone mines next to State Parks, the operation of this mine, at least so far, has had no or minimal effects on McConnell's Mill State Park.

The Permit Application Process

As indicated earlier, this permit application was intensely scrutinized by the Department. It is common on complex permits that the Department issues permit deficiency letters, correction letters, and pre-denial letters. It is true that the Department certainly had serious concerns about some aspects of the permit application, including blasting. However, it is just as true that after Quality Aggregates made both substantive changes to its application and provided more detailed scientific and engineering information that these questions of the Department were satisfactorily answered. As recently pointed out by Judge Miller in *County of Berks v. DEP*, *slip op.* page 34 (Adjudication issued March 31, 2005)

> We find nothing improper in this course of action. There is no rule of law or mandatory requirement in the Department's regulations which precludes the Department from informing an applicant that with consideration of current information a permit can not be granted, but allowing further submission. In the past the Board has characterized such correspondence as "typical of the give-and-take that goes on during DEP's processing of applications...." Since nothing required the Department to deny the permit application, we will not interfere in the manner in which the Department chooses to process permit applications.

Birdsboro v. Department of Environmental Protection, 2001 EHB 377, *aff'd.* 795 A.2d 444 (Cmwlth. Ct. 2002) is also instructive. This case also involved a third party appeal of a non-coal permit. We also dealt here with 25 Pa. Code Section 77.126 and the appellant's argument that this regulation required the permit applicant to affirmatively disprove any possibility of adverse effects from its operation. That permit was also divided in phases with the mining company not only meeting the permit conditions but having to seek permission from the Department before beginning the next phase of mining. 795 A.2d at 446. The Commonwealth Court affirmed the Board's dismissal of the appeal and its holding that the mining company under the applicable regulation needed "to demonstrate that there is no evidence that presumptively indicates pollution will occur." 795 A.2d at 448. That is what Quality Aggregates showed and what the Department found in this case prior to issuing the permit.

The Department changed its position here after receiving additional information and assurances from Quality Aggregates. 25 Pa. Code Section 77.126 sets forth the criteria for permit approval or denial. Among other things, the permit applicant is required to affirmatively demonstrate and the Department must find in writing that the non-coal mining activities can be accomplished in conformance with the applicable environmental laws and that there is no presumptive evidence of potential pollution to the waters of the Commonwealth. *Birdsboro*, 795 at 448. The Department conducted a thorough review of the permit application and required Quality Aggregates to make

numerous changes and agree to various conditions prior to approving the mining. This appeal followed.

The record is also devoid of any evidence that the Department's approval was brought about by any pressure from senior Department officials. Indeed, Mr. J. Scott Roberts, Deputy Secretary for Mineral Resources Management, called a meeting in Harrisburg to make sure that Quality Aggregates realized "that if certain deficiencies with the application were not dealt with, the application would be denied." (N.T. 657) Following the meeting, Deputy Secretary Roberts testified he had no further involvement with the permit application. Specifically, he did not have any involvement in the actual decision to issue the permit. (N.T. 662) There is certainly nothing sinister about such a meeting. In fact, Deputy Secretary Roberts testified that he has met with groups opposed to the issuance of permits. (N. T. 677) Moreover, as indicated previously, Quality Aggregates made various modifications and came forward with additional information following this February, 2002 meeting. The Department continued to carefully review this permit application as evidenced by the fact that the permit was not issued until late September, 2002.

Blasting

Appellants have raised several concerns regarding blasting. The first has to do with safety. Appellants are concerned that rock and stones from the blasting could injure park visitors. However, the blast plan approved in the Permit should safely protect all users of the Park. The amount of overburden, spacing of the blast holes, and

other technical issues, which included testimony from very knowledgeable individuals experienced in blasting, overwhelmingly attest to the safety of the blasting operation.

There will only be a limited number of blasts each week and all will take place on weekdays between sunrise and 10:00 a.m. A detailed procedure is in place which includes notifying Park management prior to the blast, clearing an area at least 500 feet around the blast area, setting up a "human fence" of Quality Aggregates employees on the perimeters to make sure no one wanders into the area, and completing all blasting before 10:00 a.m. This aspect of the blasting plan was mainly reviewed by Department employee Mr. William Foreigner. We found his testimony credible and believe that the danger to the public from fly rock is negligible.

Approximately 9,000 people visit the Park to climb the massive and visually stunning rock formations found on the west side of the Slippery Rock Creek Gorge in the Rim Road area. The only expert testimony proferred by the Appellants with respect to whether blasting authorized by the Permit could adversely affect these cliffs and other areas in McConnell's Mill Sate Park was the testimony of Dr. Kyshakevych. His testimony was tentative and speculative at best as to whether any damage would occur. For example, with regard to the sandstone formation he said: "I don't really know if blasting is going to do any damage to it." (N.T. 215) He opined that vibration from the blasting "is going I – I believe that –that this kind of anthropogenic activity is going to contribute, at least – to what extent I cannot say, but to some extent it has to contribute to the instability of these blocks." (N.T. 216)

Although Dr.Kyschakevych visited the mine site three times prior to the issuance of the Permit he did not conduct any specific analysis of the blasting to be conducted or the ground movement associated with the blasting. He did not perform any calculations as to the potential of vibration from the blasting to affect the sandstone formation. He did not review the blast plan; nor did he even consider the specific explosive charges to be used. When pinned down on cross-examination, he did not articulate an opinion that the mining operations will cause harm to the blocks or the cliff face, but only that it *might* cause harm. He had no knowledge of the blasting regulations, which he also had never reviewed, and no experience with blasting except that he observed a blast in connection with road construction more than thirty years ago. He was not aware that blasting is prohibited by the Permit within 500 feet from Slippery Rock Creek Gorge but instead testified assuming that blasting would be conducted within 300 feet.

Dr. Kyshakevych's testimony provides absolutely no basis for finding that blasting at the levels authorized in the Permit would cause any harm to McConnell's Mill State Park and specifically the rock climbing area. Nevertheless, Quality Aggregates and the Department presented extremely detailed and compelling scientific testimony refuting the allegations raised by the Appellants and providing overwhelming proof that Quality Aggregates' operations would not cause any damage to McConnell's Mill State Park.

Mr. Mohammad Sharif, a highly qualified nationally recognized expert on vibration, testified that the vibration limits he developed based on specific detailed

calculations will comprehensively protect the Park structures from any damage from vibration caused by the blasting. His previous experience includes setting vibration limits to protect and prevent damage to the United States Capitol, Lincoln Memorial, Smithsonian Institute, and the Philadelphia Museum of Art. (N.T. 261-271)

Without reviewing his calculations in detail, he arrived at a maximum level of vibration which will insure no damage to the structures in the Park. He later revised his calculations which resulted in a higher number. Nevertheless, Quality Aggregates and the Department elected to select his more conservative lower number which has a greater safety margin of four.

A safety factor of four means that the vibration would have to be four times as high as the level established in the permit before there would be a potential failure due to the vibration caused by blasting. Mr. Sharif testified directly that this level established in the permit will not cause the sandstone blocks resting on the side of the Gorge to fall down the hill or otherwise experience any movement. (N.T. 286-287) We found his testimony very credible and it was not contradicted by any credible testimony.

Our conclusion is also supported by the testimony of Mr. Richard Lamkie, Chief of the Explosives and Safety Section of the Department of Environmental Protection. Mr. Lamkie has extensive experience with the effects of blasting. He is a licensed blaster himself and helped design blasts that would not damage nearby structures. He also has extensive experience in inspecting surface mines and the application of the

regulations to blasting conducted at surface mines. He also consulted with other experts, including a geologist at the Department, Mr. Keith Brady (who has testified several times before this Board), and an expert with the Office of Surface Mining.

Appellants blasted Mr. Lamkie's approval of this aspect of the Permit, arguing that he did not have the expertise to critically review Mr. Sharif's report. Instead, Appellants argue that the Department should have hired an outside expert to conduct a thorough review of Mr. Sharif's findings and conclusions. We disagree.

Mr. Lamkie based his review and approval of the blasting aspects of the permit application in part upon his extensive experience and knowledge of how vibrations from blasting affect the ground, and his having performed ground vibration studies and observations of blasting effects over a period of many years. The findings of the first report were consistent with his knowledge and past experience with regard to vibration from blasting. Moreover, the Department has a right to rely on the assertions of competent professionals who submit technical information in a permit application. Of course, its reliance is not a blind reliance and it was certainly not here. The Department picked and probed, cajoled and ordered, and exhaustively reviewed all the components of this blasting operation. It is important to remember that the permit process at the Department level is not an adversarial one *per se*. Instead, the goal is to protect the environment through the strict parameters of a permit. The permit is based on the statutes and regulations of the Commonwealth and is administered by the Department through highly educated and specially trained professionals. Like all large

organizations, the level of experience varies depending on various factors including the age of the person. In this case, the Department assigned Mr. Lamkie, who clearly has the knowledge and experience to review the blasting plan proposed by Quality Aggregates and Mr. Sharif, and came to an informed decision as to whether the blasting will have any effect on the natural and man-made structures in McConnell's Mill State Park. Just because he does not have the extensive and extremely specialized knowledge of Mr. Sharif does not require the Department to have Mr. Sharif's conclusions reviewed by an outside expert. Mr. Lamkie and the Department have a right to rely on the conclusions of experts retained by the Permittee if Mr. Lamkie, in this case, determines that he does not need additional expertise to reach a conclusion on the validity of the point espoused by the consultant

Quality Aggregates monitored the levels of all blasts through two accelerometers. There have been only several blasts which have measured slightly higher than .02g. There have been over one hundred readings of less than .02g. Quality Aggregates had established a quality control level of .13g which is 75% of the .18g limit. If any blast measures .13g or more it will stop blasting to reevaluate its procedures and make any necessary changes to ensure that there will be no blasts above the .18g limit. (N.T. 391-392)

Air Quality

One of the arguments raised by the Appellants is that operation of the mine will adversely affect air quality as a result of dust from blasting. The record does not support

this allegation. First, the berm around the outward site above Rim Road provides a natural barrier for any dust that might otherwise be carried off the site. Second, air quality dispersion modeling that was submitted by Quality Aggregates with its permit application demonstrated there would be no violation of the air quality standards as a result of the operation of the mine. Finally, the permit specifically contains measures intended to control dust, which include the watering of haul roads and dust monitoring.

Perhaps, however, the best indicator of whether the mining operation will generate dust in violation of air quality standards is based on actual measurements taken at the site and entered into evidence at the trial. Monitoring at the mine site is conducted by the Hillcrest Group, an environmental consulting firm. The monitoring consists of four dust fall jar monitoring stations placed around the perimeter of the permitted area. The dust fall sampling study for this site was designed by Mr. Joseph Pezze, the principal owner of the Hillcrest Group and the former Regional Air Quality Manager of the Department's Southwest Regional Office. Mr. Pezze testified that in developing the sampling program for the site the key factor was to determine what, if any, impact there would be to McConnell's Mill State Park. As a result, he made certain that a number of the sampling containers were placed as close to the park as possible in order to monitor the carryover of any fugitive dust into the park. He also took into consideration prevailing wind direction in selecting the sampling locations.

The dust fall samples are collected monthly and analyzed, and a report is sent to the Department's District Mining Manager, with a copy to Quality Aggregates. The dust fall sampling shows that the area around the mine site is meeting the annual Pennsylvania

dust fall standards. The only time the area did not meet the standard was for sites no. 3 and 4 for the month of March 2003. Testimony revealed that these particular sites had a significant amount of recreational dirt bike and quad use in the vicinity during that timeframe. Additionally, site no. 4 is located upwind of the mine site and, therefore, any readings above the dust fall standards would not be attributed to the mine itself. (N.T. 414-415)

In addition to testing, observations of various personnel confirm there is no significant amount of dust leaving the mine site and entering the park. Department inspector/supervisor Mr. Timothy Vandyke conducts three to four formal inspections per year at the mine in addition to monthly informal inspections. He has never seen any dust leaving the permit area. Mr. Pezze also testified he has never witnessed anything that would constitute a violation of the air quality standards with respect to dust.

Although Mr. Derr, the Park manager, noticed some dust he had also noticed dust prior to mining. We do not attribute this dust to the mining operation based on the evidence admitted at the trial. Therefore, based on the sampling results and the observations of Mr. Vandyke and Mr. Pezze, we find there is no significant amount of dust entering the park from the mining operation.

Water Quality

The Appellants argue that the mining will cause adverse impacts to waters of the Commonwealth. In support of this claim, the Appellants presented the testimony of Dr. Kyshakevych. Dr. Kyshakevych is a geoscientist and holds a Ph.D. in geology. He conducted a hydrologic impact study to calculate the amount of runoff expected at the

site, and based on his study he concluded that mining will cause the rate of infiltration to decrease and the amount of runoff to Slippery Rock Creek to increase. However, Dr. Kyshakevych based this conclusion on his assumption that the entire permit area would be deforested and stripped of vegetation. (N.T. 217) He did not take into account that not all of the 197 acres making up the permit area would be affected by mining. He was also not aware that under the reclamation plan the site is required to return to forest and admitted that his calculations did not take into account post-mining revegetation. (N.T. 216-17, 221) In performing his calculations, he also did not take into account the Department's regulations governing erosion and sedimentation control or Department guidance manuals on erosion and sedimentation control for limestone mines. (N.T. 220-21) Further, Dr. Kyshakevych admitted that his review was based on an earlier version of the permit application and not the final permit application as it existed in September 2002. (N.T. 212, 219-20)

Based on the above, we find that the testimony of Dr. Kyshakevych was not sufficient to meet the Appellants' burden of proving their claim on this issue. *Lower Mount Bethal Twp. v. DEP*, 2004 EHB 662, 673.

In contrast, the Department and Quality Aggregates presented evidence that persuades us the waters of the Commonwealth will be protected under the permit. The Department required erosion and sedimentation control facilities to be in place prior to the start of mining. Additionally, erosion and sedimentation will be further controlled by the type of mining method being employed by Quality Aggregates, which is the modified block method. This type of mining allows reclamation to begin as soon as possible after

extraction. (N.T. 353-54) Employing the modified block method allows grass to begin growing within 12 months after mineral extraction. (N.T. 354) In the experience of mining engineer Mr. Robert Dolence this is a very short time period in which to have vegetation after mining. (N.T. 354) Having vegetation established in a shorter time span allows erosion to be controlled and places infiltration rates back to the pre-mining level as soon as possible. (N.T. 354)

During the mining process, there are six sedimentation ponds and 14 collection ditches to control and prevent erosion and sedimentation leaving the site. Two of the sedimentation ponds will remain in place even after mining and reclamation are completed. According to Mr. Dolence, the two ponds that remain will serve as stormwater surge protection devices. (N.T. 359) Mr. Dolence and Department mining engineer Mr. Roger Bowman also testified about other protections that will be or have been put into place to control erosion and prevent sedimentation from leaving the site. We find their testimony to be credible and competent.

Testimony was introduced about discolored water emanating from a wet weather spring off the permit area and cloudy conditions in tributary 8 on one occasion. However, there was no evidence that either of these events were due to the mining operation. Mine inspector Mr. Timothy Vandyke, who visits the site monthly, testified that he has never observed any erosion or sedimentation violations.

In addition, because mining will impact .7 acres of existing wetlands, the Department required Quality Aggregates to construct 1.26 acres of replacement wetlands. This increases the total wetland area by 80% and includes a greater diversity of plants.

(N.T. 355) The Department required the replacement wetlands to be constructed prior to any existing wetlands being affected by mining.

Based on the evidence presented, we find that the Appellants have not met their burden of proving the mining operation will adversely affect waters of the Commonwealth.

Noise

The Appellants assert that noise from the operation of the mine, specifically blasting, and the operation of construction machinery, will adversely affect the park and its users. The only expert witness who presented testimony on noise at the trial was Quality Aggregates' expert, Ms. Janice Reed, who was recognized as an expert in sound, acoustics and sound measurement. Her experience includes evaluating the noise impacts of blasting. Ms. Reed conducted a sound study in January 2004 when the mine was in operation. The study included measuring the sound of a blast at the mine from a particular area in the park. The highest sound registered from the blasting was 64.5 dBA. According to Ms. Reed, a reading of 64.5 dBA is only slightly higher than the level of a typical conversation between two people approximately five feet apart. (T. 703-04)

Ms. Reed also measured the sound of a drill and dozer when they were in operation and projected what the sounds would be at the park. At 400 feet away, the dozer produced a sound of 27 dBA, which would be barely audible to the human ear. (N.T. 711) The drill produced a sound of 63 dBA, which as stated earlier would be around the level of a typical conversation. In comparison, the sound level of the water flow at the mill within the park was 69.7 dBA. (N.T. 715)

Ms. Reed acknowledged that quarry activities will be heard at some locations in the park. However, she testified that the duration of a blast would be approximately two seconds. (N.T. 720) She further testified that people engaged in activities at the park would probably be a more significant source of sound than the blasting and operation of the drill. (N.T. 720) Given the sound level measurements, Ms. Reed concluded that sound from the mining operation will have no adverse effect on the park.

Furthermore, the permit requires Quality Aggregates to take measures to ensure that noise from the mining operation does not adversely interfere with enjoyment of the park. Blasting is prohibited after the hour of 10:00 a.m. and on weekends and holidays. (N.T. 347) In the event someone were to enter the park prior to 10:00 a.m., there is a notice stating the time that a blast is due to occur. (N.T. 348) Another means of reducing the impact of noise on the park is the requirement that pit walls face away from the park and that berms be installed between haul roads and the park and along the permit boundary to act as a noise buffer. (N.T. 326, 351-52) In addition, the modified block method of mining, discussed above, keeps the operation in the pit to the maximum extent possible, thereby preventing sounds from traveling laterally. (N.T. 351) Finally, bulldozers will be operated only in first gear when going in reverse in order to lower the amount of noise. (N.T. 353)

Based on the preponderance of the evidence on this issue, we find that the park will not be adversely affected by noise from the mining operation.

Ecology of the Park

The Appellants contend that the mining operation will have an adverse impact on

the ecology of McConnell's Mill State Park. In support of this contention, the Appellants produced the testimony of Mr. James Kooser, who was recognized as an expert in ecology and in landscape and ecosystem ecology. Mr. Kooser is the principal author of a 1995 report entitled "Strategic Plan for the Protection of Slippery Rock Creek Gorge." The report involved a study of the park's ecology and set forth various activities or events that were considered to be potential threats to the ecology of the park. One of the potential threats listed was mining. The concerns listed in connection with non-coal surface mining included the deposit of limestone dust, the effects of blasting and the deposit of waste. (N.T. 631) The report recommended that no mining be permitted within a certain area within a half mile of Slippery Rock Creek.

However, Mr. Kooser's report also stated that while mining had been a large threat to the park in the past, the magnitude of that threat was lessened when the mining involved limestone rather than coal and followed modern reclamation practices. (N.T. 644) His report further acknowledged that if current reclamation practices were followed and the mining were closely monitored, limestone mining would not be the greatest threat to the park. (N.T. 644)

Mr. Kooser's report did not look at the potential impact of the Quality Aggregates mine on McConnell's Mill State Park since it did not exist at the time of the study. The report was intended as a general study to develop an ecological management plan for the park. Mr. Kooser was not familiar with the specific requirements of the permit with regard to blasting, dust control and reclamation. He could not say that the mine would have inadequate reclamation or create a problem with dust. With regard to blasting, his

report acknowledged that blasting done even close to the park would not result in the movement of rocks around the gorge. In addition, though he stated a concern with regard to destruction of forest area and its impact on the watershed, he agreed that the Quality Aggregates mine was not going to create a further problem in this regard. He acknowledged that most of the trees had been removed from the mining area in the 1950's. (N.T. 638)

What is clear from Mr. Kooser's report is that if mining is performed in the vicinity of McConnell's Mill State Park, certain precautions should be taken, in particular with regard to blasting, reclamation and dust control. As set forth in this adjudication, the evidence shows that the Department has taken the necessary safeguards to allow limestone extraction at the Quality Aggregates while still protecting McConnell's Mill State Park.

Conclusion

In order to revoke this permitted decision of the Department, the Appellants were required to prove by a preponderance of the evidence that the Department's action in issuing the permit was unreasonable or not in accordance with the law. The Appellants clearly failed to produce sufficient evidence to show that this permit should not have been granted. Moreover, the credible testimony of the expert witnesses, including consultants and Department employees, establishes that the permit issued by the Department meets the strict mandate of the applicable law. The Department and Permittee adequately addressed every allegation raised by the Appellants and the

evidence indicates that the mine is both well planned, carefully monitored, and well run.

At the *permitting* stage, the burden is on the *permit applicant* to convince the Department that it meets all the requirements necessary for issuance of the permit. This includes, among other things, ensuring that the permitted operation will not pollute the air or waters of the Commonwealth and that it complies with all relevant environmental statutes and regulations. At the permitting stage, the Department receives input from the public, including concerned citizens. Those citizens are provided with an opportunity to come forward with their concerns which are then investigated by the professional staff at the Department. Many times concerns are raised by citizens that must be addressed by the technical staff and other professionals hired by the permit applicant. In some cases, issues raised by concerned citizens are such that, after more investigation by the Department and further response by the professionals employed by the permit applicant, the Department decides not to issue the permit or imposes substantial conditions in the permit.

If the Department issues the permit, third parties, including concerned citizens, have the right to appeal the permit issuance to the Pennsylvania Environmental Hearing Board. The Environmental Hearing Board is the state trial court for environmental matters.[1] At this stage in cases involving the issuance of a permit, the burden of proof is

[1] *See Department of Environmental Protection v. North American Refractories Co.*, 791 A.2d 461, 462 (Pa. Cmwlth. 2002) ("The EHB and the Department are two branches of the tripartite administrative structure that governs environmental regulation in Pennsylvania. . . .The EHB is the judicial branch, empowered to hold hearings and issue adjudications on orders, permits,

no longer on the permit applicant but on the *party challenging the permit* to show the permit should not have been issued. Appellants, therefore, must prove by a preponderance of the evidence that the permit should not have been issued. 25 Pa. Code § 1021.122 (a) and (c) (2). To establish one's case by a "preponderance of the evidence" means that "the evidence in favor of the proposition must be greater than that opposed to it. . . 'It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established.'" *Noll v. DEP*, EHB Docket No. 2003-131-K (Adjudication issued May 20, 2005), *slip op.* at 11 (citing *Bethenergy Mines, Inc. v. DER*, 1994 EHB 925, 975 (quoting *Midway Sewerage Authority v. DER*, 1991 EHB 1445, 1476)).

In other words, the appellants may not simply raise an issue and then speculate that all types of unforeseen calamities may occur. They must come forward and prove their allegations by a preponderance of the evidence. When they raise technical issues they must come forward with technical evidence. In many cases, they need expert testimony to establish their position.

Where the appellants argue that the granting of a permit will destroy or pollute a valuable natural resource it is not enough to meet their burden to simply focus on the value of the natural resource. The natural resource's value is usually acknowledged by all parties involved, including the Department whose primary function it is to protect the environment. They must come forward with evidence, usually in the form of expert

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licenses or decisions of the Department.") (citing Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. § 7514)

testimony, to prove their claims. In some cases, not only does the party making the claim not come forward with evidence proving their claims, but often, in cases of this type, the Department and permittee will come forward with a tremendous amount of expert testimony refuting the claims of the third-party appellant. In such situations, the Board has no choice but to follow the law and dismiss the appeal. We cannot revoke a permit because someone raises a concern about a natural resource if that concern is not supported by a preponderance of the evidence. An appellant cannot simply come forth with a laundry list of potential problems and then rest its case. It must prove by a preponderance of the evidence that these problems have occurred or are likely to occur. We are a trial court, expert in environmental issues including technical matters and, as such, our decisions must be based on the record developed before us.

That is not to say an appellant cannot argue policy; however, that argument must be based on the law and on facts introduced into evidence. To carry its burden based solely on policy, an appellant must convince the Board that the policy it espouses is the policy of the Commonwealth of Pennsylvania as set forth in the law.

Finally, it is not enough to argue there were minor errors in the permitting process. A trial before the Board should not be a giant game of "gotcha." If there are errors in the permit, such errors must be material in order to warrant a revocation or remand of the permit. *Giordano v. DEP*, 2001 EHB 713, 736 ("With regard to all of the alleged procedural defects, no purpose would be served by nullifying or remanding the permit modification on such grounds.....it is generally not enough for an appellant to prevail to pick at errors that the Department might have made along the way if the Department's

final action is nevertheless appropriate." Citing *O'Reilly*, slip op. at 22.) Moreoever, even though we have full authority and power to take action regarding permits if we determine that the Department has erred, we are not quick to exercise that authority and power simply for the sake of making a point or to correct harmless or immaterial errors. *Warren Sand & Gravel Company v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Shippensburgh Township P.L.A.N. v. DEP*, 2004 EHB 548, 551.

We have painstakingly reviewed the record and cannot find any solid evidence supporting the Appellants' position. The Board readily agrees that McConnell's Mill State Park is a valuable natural resource and should be preserved so that all may enjoy its natural beauty. The record demonstrates that the permit issued by the Department to Quality Aggregates will accomplish this goal. We recognize that the Appellants are very sincere individuals who obviously care deeply about McConnell's Mill State Park; they simply did not come forward with the necessary evidence warranting a revocation or remand of the permit.

CONCLUSIONS OF LAW

1. The Board's review in this matter is *de novo*. *Warren Sand & Gravel*, *supra*.

2. The Appellants bear the burden of proving by a preponderance of the evidence that the Department acted unreasonably or contraty to law in issuing the non-coal mining permit to Quality Aggregates. 25 Pa. Code § 122(c)(2); *Zlomsowitch, supra.*

3. To establish one's burden of proof by a preponderance of the evidence means that the evidence in favor of a proposition must be greater than that opposed to it and

must satisfy an unprejudiced mind of the existence of the facts sought to be established. *Noll, supra.*

4. In order to meet its burden of proof, an appellant may not simply come forth with a laundry list of potential problems; he or she must prove by a preponderance of the evidence that the problems have occurred or are likely to occur.

5. The Appellants did not meet their burden of proving that blasting will interfere with the safety and enjoyment of McConnell's Mill State Park.

6. The Appellants did not meet their burden of proving that the mine operation will negatively impact the air quality of the Park.

7. The Appellants did not meet their burden of proving that the mining operation will cause adverse impacts to the water quality of the Park or cause an increase in erosion or sedimentation.

8. The Appellants did not meet their burden of proving that noise from the operation of the mine, specifically blasting and machinery, will adversely affect the Park and its users.

9. The Appellants did not meet their burden of proving the ecology of the Park will be adversely impacted by Quality Aggregate's mining.

10. Errors in a permit must be material in order to warrant revocation of the permit. *Giordiano, supra.*

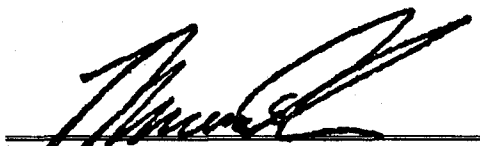
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT SHUEY, ROBERT VELTRI, STANLEY M. STEIN, WILLIAM KEANE, SLIPPERY ROCK STREAM KEEPERS, THE LEAGUE OF WOMEN VOTERS OF LAWRENCE COUNTY, BARTRAMIAN AUDUBON SOCIETY and FRIENDS OF MCCONNELL'S MILL STATE PARK	:	
v.	:	**EHB Docket No. 2002-269-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and QUALITY AGGREGATES , INC., Permittee	:	

ORDER

AND NOW, this 10th day of August, 2005, the Appeal is *dismissed*.

ENVIRONMENTAL HEARING BOARD



MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: August 10, 2005

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WHITE TOWNSHIP and READE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-068-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 11, 2005**

OPINION AND ORDER ON THE DEPARTMENT'S MOTION TO CONSOLIDATE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Two appeals involving common questions of law and fact are consolidated. Although there may be some issues in one of the appeals that do not involve the permittee, that does not prevent consolidation where it is otherwise warranted.

OPINION

Presently before the Pennsylvania Environmental Hearing Board (Board) is the Motion to Consolidate filed by the Pennsylvania Department of Environmental Protection

(Department). The Department has moved to consolidate this appeal with a later appeal, *White Township v. DEP*, EHB Docket No. 2005-097-R. In addition, the Board granted the Department's request to stay all proceedings pending the Board's disposition of the Motion to Consolidate. Counsel for White Township supports the Department's Motion while counsel for Glendale Yearound Sewer Company vigorously opposes it.

Discussion

25 Pa. Code Section 1021.82 provides that the Board may consolidate appeals "involving a common question of law or fact." Of course, the decision to consolidate appeals rests within our sound discretion. *Columbia Gas of Pennsylvania, Inc. v. DEP*, 1996 EHB 22. We often consolidate appeals in order to promote judicial efficiency, reduce the inconvenience to witnesses who might have to be deposed or testify multiple times in separate proceedings, and reduce the cost and expense to the parties and the Board. *Barshinger v. DEP*, 1996 EHB 1021. We also consolidate appeals if there is a chance there may be inconsistent outcomes. *Columbia Gas of Pennsylvania*, 1996 EHB at 23.

The Department contends that several of the issues regarding Glendale Yearound Resort are raised in both appeals. Moreover, after review of the appeal involving the Department's disapproval of White and Reade Townships Act 537 Wastewater Facility Plan Amendment we are convinced that if we do consolidate these cases we will eliminate the chance of inconsistent adjudications. At this early stage of the proceedings and without knowing what issues the parties will focus on we are hesitant to allow these appeals to

proceed on separate tracks.

Counsel for Glendale Yearound Sewer Company points to issues in the earlier appeal that do not involve his client. However, we are most concerned with the issues common to both appeals. We also remind the parties that we are a highly sophisticated tribunal capable of fashioning an appropriate pre-hearing order after consolidation with the parties providing for the trial of common issues of law and fact. It also appears that it would save all parties time and money not to have to attend multiple depositions of the same witnesses in both proceedings.

We will therefore issue an Order consistent with this Opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHITE TOWNSHIP and READE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-068-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 11th day of August, 2005, after review of the Department's Motion to Consolidate and the Permittee's Answer, it is ordered as follows:

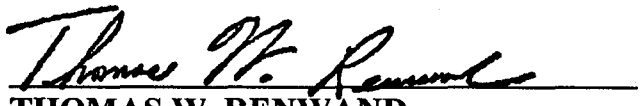
1) Upon consideration of the Department of Environmental Protection's Motion to Consolidate and the Permittee's Answer thereto, the Motion is ***granted.***

2) These case are consolidated under EHB Docket No. 2005-068-R

3) The caption is as follows:

WHITE TOWNSHIP and READE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-068-R (Consolidated with 2005-097-R)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GLENDALE YEAROUND SEWER CO., Permittee	:	

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: August 11, 2005

c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WHITE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-097-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GLENDALE YEAROUND SEWER CO., Permittee	:	**Issued: August 11, 2005**

OPINION AND ORDER ON THE DEPARTMENT'S MOTION TO CONSOLIDATE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Two appeals involving common questions of law and fact are consolidated. Although there may be some issues in one of the appeals that do not involve the permittee, that does not prevent consolidation where it is otherwise warranted.

OPINION

Presently before the Pennsylvania Environmental Hearing Board (Board) is the Motion to Consolidate filed by the Pennsylvania Department of Environmental Protection

(Department). The Department has moved to consolidate this appeal with an earlier appeal, *White Township and Reade Township v. DEP*, EHB Docket No. 2005-068-R. In addition, the Board granted the Department's request to stay all proceedings pending the Board's disposition of the Motion to Consolidate. Counsel for White Township supports the Department's Motion while counsel for Glendale Yearound Sewer Company vigorously opposes it.

Discussion

25 Pa. Code Section 1021.82 provides that the Board may consolidate appeals "involving a common question of law or fact." Of course, the decision to consolidate appeals rests within our sound discretion. *Columbia Gas of Pennsylvania, Inc. v. DEP*, 1996 EHB 22. We often consolidate appeals in order to promote judicial efficiency, reduce the inconvenience to witnesses who might have to be deposed or testify multiple times in separate proceedings, and reduce the cost and expense to the parties and the Board. *Barshinger v. DEP*, 1996 EHB 1021. We also consolidate appeals if there is a chance there may be inconsistent outcomes. *Columbia Gas of Pennsylvania*, 1996 EHB at 23.

The Department contends that several of the issues regarding Glendale Yearound Resort are raised in both appeals. Moreover, after review of the appeal involving the Department's disapproval of White and Reade Townships Act 537 Wastewater Facility Plan

Amendment we are convinced that if we do consolidate these cases we will eliminate the chance of inconsistent adjudications. At this early stage of the proceedings and without knowing what issues the parties will focus on we are hesitant to allow these appeals to proceed on separate tracks.

Counsel for Glendale Yearound Sewer Company points to issues in the earlier appeal that do not involve his client. However, we are most concerned with the issues common to both appeals. We also remind the parties that we are a highly sophisticated tribunal capable of fashioning an appropriate pre-hearing order after consolidation with the parties providing for the trial of common issues of law and fact. It also appears that it would save all parties time and money not to have to attend multiple depositions of the same witnesses in both proceedings.

We will therefore issue an Order consistent with this Opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHITE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-097-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GLENDALE YEAROUND SEWER CO., Permittee	:	

ORDER

AND NOW, this 11th day of August, 2005, after review of the Department's Motion to Consolidate and the Permittee's Answer, it is ordered as follows:

1) Upon consideration of the Department of Environmental Protection's Motion to Consolidate and the Permittee's Answer thereto, the Motion is ***granted.***

2) These case are consolidated under EHB Docket No. 2005-068-R

3) The caption is as follows:

WHITE TOWNSHIP and READE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-068-R**
	:	**(Consolidated with 2005-097-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GLENDALE YEAROUND SEWER CO., Permittee	:	

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: August 11, 2005

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MON VALLEY TRANSPORTATION CENTER, INC.	:	
v.	:	**EHB Docket No. 2005-049-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 12, 2005**

SECOND OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Department's motion to dismiss, treated as a motion for summary judgment, is granted. Although the Department's letter to a permit applicant appears to indicate that the permit will be denied if the bond requested by the Department is not submitted, a further review of the permitting process reveals that the bond calculation is not final at this stage and may still be revised. Therefore, we find that the Department's letter to the permit applicant was not an appealable action.

OPINION

This matter involves an application for a coal mining permit renewal for the Glassport Tipple, which is operated by Mon Valley Transportation Center, Inc. (Mon Valley Transportation). A motion to dismiss the appeal was filed by the Department on May 2, 2005

and Mon Valley Transportation filed an answer.[1] The Department elected not to file a reply. In an Opinion issued on June 17, 2005, the Board determined that certain legal issues remained in dispute and ordered the Department to file a reply responding to these issues.[2] After a review of all the pleadings, we find that the motion should be granted.

The background of this matter is as follows. On February 10, 2005, the Department of Environmental Protection (Department) notified Mon Valley Transportation that it had completed its technical review of the permit renewal application and requested the company to submit a reclamation bond in the amount of $ 390,369.57 in order for the Department to complete its review of the application. Mon Valley Transportation filed an appeal from the bond request.

In its motion to dismiss, the Department contended that the bond request was not a final action and, therefore, not appealable to the Board. The Department states that the bond request is simply one step in the permit review process and that if the applicant fails to submit the bond as requested, the next step is for the Department to issue a "Notice of Intent to Deny" letter which states that the Department intends to deny the permit if the applicant fails to submit the bond and provides the applicant with an opportunity to meet and discuss the application and bond with representatives of the Department. Only after the Notice of Intent to Deny is sent and the applicant has had an opportunity to meet with Department personnel does the Department make what it considers to be its final decision on the application. If the Department's decision is to deny the permit, the Department then sends another letter stating that the Department has completed its review of the application and has denied the permit. It is this letter that the

---

[1] We will treat the Department's motion as a motion for summary judgment, which has no impact on the result. *Jai Mai, Inc. v. DEP*, 2003 EHB 349, 351, n. 3.

[2] *Mon Valley Transportation Center, Inc. v. DEP*, EHB Docket No. 2005-049-R (Opinion and Order on Motion to Dismiss issued June 17, 2005)

Department considers to be a final, appealable action.

In response, Mon Valley Transportation points to the following language contained in the bond request letter:

> We have completed our technical review of your application to renew the existing permit for the above referenced operation. Before a permit can be issued you must provide the following:
>
> Mining and Reclamation Bond in the amount of $390,369.57
>
> I have enclosed the following materials to help you complete the process: an instruction sheet, bond forms, a bond submittal form and any other forms that may apply.
>
> The completed bond submittal form and the completed bond forms are to submitted to the Division of Licensing and Bonding by March 10, 2005. *Failure to submit them by that due date will result in permit denial.*

(Exhibit A to Response, emphasis added)

Mon Valley Transportation contends that the language of the letter is clear – the permit renewal application will be denied if the bond is not submitted. Based on this language, it argues that the letter is a final, appealable action.

According to the Department's reply, which is supported by the affidavit of Engineering Supervisor, Joel Koricich, following the receipt of a Notice of Intent to Deny letter, an applicant has the opportunity to request an informal conference with Department representatives where it can dispute the bond amount required by the Department. If the Department agrees with the applicant's position, it will then request the applicant to submit a revised bond calculation worksheet reflecting the changes agreed to by the Department. (Koricich Affidavit, para. 16) If the Department does not agree to change the bond amount and the applicant does not submit the bond in the amount originally determined by the Department, the Department will then issue a permit denial letter which is a final action.

The Board will dismiss an appeal only where there are clearly no material factual disputes and the moving party is entitled to judgment as a matter of law. *Cooley v. DEP*, 2004 EHB 554, 558. The motion must be reviewed in the light most favorable to the non-moving party. *Id.*

We agree with Mon Valley that upon first glance, the language of the Department's February 10, 2005 letter appears to be a final action. However, based on the explanation provided by Mr. Koricich, it is, in fact, not a final action. There are additional steps in the permitting process during which the bond calculation may yet be revised. Once Mon Valley receives a Notice of Intent to Deny letter, it has the right to request an informal conference with the Department to discuss the amount of the bond and request revisions. Because the bond calculation for Mon Valley's permit application is not final at this stage and may be revised at an informal conference requested by Mon Valley, we find that the matter is not yet final or appealable.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MON VALLEY TRANSPORTATION CENTER, INC.	:	
v.	:	**EHB Docket No. 2005-049-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 12th day of August 2005, the Department of Environmental Protection's motion is **granted** and the appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATE: August 12, 2005

c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CORCO CHEMICAL CORPORATION	:	
	:	
	:	
v.	:	**EHB Docket No. 2005-116-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 8, 2005**
	:	
	:	

OPINION AND ORDER
ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis

The Board dismisses an appeal from a letter sent by the Department to the appellant which merely reviews the appellant's compliance with regulations relating to its aboveground storage tanks and evaluates the submission of a spill plan in the context of an equity action commenced in a court of common pleas. This is not a final action of the Department and the Board has no jurisdiction to review it at this time.

OPINION

Before the Board is a motion to dismiss the appeal of Corco Chemical Corporation (Appellant), filed by the Department of Environmental Protection. The Department seeks dismissal on the grounds that the letter which forms the basis of the Appellant's appeal is not a final action of the Department, and the Board therefore lacks

jurisdiction. The Appellant disagrees[1] and argues that the discussion in the letter relating to the Appellant's Spill Prevention Response Plan (SPRP) is a disapproval of that plan and therefore an appealable action. After reviewing the Department's letter we find that it is not a final action and dismiss the Appellant's appeal.

The Appellant operates a chemical production and repackaging plant in Falls Township, Bucks County. On June 3, 2005, the Appellant filed a notice of appeal objecting to a letter dated May 5, 2005 from the Environmental Cleanup Division of the Department's Southeast Regional Office, which listed "the outstanding issues that still exist with regard to the regulated aboveground storage tanks currently in use at [the] facility and with the Spill Prevention and Response Plan that was recently submitted with regard to the facility."[2] In the Appellant's view, the Department had reached numerous erroneous factual conclusions and imposed unreasonable and arbitrary requirements upon the Appellant and effectively disapproved the Appellant's SPRP. On July 18, 2005, the Department filed a motion to dismiss the appeal, on the basis that the letter was not a final, appealable action of the Department.

The Board is authorized by the Environmental Hearing Board Act[3] and regulations[4] to review orders, permits, licenses or decisions of the Department, as well as any Department "action" which adversely affects a person's personal or property rights,

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[1] The Appellant only makes argument concerning the portions of the Department's letter dealing with the Spill Prevention Response Plan (SPRP). It "takes no position" concerning the appealability of the remainder of the Department's letter. Accordingly, we will only address ourselves explicitly to the portion of the letter dealing with the SPRP.

[2] Notice of Appeal attachment; Motion to Dismiss, Exhibit A, (hereinafter cited as "May 5 Letter").

[3] Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7514.

[4] 25 Pa. Code §§ 1021.1-1021.201.

privileges, immunities, duties, liabilities or obligations.[5] We have long held that there is no "bright line" rule for what communication from the Department is an "action" of the Department and what is not an action of the Department. Rather, the Board will review a document in its entirety and make that decision on a case-by-case basis.[6] In *Beaver v. DEP*,[7] the Board cataloged several factors that should be considered in order to determine whether a communication from the Department was appealable. Those factors include the specific wording of the communication; the purpose, intent and practical impact of the communication; the apparent finality of the letter; the regulatory context; and the relief that the Board may be able to provide.[8]

Using this framework of analysis we have held that comments by the Department on a "pre-permit application" of a sewage facility were not appealable.[9] Similarly, a letter from the Department expressing the view that violations observed at a sewage treatment plant meant that the Department would not be able to grant an NPDES permit until the violations were corrected was not an appealable action.[10] These decisions are consistent with older precedent of the Board holding that a letter reviewing compliance with an administrative order was not appealable,[11] a letter returning an NPDES permit application and directing the applicant to address uncertainties in design flows was not appealable[12] and a letter from the Department informing an applicant that its application for air quality

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[5] *Beaver v. DEP*, 2002 EHB 666, 673; 35 P.S. § 7514; 25 Pa. Code § 1021.2.
[6] *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121.
[7] 2002 EHB 666.
[8] *Beaver*, 2002 EHB at 673.
[9] *Boggs v. DEP*, 2003 EHB 389.
[10] *County of Berks v. DEP*, 2003 EHB 77.
[11] *202 Island Car Wash v. DEP*, 1999 EHB 10.
[12] *Central Blair County Sanitary Authority v. DEP*, 1998 EHB 643.

approval was incomplete because the project was subject to new source review was not appealable because it was not a final action.[13]

The Department states that the May 5 Letter was written in the context of pending complaints in equity filed in the Court of Common Pleas of Bucks County.[14] The letter provides comments to submissions made by the Appellant and provides a regulatory and statutory foundation for the Department's position. The Department takes the position that the letter merely provides advice for addressing certain shortcomings in the submissions, including the SPRP, made by the Appellant.

The Appellant argues that the letter is tantamount to a disapproval of its SPRP. Specifically, the language of the letter relied upon by the Appellant is as follows:

> **Spill Prevention Response Plan**. Storage Tank and Water Quality personnel of the Department have reviewed the Spill Prevention Response Plan (SPRP) dated December 3, 2004. Our review has determined that the plan was not completed in accordance with Section 902 of the Storage Tank and Spill Prevention Act.[15] Enclosed for your reference are Guidelines for Development and Implementation of Environmental Emergency Response Plans. We will not consider the SPRP complete until a revised plan addressing the following issues is submitted . . .[16]

The letter then goes on for the next three pages, detailing the specific shortcomings of each section of the Appellant's submission. The Appellant contends that this constitutes a

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[13] *United Refining v. DEP*, 2000 EHB 132.

[14] The Appellant agrees that this is the factual context in which the letter was written. Response to Motion to Dismiss, ¶¶ 2-5.

[15] Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. § 6021.902. Section 902 prescribes the contents of spill prevention plans.

[16] May 5 Letter at page 2.

disapproval of the SPRP under Section 903(b) of the Tank Act,[17] and is therefore an appealable action of the Department.

We conclude that the May 5 letter dealing with the Department's position on the Appellant's SPRP falls squarely within the precedent established by the Board. First, it was written in the context of litigation in an equity action in a court of common pleas, presumably working toward a resolution of those complaints. In that respect it is similar to our decisions where the Department has issued a letter reviewing an appellant's compliance with an administrative order.[18]

Second, the language of the letter does not suggest that the Department is making a final decision on the Appellant's SPRP. Rather, it is providing the Appellant with an evaluation of certain shortcomings based on the Department's interpretation of the Tank Act and procedural guidelines, before the Department makes a final decision. This is very clearly in the nature of an interlocutory decision of the Department made in the processing of an application, wherein the Department has interpreted its regulations concerning the contents of SPRPs, and advised the Appellant about how to improve its plan, including its view that the plan as submitted is incomplete.[19]

---

[17] 35 P.S. § 6021.903(b). That section provides:

> **(b) Department action.** – The department shall approve the spill prevention response plan or disapprove the plan and provide the owner of the storage tank or tank facility with specific reasons for the disapproval. If disapproved, the owner of the storage tank or tank facility shall submit a revised plan to the department.

[18] *202 Island Car Wash.*

[19] *See, e.g. Central Blair County Sanitary Authority*, 1998 EHB at 646.

The Appellant argues that the Department's determination that the submission is "incomplete" is tantamount to a "disapproval" under Section 903(b) of the Tank Act, which provides that the Department "shall approve the spill prevention response plan or disapprove the plan and provide the owner of the storage tank or tank facility with specific reasons for the disapproval."[20] However, we view this statement in the Department's letter that it can not approve the plan without more information, as a conclusion that the Department is not in a position to act on the plan because of the many deficiencies in the information provided to the Department rather than a disapproval of the plan. We do not interpret section 903(b) of the Act to deprive the Department of its ability to request further information before acting on a plan to either approve or disapprove it.

Section 902 of the Act[21] specifically describes categories of information that must be submitted with the plan, but it further states in Subsection 902(f): "The owner shall provide the Department with all other information required by the Department to carry out its duties under this act."[22]

We are required to read the requirements of these two sections of the Tank Act together.[23] Since Section 902(f) requires the applicant to submit all information required by the Department to enable it to properly consider a plan, the Department is well within its rights to require the applicant to submit additional information before it acts to

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[20] 35 P.S. § 6021.903(b).
[21] 35 P.S. § 6021.902.
[22] 35 P.S. § 6021.902(f).
[23] Section 1932 of the Statutory Construction Act, 1 Pa.C.S. § 1932.

approve or disapprove a plan as required by Section 903(b) of the Act. The appellant acknowledges that approval or disapproval of the plan is one of the Department's duties.

Even a cursory reading of the Department's letter demonstrates that its requirements relate to matters necessary for the Department to carry out its duties under the Department's regulations in its Spill Prevention Program under Part 245 of its regulations. The letter begins with deficiencies in meeting the maintenance monitoring and leak detection requirements. Those requirements are described in the Department's regulations at 25 Pa. Code §§ 245.511 to 245.516. While the Department's requirements for a description of the facility may entail more detail than the language used in Section 902 of the Act for a description of the facility, many of those requirements as expressed in the Department's letter may be proper for the Department's consideration. For example, a description of the products manufactured and the waste generated from those processes, the location of storage of such materials and potential for spills, leaks and storm water flow are likely to be relevant matters for the Department's consideration. Similarly, many of the Department's requests for further information under the titles of Spill Leak Detection and Response and Countermeasures as well as Evacuation Plan for Installation Plan Personnel may be within the Department's area of concern. It may be that other requests in the letter are unreasonable as being unnecessary for the Department to carry out its duties under the Act. However, such questions are not ripe for review by this Board until the Department takes final action either approving or disapproving the Appellant's SPRP.

While the Department's letter asked that Appellant provide the requested information by June 6, 2005, the Appellant has been free to provide such information as

is clearly within the legitimate concerns of the Department and refuse to supply other information at the risk of having its plan disapproved. In our view the Department's action will not be final until after the Department acts finally on the plan after Appellant submits further information. Since many of the Department's requirements appear to be well within its rights to request further information, we think it only proper for us to hold that the Department action is not final for purposes of our review at this time.

Accordingly, until the Department takes definitive action disapproving the SPRP, it is inappropriate for this Board to interfere. As Judge Myers observed in *Phoenix Resources v. DEP*:

> [I]t 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.[24]

Accordingly, we will dismiss the Appellant's appeal and enter the following order:

---

[24] 1991 EHB 1681,1684. *See also United Refining Company v. DEP,* 2000 EHB 132 (dismissing an appeal from a determination that the application was incomplete because new source performance standards had to be met); *County of Dauphin v. DEP*, 1997 EHB 29 (dismissing an appeal for lack of jurisdiction when it sought Board review of a Department decision to suspend review of a landfill permit application pending substantive changes required by Act 101.)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CORCO CHEMICAL CORPORATION	:	
	:	
	:	
v.	:	**EHB Docket No. 2005-116-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this day of 8th day of September, the motion to dismiss the above-captioned appeal is hereby **GRANTED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Bernard A. Labuskes Jr.

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **September 8, 2005**

c: **DEP Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CORCO CHEMICAL CORPORATION	:	
	:	
	:	
v.	:	**EHB Docket No. 2005-116-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	

DISSENTING OPINION OF
CHIEF JUDGE KRANCER IN WHICH JUDGE RENWAND JOINS

By Michael L. Krancer, Chief Judge and Chairman

We respectfully dissent. We believe the Department's letter is an appealable action for several reasons. First, the letter clearly contains prescriptive elements. It requires the Appellant to submit copious additional documentation by a certain and specific date. Second, it requires the Appellant to submit an updated Spill Prevention Response Plan (SPRP) by a certain and specific date. Moreover, the letter under appeal is nothing other than a disapproval of the Appellant's extant SPRP under Section 903(b) of the Storage Tank Act.

After setting forth at length and in detail in three pages the specific supposed shortcomings of each section of the Appellant's submitted materials, the letter provides, "[p]lease provide the documentation requested and an updated SPRP by June 6, 2005." Thus, we have two separate prescriptive elements in operation. First, in the face of the Appellant's contention that the documentation it had already submitted is sufficient to qualify as a valid SPRP, the Department is requiring the Appellant to both submit additional documentation by June 6th and requiring Appellant to submit an updated SPRP

by June 6th. This is far beyond the mere listing of violations observed, the advising of the possibility of future enforcement action, the mere providing of information to the recipient of procedures necessary to achieve compliance, or the mere advising of the Department's interpretation of the law, all of which we have held to be on the non-appealable side of the equation. *See County of Berks v. DEP*, 2003 EHB 77, 81-83 *citing Donny Beaver v. DEP*, 2002 EHB 666, 673-675. Instead, this letter sets forth a concrete prescriptive imperative. This letter effectively orders Appellant to accomplish more submittals and to submit an updated SPRP in the face of Appellant's contention that the material already submitted qualifies as an effective SPRP.

Even the majority confesses the prescriptive nature of the letter. The majority talks about how the Department is entitled under Section 902(f) to require the applicant to submit additional information and how the letter "demonstrates that its [meaning the letter's] requirements relate to matters necessary for the Department to carry out its duties under the [Act]." *Ante* at 6-7. Indeed, therein the majority's formulation are at least two obviously appealable questions: (1) is the Department entitled under Section 902(f) to "require the applicant to submit the additional information"; and (2) does the letter "demonstrate[] that its requirements relate to matters necessary for the Department to carry out its duties under the [Act]."

The majority's conclusion that we have no appealable action here is even less defensible in light of its recognition that many of the letter's imperatives to the Appellant go even further than the law allows. For example, the majority admits that, "[w]hile the Department's requirements [in the letter] for a description of the facility may entail more detail than the language used in Section 902 of the Act for a description of the facility,

many of those requirements as expressed in the Department's letter may be proper for the Department's consideration." *Ante* at 7. One has to wonder how a Department imperative to a person for action that even the majority recognizes as beyond that allowed by law, and that requires the provision of information which only "may be proper" for the Department's consideration, is not appealable. As the majority would have it, the Department may very well have ordered more than it may lawfully do so and have required material which may not even be proper for its consideration and the Appellant has no recourse.

The majority's view that "such questions are not ripe for review" until the Department takes what the majority would say is its "final action either approving or disapproving the Appellant's SPRP" again is misguided for an obvious reason. *Ante* at 7. The current imperative the Appellant faces imposed by the letter is to submit the information which has been demanded. The Department has taken the passive-aggressive posture of refusing to "consider the SPRP complete" until the Appellant complies with its demands. Yet under the majority's view, that imperative to submit this information, which even the majority sees as being beyond what is provided for by law, would never be able to be challenged.

This leads to the other reason that the letter can and should be seen as appealable. The letter is the functional denial of the Appellant's submittals which it contends amount to a valid SPRP and is therefore an appealable action of the Department. Section 903(b) of the Storage Tank Act provides:

> **(b) Department action.** – The department shall approve the spill prevention response plan or disapprove the plan and provide the owner of the storage tank or tank facility with specific reasons for the disapproval. If disapproved,

> the owner of the storage tank or tank facility shall submit a revised plan to the department.

This letter, under these circumstances, is well beyond the general interlocutory give and take between the Department and member of the regulated community in their relationship which would not involve crossing the line of being a final appealable action. The Storage Tank Act explicitly requires the Department to take specific action to "approve" or "disapprove" a spill plan. With this statutory context in mind, the May 5 letter, read as a whole, constitutes a disapproval of the Appellant's SPRP, and is therefore a final action of the Department. The Department's letter says specifically that it has "determined that the plan [which Appellant had submitted in compliance with the Act] was not completed in accordance with Section 902 of the Storage Tank and Spill Prevention Act." Moreover, the letter tracks exactly the statutory formula of a Section 903(b) disapproval letter. The letter describes the shortcomings of the Appellant's plan in three pages of detailed explanation. These are "specific reasons for the disapproval" as required to be outlined by the Department in a Section 903(b) disapproval letter. Also, the letter requires the Appellant to submit a revised plan to the Department which is exactly what Section 903(b) requires when the Department has disapproved a SPRP. Thus, the letter is written in the precise formula outlined by Section 903(b) for a disapproval letter.

The single word the Department uses in this letter, saying that it is merely deeming the SPRP "incomplete" rather than "disapproved" is not only a transparent attempt to cut off appeal rights, its use belies reality, the facts and the nature of the letter. We decline to go along with that attempted finesse of the use of a single word, and an

improper use of it to boot, to allow the complete destruction of quite legitimate and valid appeal rights.

Also, we keep in mind, and the majority has seemingly missed this point which is an important one: this is a Motion to Dismiss. That means we ought to be evaluating the motion in the light most favorable to the non-moving party, in this case the Appellant. We should only be granting such a motion where there is no doubt at all that the moving party is clearly entitled to judgment as a matter of law. The majority has reversed those principles and viewed this matter from the perspective of the granting the moving party every benefit of the doubt. We see that viewed in the light most favorable to the non-moving party, this letter contains prescriptive elements and that viewed in the light most favorable to the non-moving party, this letter is a disapproval of the Appellant's extant SPRP.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: September 8, 2005

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

AMERICAN IRON OXIDE COMPANY	:	
	:	
v.	:	**EHB Docket No. 2004-219-R**
	:	**(Consolidated with 2004-119-R**
	:	**and 2004-249-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 12, 2005**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

An appellant's failure to prepay a civil penalty or post an appeal bond or make a claim of financial inability to prepay the penalty within the 30 day appeal period results in a waiver of its right to challenge the penalty pursuant to Section 9.1 of the Air Pollution Control Act. Unlike similar prepayment provisions in other statutes, the Air Pollution Control Act requires the Board to hold a hearing on a claim of inability to prepay within 30 days of the filing of the appeal. This indicates that the claim of inability to prepay must be made prior to that time. Further, where the parties have entered into a Consent Order that states that it supersedes a compliance order issued by the Department, the appeal of the compliance order is rendered moot.

OPINION

Background

American Iron Oxide Company (AMROX) operates an iron oxide manufacturing facility in Allenport, Pennsylvania. The Department of Environmental Protection (Department) issued an order to the company in May 2004 (the May 2004 order) which AMROX appealed at Docket No. 2004-119-R. The order was issued for alleged violations of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §§ 4001 – 4106. The parties entered into settlement negotiations and signed a Consent Order and Agreement (Consent Order) on February 9, 2005 that superseded the May 2004 order.

During the time period when negotiations were taking place, the Department issued a series of civil penalty assessments on August 4, 2004, September 9, 2004 and October 25, 2004, which the Department stated were for non-compliance with the May 2004 order. The civil penalties were assessed pursuant to Section 9.1 of the Air Pollution Control Act, 35 P.S. § 4009.1, which authorizes the Department to assess civil penalties for any violation of the act or its underlying regulations. According to subsection (b) of Section 9.1:

> The person charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full, or, if the person wishes to contest the amount of the penalty or the fact of the violation to the extent not already established, the person shall forward the proposed amount of the penalty to the hearing board within the thirty (30) day period for placement in an escrow account with the State Treasurer or any Commonwealth bank or post an appeal bond to the hearing board within thirty (30) days in the amount of the proposed penalty. . . . *Failure to forward the money or the appeal bond at the time of the appeal shall result in a waiver of all legal rights to contest the violation or the amount of the civil penalty unless the appellant alleges financial inability to prepay the penalty or to post the appeal bond. The hearing board shall conduct a hearing to consider the appellant's alleged inability to pay within thirty (30) days of the date of the appeal.* The hearing board may waive the requirement to prepay the civil penalty or to

> post an appeal bond if the appellant demonstrates and the hearing board finds that the appellant is financially unable to pay. The hearing board shall issue an order within thirty (30) days of the date of the hearing to consider the appellant's alleged inability to pay.

35 P.S. § 4009.1(b) (emphasis added)

Appeals of Civil Penalty Assessments

AMROX did *not* file a notice of appeal of the August 4, 2004 civil penalty assessment with the Environmental Hearing Board (Board) within 30 days of its receipt of the assessment, nor did it forward the amount of the proposed penalty or claim of financial inability to prepay within 30 days of receipt of the assessment.

AMROX *did* file an appeal of the September 9, 2004 civil penalty assessment with the Board within 30 days of receipt of the assessment. This appeal was docketed at Docket No. 2004-229-R. It also attempted to appeal the August assessment at this time. However, it did *not* forward the amount of the proposed penalty for either the August or September assessment or a claim of financial inability to prepay within the 30-day period following receipt of the September assessment.

AMROX *did* file an appeal of the October 25, 2004 civil penalty assessment with the Board within 30 days of receipt of the assessment. This appeal was docketed at Docket No. 2004-249-R. However, it did *not* forward the amount of the proposed penalty or claim of financial inability to prepay within that time period.

The three appeals – of the May 2004 order and the August/September and October civil penalty assessments – were consolidated under Docket No. 2004-219-R.

Department's Motion to Dismiss

On May 2, 2005, the Department filed a motion to dismiss all of the appeals. An appeal

may be dismissed where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Mon Valley Transportation Center, Inc. v. DEP*, EHB Docket No. 2005-049-R (Opinion and Order issued June 17, 2005), *slip op.* at 3; *Cooley v. DEP*, 2004 EHB 554, 558. The motion must be viewed in the light most favorable to the non-moving party. *Id.*

The Department's basis for dismissal of the appeal of the May 2004 order is that the order has been superseded by the Consent Order and is therefore moot. Its argument for dismissal of the civil penalty assessments is that AMROX waived its right to challenge the assessments by failing to forward the amount of the proposed penalty or an appeal bond within 30 days as required by Section 9.1 of the Air Pollution Control Act, nor a claim of inability to prepay.

In response, AMROX asserts that it entered into the Consent Order with the understanding that it would resolve the issue of the May 2004 order as well as the issue of civil penalties. It also asserts that a claim of inability to prepay need not be made within the 30-day appeal period but may be raised at a later date.

Negotiations re Consent Order

We first address AMROX's argument that the parties' good faith negotiations surrounding the Consent Order should allow it an opportunity to challenge the civil penalty assessments generated from the May 2004 order. According to AMROX's response, in order to implement the substantive provisions of the Consent Order promptly, the parties had agreed to defer negotiation of an appropriate civil penalty amount. AMROX contends it entered into the Consent Order "on the belief...that the Department would in good faith subsequently negotiate any reasonable penalty amount." It argues that the Department cannot have it both ways; in

other words, if the appeal of the May 2004 order was rendered moot by the Consent Order, then so too are the civil penalties generated by the order.

The language of the Consent Order is quite clear: "The May 2004 Order is hereby superceded except with regard to civil penalty liability for non-timely or incomplete compliance with such order. The Department's ability to pursue such civil penalties is preserved." (Exhibit 1 to Response, para. 19) This leaves no doubt that the Department's May 2004 order is superseded by the Consent Order, while the civil penalty assessments are not.

We sympathize with AMROX's statement that it entered into the Consent Order believing it would have a further opportunity to negotiate the 2004 civil penalty assessments. However, if this was the intention of the parties, it was not memorialized in either the Consent Order itself or a separate document. Several paragraphs of the Consent Order do address the issue of civil penalties, but only the amount agreed upon by the parties for a violation of the Consent Order itself. The Consent Order makes it clear that it supersedes only the May 2004 order and does not affect the Department's right to assess civil penalties for any alleged violations of that order.

Moreover, even if the parties did intend negotiations to address the civil penalty assessments, that did not relieve AMROX of the necessity of filing a protective appeal for each of the assessments and complying with the statutory requirement for prepayment. The civil penalties were assessed in August, September and October of 2004. The Consent Order was not entered into until February 2005. Had no agreement been reached between the parties, AMROX would be left with no recourse to challenge the assessments.

Furthermore even if, as AMROX contends, the parties intended to continue negotiating the civil penalty assessments after the Consent Order was signed, that did not relieve AMROX of

the necessity of filing an appeal of the assessments in the first place or complying with the statutory requirement for prepayment. No matter how well intentioned parties may be in their attempt at resolving a case, negotiations sometimes break down and settlements are not always reached. Engaging in settlement negotiations does not excuse a party from appealing an action and complying with the requirements for appeal. *Simons v. DEP*, 1998 EHB 1131, 1134-35; *Johnston Laboratories, Inc. v. DEP*, 1998 EHB 695, 697. Therefore, AMROX cannot rely on its belief that further negotiations would have resolved the civil penalty issue, thereby relieving it of the necessity to file appeals from the assessments and comply with the prepayment provisions.

Because the Consent Order clearly says that the May 2004 order is superseded, we find it is appropriate to dismiss the appeal of the order on that basis. However, the language of the Consent Order clearly states that the civil penalty assessments were not made moot by the agreement. Therefore, we turn to AMROX's argument regarding its claim of inability to prepay.

Prepayment of Penalties

Section 9.1 of the Air Pollution Control Act clearly states that a party must either prepay the amount of the proposed penalty or post an appeal bond in that amount within the 30-day appeal period or waive its right to contest the violation or civil penalty assessment. An exception is if the party alleges an inability to prepay the proposed penalty amount. In that case, the Board must hold a hearing on the claim of inability to prepay. The question is whether the allegation of financial inability to prepay must be made within the 30-day appeal period in order to comply with the statute.

AMROX asserts that, pursuant to the Commonwealth Court's decision in *Pilawa v. DEP*, 698 A.2d 141 (Pa. Cmwlth. 1997), a party need not specifically assert a claim of inability to prepay during the 30 day appeal period but may do so in response to a motion to dismiss. *Pilawa*

involved a civil penalty assessed under the Storage Tank and Spill Prevention Act (Storage Tank Act), Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101 – 6021.2105. Like the Air Pollution Control Act, the Storage Tank Act also requires that a person challenging a civil penalty assessment must either prepay the penalty or post an appeal bond within the appeal period. 35 P.S. § 6021.1307(b). The appellants in *Pilawa* neither prepaid the penalty nor posted an appeal bond, nor did they make a claim of financial inability to prepay within the appeal period. The first time the appellants raised a claim of financial inability to prepay was in response to the Department's motion to dismiss. Finding that it lacked jurisdiction on the grounds that the appellants had failed to make a claim of financial inability to prepay within the 30-day appeal period, the Board dismissed the appeal.

The Commonwealth Court reversed. Relying on its earlier decision in *Twelve Vein Coal Co. v. DER*, 561 A.2d 1317 (Pa. Cmwlth. 1989), *petition for allowance of appeal denied*, 578 A.2d 416 (Pa. 1990), the court stated as follows:

> Our decision in *Twelve Vein* clearly holds that when a party alleges that it is not able to comply with the prepayment or bond requirements for perfecting an appeal to the EHB, the proper procedure is for the EHB to hold a hearing to determine whether the party is, in fact, impecunious and unable to comply with the prepayment condition. While the issue of the timeliness of an appellant's claim of financial hardship was not discussed in *Twelve Vein Coal Co.*, we do not believe that Pilawa's failure to raise its financial condition as a separate issue during the appeal period mandates a different result here.

Id. at 143.

The court went on to state further that the Board's rules of practice and procedure did not require an appellant to raise the issue of financial inability to comply with prepayment or bond requirements during the appeal period, nor did our notice of appeal form require documentation proving payment or execution of a bond. The court further pointed out that Section 1307 of the

Storage Tank Act requires the prepayment to be made to the Department, not to the Board, causing the transaction to be outside the Board's appeal process. *Id.* at 144. Based on this reasoning, the court concluded that the Board was required to hold a hearing on Pilawa's claim of financial inability to prepay regardless of when it made that claim.

Pilawa and *Twelve Vein Coal* were followed by the Board in *Carl L. Kresge & Sons, Inc. v. DEP*, 2001 EHB 511, which involved a civil penalty assessed under the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Act), Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326. Like the Air Pollution Control Act and the Storage Tank Act, Section 21(b) of the Noncoal Act requires an appellant to prepay the penalty or post an appeal bond. In that case, the appellant had not prepaid the penalty or posted an appeal bond, nor had the Department moved to dismiss the appeal. The first time the fact that the penalty had not been prepaid was raised was at the start of the trial on the merits. The Board proceeded with the trial on the merits but also permitted evidence to be presented regarding the appellant's ability to prepay the penalty. The Board concluded that the appellant failed to prove it was unable to prepay the penalty or obtain an appeal bond.

AMROX contends that if we apply the Commonwealth Court's holding in *Pilawa* to the facts of this case, the Department's motion to dismiss must be denied. In reply, the Department argues that there is a critical difference in the language of the Air Pollution Control Act compared to that of the Storage Tank Act, under which *Pilawa* was decided, which makes the *Pilawa* holding inapplicable here. Only the Air Pollution Control Act contains an exception to the prepayment requirement for an inability to prepay. The penalty sections of the other statutes are silent on this issue.

In creating this exception, the Air Pollution Control Act sets forth a specific timeframe

for addressing a claim of inability to prepay. Section 9.1 of the Air Pollution Control Act specifically states that "[t]he hearing board shall conduct a hearing to consider the appellant's alleged inability to pay within thirty (30) days of the date of the appeal." In contrast, the Storage Tank Act contains no such mandate. Nor does the Noncoal Act under which *Kresge* was decided. The Department argues that because the Air Pollution Control Act sets a tight time schedule for holding a hearing on the ability to prepay, it is clear that the statute requires that the prepayment or claim of inability to prepay must be submitted promptly.

Section 9.1 explicitly provides that if an appellant alleges financial hardship, the Board *shall* conduct a hearing to consider the appellant's financial condition within 30 days of the date of the appeal. The word "shall" when used in a statute is generally mandatory, imposing a duty on the person to whom it is directed. *Commonwealth v. Sojourner*, 518 A.2d 1145, 1148 (Pa. 1986); *Division 85, Amalgamated Transit Union v. Port Authority of Allegheny County*, 208 A.2d 271 (Pa. 1965). Thus, the text's plain meaning leads us to conclude that if the Board is required to hold a hearing on an appellant's financial inability to prepay within 30 days of the date of the appeal, the appellant must necessarily file any claim of financial inability prior to that time. Therefore, AMROX's claim of financial inability at this stage of the proceeding, more than six months after the filing of the notices of appeal, is untimely.

This conclusion is further supported by the Commonwealth Court's reasoning in *Pilawa*. There, the court relied heavily on the fact that neither the Board's rules nor the Storage Tank Act provided any timeframe for making a claim of financial inability to prepay. It stands to reason that since the Air Pollution Control Act does provide a specific timeframe in which to make a claim of financial inability, that timeframe should be followed. We do not believe that such a time requirement is violative of AMROX's due process rights.

Because the Air Pollution Control Act is clear that a failure to prepay the penalty or post an appeal bond within the requisite time period causes the appellant to waive its right to contest the amount of or basis for the civil penalty, and because AMROX failed to make a timely claim of financial inability to prepay the penalty or post the appeal bond, we find that it has waived its right to challenge the penalty.

Appeal of the order does not result in an automatic appeal of the penalties

AMROX asserts that a party that has appealed an underlying compliance order may challenge penalty assessments based on that order even though it did not file separate appeals of the penalty assessments. It bases its argument on the holding in *Mustang Coal & Contracting Corp. v. DER*, 1990 EHB 1496.

However, that is not the holding of the *Mustang* case. In that case, the Department issued a compliance order and later a civil penalty assessment to the appellant. The appellant appealed only the compliance order, not the penalty assessment. The Department filed for summary judgment, claiming that under the doctrine of administrative finality the appellant's failure to appeal the subsequent civil penalty assessment precluded it from challenging the order on which the penalty was based. The Board dismissed the Department's argument, finding that the appellant's failure to appeal the penalty assessment in no way precluded it from challenging the validity of the compliance order which it did appeal.

In *Mustang*, unlike the present case, the appellant was not seeking to use its appeal of the compliance order as a vehicle for appealing the subsequent civil penalty assessments, as AMROX is attempting to do here. The appellant was not attempting to appeal the penalty assessments at all. Rather, it was the Department that sought to prevent the appellant from appealing the order by its failure to appeal the subsequent assessments. That is an entirely

different scenario than the facts of the present case.

Finally, AMROX asserts that allowing it to appeal the May 2004 order but not the subsequent civil penalty assessments could cause an unfair and unjust result. It argues that it could be required to pay penalties for violations for which it may be found not liable. We need not address this argument since we have already determined that its appeal of the May 2004 order is moot.

Conclusion

In conclusion, we find that AMROX's failure to appeal the August 2004 assessment and its failure to prepay or post an appeal bond for the September and October 2004 assessments and or make a timely claim of inability to prepay the penalties results in a waiver of its right to challenge the penalty assessments. We, therefore, enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

AMERICAN IRON OXIDE COMPANY	:	
	:	
v.	:	**EHB Docket No. 2004-219-R**
	:	**(Consolidated with 2004-119-R**
	:	**and 2004-249-R)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 12th day of September 2005, the appeals consolidated at EHB Docket No. 2004-219-R are **dismissed.**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

EHB Docket No. 2004-219-R

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATE: September 12, 2005

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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SECRETARY TO THE BOARD

REV. DR. W. BRAXTON COOLEY, SR., CHARLES CHIVIS, DIANE WHITE, WENDI J. TAYLOR, EVELYN WARFIELD, & FRANK DIVONZO	:	
v.	:	**EHB Docket No. 2003-246-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION & THE HARRISBURG AUTHORITY, Permittee	:	**Issued: September 15, 2005**

OPINION AND ORDER GRANTING JOINT MOTION FOR SUMMARY JUDGMENT OF THE PERMITTEE AND THE DEPARTMENT AND DENYING APPELLANTS' DISPOSITIVE MOTION TO RESCIND PLAN APPROVAL

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Department's and the Permittee's Joint Motion for Summary Judgment is granted and this appeal is dismissed as moot. Appellants filed this appeal challenging the Department's issuance of Air Pollution Control Act Plan Approval No. 22-05007A on September 10, 2003. Shortly after this appeal was filed, the Permittee submitted an application to modify the plan approval, which the Department treated as an application for a new plan approval. When the second plan approval subsequently was issued it superseded the first plan approval which is the subject of this appeal. Appellants did not file an appeal challenging the issuance of the second plan approval. Appellants' appeal of the first plan approval does not cover the second plan approval. In order to have challenged the second plan approval, Appellants needed to have filed

an appeal from the issuance of the second plan approval. They did not do so and we cannot grant meaningful or effective relief to Appellants with regard to the extant plan approval by issuing a ruling on the now defunct first plan approval.

I. Factual and Procedural Background

The Parties and Facility

Currently before the Board are the parties' cross motions for summary judgment. This appeal was filed by six individuals (Appellants) who reside in general proximity to the Harrisburg Materials, Energy, Recycling and Resource Facility (HMERRF or Facility), a waste-to-energy facility located in Harrisburg and owned by the Harrisburg Authority (Authority or Permittee).[1] The Facility is located at 1670 South 19th Street, Harrisburg, Pennsylvania and is part of the Authority's integrated waste management system, which includes the HMERRF, a transfer station and a landfill. Joint List of Stipulated Facts (Stipulated Facts) B.8.[2] The Department of Environmental Protection (Department or DEP) is the state administrative agency with responsibilities that include, *inter alia*, the permitting of solid waste disposal facilities, including landfills, transfer stations and resource recovery facilities, in the Commonwealth. Stipulated Facts B.7.

The HMERRF was built by the City of Harrisburg and commenced operation in 1972. Affidavit of Thomas J. Mealy, Executive Director of The Harrisburg Authority (Mealy Affidavit) ¶ 4. The City sold the HMERRF and an adjacent landfill to the Authority in

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[1] The Authority is a municipal authority created pursuant to the Municipalities Authorities Act, 53 Pa.C.S. §§ 5601-5623.

[2] On May 13, 2005 counsel for Appellants filed the parties' Joint List of Stipulated Facts. The document contains two headings: "I. List of Stipulated Facts Based on Appellants' Proposals" followed by 41 facts numbered, but not numbered consecutively; and B. List Proposed By Pennsylvania Department of Environmental Protection Agency and the Harrisburg Authority" followed by 64 facts, also numbered, but not consecutively. We will cite to the stipulated facts using the heading designation and number given the fact by the parties in the filing despite the unusual heading and numbering nomenclature in the document.

December 1993, Stipulated Facts ¶ 6, but remained the operator of the Facility pursuant to an agreement with the Authority. *Id.* ¶ 7.[3]

In August 1998, the operating permit for the HMERRF was modified to allow the HMERRF to be retrofitted to comply with the Clean Air Act regulations for municipal waste combustors or, after December 19, 2000, to be operated as "de-rated units." Stipulated Facts B.24. In January 2001 the Authority and the Department and the United States Environmental Protection Agency (EPA) entered into consent decrees pursuant to which the Authority operated the HMERRF as a de-rated facility until June 18, 2003 and agreed to cease operation of the HMERRF on June 18, 2003 and not to re-open the HMERRF until it had retrofitted and substantially upgraded the HMERRF to comply with the new Clean Air Act regulations. Stipulated Facts B.26. Operation of the HMERRF ceased on June 18, 2003. Mealy Affidavit ¶ 8.

First Plan Approval Process

On May 17, 2002, the Authority filed a plan approval application for the retrofit and substantial upgrade of the HMERRF (First Plan Approval Application). Stipulated Facts I.5, B.59. On June 6, 2002, the Department published notice in the *Pennsylvania Bulletin* that the First Plan Approval Application had been received and notified the Authority that the application was determined to be administratively complete. Stipulated Facts B.60. Following discussions between EPA and the Department, it was determined that the federal regulations on New Source Performance Standards for Large Municipal Waste Combustors applied to review of the First Plan Approval Application. Mealy Affidavit ¶ 29. Pursuant to the federal regulations, 40 C.F.R.

[3] The Harrisburg City Council approved a guaranty of the financing to retrofit the Facility by a 6-1 vote by the 7 members of the City Council, all of whom are African-American. Stipulated Facts. B.54.

§ 60.51b, the Authority prepared a Materials Separation Plan (MSP) and a Siting Analysis.[4] The Authority submitted the preliminary draft MSP for public comment and held a public hearing on the draft MSP. Mealy Affidavit ¶ 30. Following the pubic hearing, the Authority published responses to the comments received and a final draft MSP and noticed and conducted a public hearing on the final draft MSP. Mealy Affidavit ¶ 31.

DEP also provided public notice of the First Plan Approval Application and conducted public hearings. Plain language notices of a public hearing regarding the First Plan Approval Application to be held on June 10, 2003 were published in the *Harrisburg Patriot News* on May 22, 2003 and June 3, 2003. Stipulated Facts B.74. Several of the Appellants attended and spoke at the June 10, 2003 public hearing. Stipulated Facts B.66. On June 14, 2003, four days after the public hearing on the First Plan Approval Application, DEP published notice in the *Pennsylvania Bulletin* of its Proposed Determination to Issue Plan Approval (First Proposed Determination). Stipulated Facts B.67. On July 9, 2003 the Department held a public hearing regarding the First Proposed Determination and several of the Appellants attended and spoke at that public hearing. Stipulated Facts B.68. Comments regarding the First Proposed Determination were accepted until July 19, 2003, Stipulated Facts B.69, and a comment response document was issued by the Department in September 2003 responding to the comments received at the July 9, 2003 public hearing and to comments which had been received in writing thereafter. *Id.* B.70.

On September 10, 2003, DEP issued an Air Pollution Control Act Plan Approval designated Plan Approval No. 22-05007A (First Plan Approval) to the Authority covering the Facility, Stipulated Facts I.10, B.76, B.78, and published notice of issuance of the First Plan

[4] An MSP is a "plan that identifies both a goal and an approach to separate certain components of municipal solid waste for a given service area in order to make the separated materials available for recycling." 40 C.F.R. § 60.51b. A siting analysis is "an analysis of the impact of the affected facility on ambient air quality, visibility, soils, and vegetation." *Id.* § 60.57b(b)(1).

Approval in the *Pennsylvania Bulletin* on September 27, 2003. *Id.* B.78. The First Plan Approval authorized construction of two municipal waste combustion units each with a capacity of 400 tons of waste per day, for a total design capacity of 800 tons of waste per day. Stipulated Facts I.10, B.77.

At the time of issuing the First Plan Approval, DEP was aware that the $PM_{2.5}$ 3-year ambient annual average concentration in Dauphin County exceeded 15.0 $\mu g/m^3$. Stipulated Facts I.11. Operation of the municipal waste incinerators covered by the First Plan Approval would emit $PM_{2.5}$ particulate matter and $PM_{2.5}$ precursors into the environment. *Id.* I.15. The First Plan Approval did not include any specification or conditions related to $PM_{2.5}$, Stipulated Facts I.12, and did not include any limitation on emission of $PM_{2.5}$. *Id.* I.19. The First Plan Approval did not condition operation of the incinerator on prior acquisition of $PM_{2.5}$ emission offsets. *Id.* I.18.

On October 10, 2003 Appellants filed a *pro se* appeal challenging the issuance of the First Plan Approval. Stipulated Facts I.20, B.84.[5] The Notice of Appeal (NOA) specified two grounds for appeal as follows:

> (1) The Department issued the permit without making any investigation regarding possible violations of the Civil Rights Act of 1964, Title VI, Section 601, 42 U.S.C. § 2000d as it is required to do. The Department is the recipient of federal financial resources from the [EPA] which requires the Department to prevent racial discrimination.
>
> (2) In granting the permit, the Department failed to give any consideration to the emission of $PM_{2.5}$ and the amount of $PM_{2.5}$ in the ambient air.

Notice of Appeal ¶ 3; Stipulated Facts I.20.

[5] From October 2003 until April 2004 the appeal lay dormant while Appellants attempted to secure *pro bono* representation. On December 9, 2003, the Board entered an order extending fact discovery to March 19, 2004 and expert discovery until April 16, 2004. None of the parties undertook discovery during either the original or the extended discovery period. On April 5, 2004, counsel entered an appearance on behalf of Appellants.

Second Plan Approval Process

On October 27, 2003, the Authority filed what it characterized as an application for a modification of the First Plan Approval. The application requested that the Department approve installation of three 266 ton per day units instead of the two 400 ton per day units previously approved. Stipulation of Facts I.22, B.86. The Department, however, treated the submission as an application for a new plan approval, not as an application for an amendment or modification of the First Plan Approval. Affidavit of Leif Ericson, Air Quality Program, Southcentral Region of DEP (Ericson Affidavit) ¶ 21; Mealy Affidavit ¶ 52. The Department immediately notified the Authority that the application would be treated as an application for a new plan approval and would require that the Authority conduct new meetings and hearing, prepare a revised siting analysis and comply with other requirements applicable to new plan approval applications. Mealy Affidavit ¶ 52. The Authority objected to the Department's treatment of this application as one for a new plan approval, but it complied with DEP's decision, including paying the application fee for a new plan approval application. Mealy Affidavit ¶ 53.

Because the application was considered one for a new plan approval, the Department required that the Authority provide a new and updated air modeling analysis for purpose of considering the application. Ericson Affidavit ¶ 24. Likewise, the Department required the Authority to prepare a new, updated siting analysis. Ericson Affidavit ¶ 23. Accordingly, in November 2003, the Authority published a "Revised Siting Analysis," submitted it for public comment and noticed a public hearing regarding the document for January 5, 2004. Stipulated Facts B.99. On December 3, 2003, the Department's Environmental Advocate held a public meeting on the Authority's Second Plan Approval Application during which members of the public attended and commented on the application. Stipulated Facts B.100. On December 6,

2003, the Department published notice in the *Pennsylvania Bulletin* regarding its intent to approve the application. Stipulated Facts B.101. The Department and its Environmental Advocate noticed and held a public hearing on January 13, 2004 regarding the Department's proposed approval of the application. Stipulated Facts I.30, B.102. Two of the Appellants submitted written comments regarding the application. Stipulated Facts B.102.

On February 5, 2004, DEP approved the application by issuing Air Pollution Control Act Plan Approval No. 22-05007B (Second Plan Approval) to the Authority covering the Facility, Stipulated Facts I.34, B.105, and published notice of issuance of the Second Plan Approval in the *Pennsylvania Bulletin* on February 21, 2004. *Id.* B.108. The Second Plan Approval authorized the construction of 3 266 ton per day combustion units rather than the 2 400 ton per day units. Stipulated Facts I.30, B.105. Appellants filed no appeal from the Second Plan Approval Application.

During its consideration of the application which resulted in issuance of the Second Plan Approval Application, DEP was aware of the appeal filed by Appellants challenging the First Plan Approval. Stipulated Facts. I.23, I.32. Before issuing the Second Plan Approval DEP personnel from the Central Office and the Southcentral Office discussed the $PM_{2.5}$ issue, Stipulated Facts I. 25, but the Central Office personnel did not require the inclusion of a specific $PM_{2.5}$ limitation in the Second Plan Approval. *Id.* I.26. At the time of issuing the Second Plan Approval DEP was aware that the average annual ambient $PM_{2.5}$ for Dauphin County exceeded 15,0 $\mu g/m^3$. Stipulated Facts I.33. The Second Plan Approval did not include any specification or conditions related to $PM_{2.5}$ nor any limitation on emission of $PM_{2.5}$ from the Facility. Stipulated Facts I.35, I.36. DEP conditioned both the First Plan Approval and the Second Plan Approval on Pennsylvania's "Best Available Technology" Standard as well as the EPA New

Source Performance Standard established in 40 C.F.R. Part 60, Subpart Eb. Stipulated Facts B.119. EPA's New Source Performance Standards do not include a numeric standard for $PM_{2.5}$. Stipulated Facts B.140. Under the Clean Air Act, the Department has until April 5, 2008 to develop a statewide implementation plan that contains both a plan, emission inventory and regulations to deal with $PM_{2.5}$. Stipulated Facts B.187.

Counsel for the Authority provided notice of the issuance of the Second Plan Approval directly to Appellants, Stipulated Facts B.106, and he even went so far as to recommend that, in order to sustain their appeal of the First Plan Approval, Appellants would have to appeal the Second Plan Approval. *Id.* B.107. As noted, Appellants did not file an appeal challenging the Department's issuance of the Second Plan Approval. Appellants' Memorandum in Support of its Dispositive Motion to Rescind Plan Approval No. 22-05007B at 2.

The Department and the Authority have filed a Joint Motion for Summary Judgment with supporting exhibits and affidavits (Appellees' Motion), a joint memorandum supporting their motion, a joint brief opposing Appellants' Motion and a joint surreply brief. Appellants have filed what they labeled a Dispositive Motion to Rescind Plan Approval No. 22-05007B with exhibits (Appellant's Motion), a memorandum supporting their motion, a memorandum opposing Appellees' Motion with exhibits and a reply to the joint reply brief filed by Appellees.

Appellees' Motion raises six bases for their request that the Board dismiss this appeal:

A. Appellants have failed to develop facts on the record to support either of the two claims raised in the NOA;

B. This Board lacks jurisdiction to hear either of Appellants' claims because they are based on federal statutes that provide for exclusive federal jurisdiction or if jurisdiction exists, this Board should decline to exercise jurisdiction because the claims are based on federal statutes;

C. The Appellants have no evidence to establish a federal civil rights claim under § 601 of Title VI of the Civil Rights Act of 1964 because there is no proof of intentional discrimination by the Department;

D. Appellants cannot establish their $PM_{2.5}$ claim as a matter of law because DEP had no ability or authority to impose a $PM_{2.5}$ limitation or criteria in the First Plan Approval or the Second Plan Approval since the EPA has not developed regulations for the criteria pollutant of $PM_{2.5}$;

E. The appeal as it applies to the First Plan Approval should be dismissed as moot because the Second Plan Approval superseded the First Plan Approval and, thus, there is no meaningful relief which the Board can grant; and

F. The Second Plan Approval was not appealed, thus is insulated from any attack by the doctrine of administrative finality.

Appellees had raised many of these same challenges to the viability of the Appellants' appeal in a Joint Motion to Dismiss, which we denied on July 16, 2004. *Cooley v. DEP*, 2004 EHB 554 (Motion to Dismiss Opinion). In that Motion, Appellees urged dismissal on the basis of: (1) mootness/administrative finality; (2) lack of standing of Appellants; (3) inability of Appellants to show intentional discrimination; and (4) lack of a legal requirement to include in the permit a condition specifically limiting emission of $PM_{2.5}$. We found that all four of these challenges required the development of a factual record and we denied the Motion. The parties have conducted discovery and Appellees seek a ruling on the issues it raises in its Motion for Summary Judgment based upon the more developed factual record that now exists.

Appellants not only oppose dismissal of the appeal as requested in the Appellees' Motion, Appellants through their Motion, seek an order rescinding the Second Plan Approval based on the alleged failure of the Department to conduct an investigation of the civil rights impact of the Second Plan Approval and the failure of the Department to include a $PM_{2.5}$ emission limitation or other condition in the Second Plan Approval despite knowing the location of the Facility was in a nonattainment area and the Facility would emit $PM_{2.5}$.

This Opinion and Order resolves both pending motions.

II. Standard of Review

Motions for summary judgment before the Board must conform to and are governed by Pennsylvania Rules of Civil Procedure 1035.1-1035.5. 25 Pa. Code § 1021.94. Under the Pennsylvania Rules of Civil Procedure, we may grant summary judgment if the record, which consists of the pleadings, depositions, answers to interrogatories, admissions, affidavits and signed expert reports, Pa.R.C.P. 1035.1, shows "there is no genuine issue of any material fact as to a necessary element of the cause of action or defense[.]" Pa.R.C.P. 1035.2. Also, when evaluating a motion for summary judgment, the Board views the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Holbert v. DEP*, 2000 EHB 796, 808.

III. Discussion

The last two issues raised by Appellees, mootness and administrative finality, are actually threshold issues because they deal with whether the appeal is viable *ad initio*. When we examined these questions at the Motion to Dismiss stage before discovery and with no factual record we found that we could not conclusively resolve the question of the relationship, if any, between the First Plan Approval and the Second Plan Approval. *Cooley v. DEP, 2004 EHB 554,* 564-66. As we noted in our Motion to Dismiss Opinion:

> There does not seem to be much dispute as to the facts about the history and circumstances of the issuance of the [First] Plan Approval and then the application for and issuance of the [Second] Plan Approval. The significant question is the legal interpretation to be accorded those events with respect to the relationship, if any, between the [First] Plan Approval and the [Second] Plan Approval.

Id. at 559.[6] Thus, we declined to dismiss Appellants' appeal on either or both of these grounds at that early stage in the proceedings, concluding "[t]he bottom line is that we cannot conclude now that the issuance of the Second Plan Approval automatically cuts off Appellants' appeal by operation of the mootness doctrine and administrative finality." *Id.* at 562.

We now have a factual record that addresses the relationship between the First Plan Approval and the Second Plan Approval and we can and do conclude that the appeal of the First Plan Approval has been rendered moot by the issuance of the superseding Second Plan Approval. The appeal of the First Plan Approval cannot act as an appeal of the Second Plan Approval. "This Board repeatedly has stated that where an event occurs during the pendency of an appeal before the Board which deprived it of the ability to provide effective relief, the matter becomes moot." *Valley Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 1160, 1163 (appeal of original NPDES permit dismissed as moot because amended NPDES permit was issued that superseded the specific condition in the original NPDES challenged in the appeal).

While the Authority submitted what it would have liked to have been an application for a modification of the First Plan Approval, the Department, from the start, treated the application as one for a new plan approval, not as an amendment or modification of the First Plan Approval. Ericson Affidavit ¶ 21; Mealy Affidavit ¶ 52. This treatment by the Department comported with its statement in the cover letter transmitting the First Plan Approval, that "[t]he approval is specific to the combustion units and ancillary equipment in the Harrisburg Authority's application. Any change in the number of units would require a new application from the

[6] In their memorandum opposing Appellees' Motion, Appellants urge us to disregard facts offered by Appellees to which the Appellants have not stipulated. We need not do so. "A grant of summary judgment by the EHB is proper where the pleadings, depositions, answers to interrogatories and admissions on file, together with 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." *Global Eco-Logical Serv., Inc. v. DEP*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001). The record at this stage is stipulated to in large part, the parties having submitted a comprehensive Joint List of Stipulated Facts. Otherwise, there are no factual disputes as to points on which we base our rulings today. In other words, to use summary judgment parlance, there are no genuine issues of material fact.

[A]uthority and a new authorization from the Department." Appellees' Motion, Exhibit L; Ericson Affidavit ¶ 22; Appellants' Motion, Exhibit 1. The Authority was not happy with the Department's treating its submission as an application for a new plan approval, but, as just noted, it knew from the start and well in advance of its second application that any request like the one contained in that application would require "a new authorization" and would not involve an amendment or modification of the First Plan Approval.

The Authority complied with DEP's treatment of its second application as being one for a new plan approval, not an amendment or modification of the existing plan approval and the Authority acted in accordance with that reality. It even observed the minor detail of paying the application fee for a new permit. Mealy Affidavit ¶ 53. More substantively, the Authority submitted copious new technical information and data to support the Department's new consideration of the new plan approval application. The Authority prepared a new Revised Siting Analysis and made it available for public review and comment; and noticing a public hearing on the Revised Siting Analysis. Stipulated Facts B.99. Moreover, the Department also required a new and updated air modeling analysis for purposes of reviewing the Second Plan Approval Application. Ericson Affidavit ¶ 24. The Department noticed and conducted a public meeting on the application for a new plan approval. Stipulated Facts B.100. Members of the public attended the public meeting and provided comments on the application. *Id.* After publishing notice of its intent to approve the application for new plan approval in the *Pennsylvania Bulletin*, the Department noticed and held a public hearing on the proposed approval of the application. Stipulated Facts I.30, B.101, B.102. Indeed, two of the Appellants submitted written comments. *Id.* B.101, B.102. Further, the Department's Central and Southcentral Offices discussed $PM_{2.5}$ issues in connection with the application but the

Southcentral Office decided not to include a specific $PM_{2.5}$ limitation in the Second Plan Approval Application. Stipulated Facts I.25-I.27.

Given this record, the Second Plan Approval cannot be viewed as a continuation, amendment or modification of the First Plan Approval. The decision to issue the Second Plan Approval was a separate, different permitting decision based upon different technical input. Upon the issuance of the Second Plan Approval, the First Plan Approval ceased to exist or have any legal effect on the activities occurring at the Facility.[7] In light of these facts and our long standing precedent on the issue, Appellants' appeal of the First Plan Approval is moot. We cannot grant meaningful or effective relief to the Appellants by issuing a ruling on the now defunct First Plan Approval. As we noted in *Stewart & Conti Dev. Co. v. DEP*:

> The question originally presented in this appeal was whether the Department erred by disapproving a version of the Township's plan that no longer exists. There is nothing that we can do with respect to that earlier version that would have any effect on the later version of the plan. It is not possible to use the earlier, now defunct version of the plan as a vehicle for reviewing the new plan. Even if we concluded that the Department committed egregious errors in approving the obsolete plan, it would not matter. Such a ruling would have no effect on the new plan.

2004 EHB 18, 19-20. *See e.g. Valley Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 1160; *Commonwealth Envtl. Sys., L.P. v. DEP*, 1996 EHB 340.

[7] In the Motion to Dismiss Opinion we noted that the First Plan Approval is Plan Approval No. 22-05007A and the New Plan Approval is Plan Approval No. 22-05007B and questioned the meaning of the same number with only a different letter designation. The record before us indicates that the first Air Quality Plan Approval given to the facility in 1972 was designated as No. 22-05007. The Number "05007" is a site designation relating to this particular site. Davis Deposition Tr. at 62. The "A" and "B" designations are simply clerical suffixes added in series to permitting decisions regarding this site. *Id.* When DEP issued the First Plan Approval in September, 2003 it added the letter "A" to the end of the number. Then when DEP issued the Second Plan Approval the suffix designation went from "A" to "B". Stipulated Facts B.117. Accordingly, the designations "A" and "B" are demonstrably purely clerical and such designations do not either create or evidence any legal relationship between the First Plan Approval and the Second Plan Approval which would dictate a different result than we have reached here today. Indeed, it would seem that, if anything, the change of suffix from "A" to "B" would be confirmatory that the Second Plan Approval is a different and distinct one from the First Plan Approval.

Nor can this appeal of the First Plan Approval be considered as somehow "covering" the Second Plan Approval. We rejected that argument in the Motion to Dismiss Opinion, 2004 EHB at 560 ("we ... reject the notion that an appeal of an original permit automatically 'covers' any subsequent amendment or new permit covering the same subject matter."). The subject matter of Appellants' appeal is the First Plan Approval. That action is gone and is no longer here for Appellants to appeal or for the Board to issue any relief with respect thereto. Our decision in *Kilmer v. DEP*, 1999 EHB 846, is directly on point. *Kilmer* dealt with an appeal of a compliance order. The first compliance order was vacated and a second compliance order was issued. *Id.* at 846. Appellant had appealed the first compliance order, but failed to file an appeal of the second compliance order. *Id.* at 846-47. The Department filed a motion to dismiss the appeal as moot and Appellant argued, as do the Appellants in this action, that the first appeal covered the second compliance order because the second order was a continuation of the first order. *Id.* at 849. What we said in *Kilmer* is clear and applies to this appeal as well:

> There is no question that the second order was an appealable action in its own right. Kilmer could have and should have appealed the second order. Doing so would have required very little effort. Furthermore, had he done so, he would have had no incentive to contest the motion to dismiss that is now before us. All of his arguments would have been preserved. There would be no question of the Board's ability to grant effective relief. Kilmer's opposition to the Department's motion, then, is really a request that he be excused from the second effort. Unfortunately for Kilmer, we see no good reason to excuse his failure to file a second appeal, and several good reasons not to.
>
> Aside from the Board precedent that is squarely against Kilmer's position, were we to adopt Kilmer's argument, we would in effect be holding that this Board has jurisdiction to review a DEP action (the second order) even though it was not itself appealed. Requiring parties to file appeals from challenged actions goes to the heart of this Board's authority. We are neither a court of equity nor a court of general jurisdiction. We are an administrative agency with limited, defined jurisdiction charged with reviewing appeals that are brought before us. We do not have the authority to substitute our initiative for that of aggrieved parties.

Although we are not prone to elevate form over substance, Kilmer would have us ignore form altogether, which we are not willing to do, particularly given the fact that we are dealing with the Board's subject matter jurisdiction. We are not willing to write legal fiction. The Department did not take one action here, it took three: it issued an order, vacated that order, and issued a new order. It did not "amend' the first order. It was very clear in what it was doing.[8]

Deciding when two Departmental actions should be treated as one puts us on a slippery slope. We think it would establish a dangerous precedent to hold that a party's appeal of one DEP action can, in effect, sometimes cover subsequent, similar acts of the Department. ...

It is not difficult to postulate other troublesome examples. Suppose the Department finds certain violations, issues an order to remediate, decides that no remediation is necessary, withdraws the order, but issues a civil penalty assessment for the past violations. Should an appeal from the superseded order be deemed to cover the follow-up civil penalty? We simply do not want to get in the business of making these types of determinations, particularly when it is such a simple matter to file a second appeal.

We are not imposing a particularly burdensome requirement when we hold that each Departmental action must be appealed separately. Filing a notice of appeal is a relatively straightforward procedure. If the two Departmental actions are very similar, the two notices of appeal will doubtless be very similar, and the second notice should require very little incremental effort. Similar appeals can readily be consolidated.

There is a great deal of value in maintaining certainty and clarity when it comes to defining this Board's authority. Holding that parties need only sometimes appeal from serial Departmental actions would mean that neither the Department nor the public can predict whether this Board will hold that subsequent DEP actions are really just resurrected versions of prior actions. It is much easier, clearer, and not the least bit burdensome to hold that each DEP action--even if it is similar to, repetitive of, or overlaps a prior DEP action - must be separately appealed.

...

Kilmer suggests that his failure to appeal the second order should be excused because he was acting without counsel at the time. Kilmer is now represented by able counsel, and Kilmer offers no explanation for his ill-considered decision to represent himself. Even if he did, absent a showing of bad faith or estoppel, which has not been attempted to be made here, or justification for allowance of an appeal *nunc pro tunc*, which also does not exist here, a party's

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[8] The current case differs from *Kilmer* only in that in *Kilmer* it was clear at the motion to dismiss stage that the Department had taken separate actions, three in the *Kilmer* case. Here, as we have discussed, it was not clear at the motion to dismiss stage but it is clear now that issuance of the First Plan Approval and issuance of the Second Plan Approval were separate Departmental actions.

> motive for failing to file an appeal is irrelevant. The scope of our jurisdiction cannot turn on whether a party seeks the advice of counsel. We have repeatedly held that appellants opting to appear before this Board *pro se* assume the risk that their lack of legal expertise may be their undoing.[9]
>
> Kilmer seems to suggest that we can review the Department's findings in the first order (e.g that Kilmer is an operator) because those findings were repeated in subsequent Department actions and may have an impact on future Department actions. The argument has no merit. We cannot review Department findings independent of a Department action. If the findings are repeated in another action we can review them then, but we cannot deal with findings that are disembodied from an appealable action. Our statutory duty is to review actions, not findings. We have held in the past that the existence of a simmering controversy because of an ongoing disagreement regarding a finding does not prevent a case from becoming moot when there is no appealable action pending.

1999 EHB at 849-53 (citations omitted, footnote added).

Since we are unable to grant any effective relief regarding the First Plan Approval and no appeal of the Second Plan Approval is before us, we dismiss the appeal. It is, thus, not necessary for us to address the Appellees' remaining arguments for dismissal. Obviously also, the Appellants' Dispositive Motion to Rescind the Second Plan Approval must be denied.

IV. Conclusion

Based on the foregoing analysis, we grant the Appellees' Joint Motion for Summary Judgment and deny the Appellants' Dispositive Motion to Rescind Plan Approval No. 22-05007B. An appropriate Order consistent with this Opinion follows.

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[9] The point we made in *Kilmer* about the *pro se* Appellant is equally applicable here. The appeal of the First Plan Approval was filed *pro se*. Although Appellants are now represented by counsel, they were not when the Department issued the Second Plan Approval. As in *Kilmer*, this fact, of course, does not permit the appeal of the First Plan Approval to proceed as if Appellants had appealed the Second Plan Approval. Also, we note that in this case we have counsel for the Authority, in a remarkable gesture of good sportsmanship and civility, having advised Appellants to appeal the Second Plan Approval.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

REV. DR. W. BRAXTON COOLEY, SR., CHARLES CHIVIS, DIANE WHITE, WENDI J. TAYLOR, EVELYN WARFIELD, & FRANK DIVONZO	:	
v.	:	**EHB Docket No. 2003-246-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION & THE HARRISBURG AUTHORITY, Permittee	:	

ORDER

AND NOW this 15th day of September 2005, upon consideration of Appellees' Joint Motion for Summary Judgment, Appellants' Dispositive Motion to Rescind Plan Approval No. 22-05007B and the parties' supportive and opposing materials, it is HEREBY ORDERED that Appellees' Joint Motion for Summary Judgment is **GRANTED** and this appeal is dismissed as moot. Appellants' Dispositive Motion to Rescind Plan Approval No. 22-05007B is **DENIED**.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **September 15, 2005**

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

AMERICAN IRON OXIDE COMPANY	:	
	:	
v.	:	**EHB Docket No. 2005-094-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 19, 2005**

OPINION AND ORDER ON MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board grants the Department's Motion to Compel Responses to Interrogatories and Request for Production of Documents. Parties are under a duty to provide full and complete answers to interrogatories setting forth all properly requested discoverable information.

Background:

Presently before the Pennsylvania Environmental Hearing Board (Board) is the Pennsylvania Department of Environmental Protection's (Department) Motion to Compel Responses to Interrogatories and Request for Production of Documents (Motion). The Motion was filed on August 22, 2005. The Appellant, American Iron Oxide Company (American Iron Oxide Company), filed its Response in Opposition to the Department's Motion to Compel (Response) on September 7, 2005. On September 12, 2005 the Department filed a Motion for Leave to File A Reply to the

Response. On September 14, 2005 the Board granted the Department's Motion for Leave to File A Reply and ordered that the Department file its Reply on or before September 23, 2005.[1]

This appeal stems from a variance form Waste Classification for spent pickle liquor, also referred to as ferrous chloride solution. Pickle liquor is used as feedstock for the production of iron oxide and hydrochloric acid at the American Iron Oxide Company's Allenport, Pennsylvania facility. The Department served interrogatories and requests for production on or about May 27, 2005. Counsel for the Department granted two requests for extensions for American Iron Oxide Company to respond to the discovery requests.

The Department contends that "after [taking] ten weeks to ... respond to this discovery, [American Iron Oxide Company] has provided responses filled with generalized objections, and virtually no additional information beyond the vague statements in its Notice of Appeal." Department's Motion to Compel, page 2. American Iron Oxide Company, meanwhile contends, that "the Department's Motion [to Compel] is inappropriate, unfounded, and should be denied." American Iron Oxide Company's Response, page 2. Furthermore, American Iron Oxide Company wrote to the Department expressing its willingness "to cooperate with the Department to provide additional information in the most effective manner to attempt to address the Department's concerns." According to American Iron Oxide Company, despite "its clear intention to cooperate and provide responsive information to the Department, the Department nevertheless chose to engage the Board with its Motion. As an initial matter, the Motion [to Compel] should be denied on the sole basis that the parties should, and still can, attempt to resolve any discovery disputes before engaging the Board in the process."

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1 We are issuing this opinion prior to receiving the Department's Reply following our review of the Motion to

American Iron Oxide Company argues that its answers in referring to its Notice of Appeal adequately address the interrogatories. In addition, American Iron Oxide Company contends that it does not yet know some of the answers, such as any witnesses it will call to present its case, and that it will file this information as it becomes available.

Discussion

We have thoroughly reviewed the Department's Motion to Compel and American Iron Oxide Company's Response together with the attached exhibits including American Iron Oxide Company's Objections and Response to the Department's First Set of Interrogatories and Document Requests.[2] Discovery before the Environmental Hearing Board is governed by both our Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure. It is important to remember that the purpose of discovery is so both sides can gather information and evidence, plan trial strategy, better explore settlement opportunities, and discover the strengths and weaknesses of their respective positions. *George v. Schirra*, 814 A.2d 202 (Pa. Super. 2002). The Board is charged with overseeing ongoing discovery between the parties and has wide discretion to determine appropriate measures necessary to assure adequate discovery where required. *DEP v. Neville Chemical Company*, EHB Docket No. 2003-297-CP-R (Opinion issued January 3, 2005, page 3). In discharging this responsibility, the Board sets discovery deadlines almost immediately after an Appeal is filed by its issuance of Pre-Hearing Order No. 1. Frequently, and in the vast majority of cases, the Board will extend these discovery deadlines.

Compel and Response.

2 Before turning to the merits of the respective positions we note that neither party filed a memorandum of law. Although our Rules of Practice and Procedure permit but do not require the parties to support their positions with legal memoranda it is always helpful when these disputes arise for the Board to have the benefit of briefs setting forth the parties' legal positions. It is especially true here when broad issues of attorney-client privilege, attorney

While both our Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure are written so that counsel can seamlessly draft and respond to discovery, both sets of Rules acknowledge the tribunal's responsibility in this area. We certainly agree, as a general proposition, with American Iron Oxide Company's position that parties should first try to work out any discovery disputes without turning to the Board.[3] However, after reviewing American Iron Oxide Company's Responses and Objections, we doubt very much whether counsel would have been able to resolve these discovery disputes. American Iron Oxide Company has filed extensive objections to each of the fifty-five interrogatories and the two requests for production.

American Iron Oxide Company's discovery responses do not seem to include any information not set forth in the Notice of Appeal. Although the Notice of Appeal is detailed the Department's Interrogatories seek further information. This is exactly what the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure allow. American Iron Oxide Company's objections also do not set forth in any way why they are applicable. A party can not simply allege attorney-client privilege, for instance, without any attempt to show why this privilege would protect otherwise discoverable information from being discovered. American Iron Oxide Company failed to provide a privilege log. *See Pennsylvania Trout v. DEP*, 2003 EHB 199, 205. Its Response also does not explain to the Board why its objections should apply to bar the discovery requested.

As we have stated numerous times– the discovery process is not a game. Parties and counsel are obligated by the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure to provide all discoverable information within thirty days. If their answers are not

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work product, and a host of other objections are raised in the Responses and Objections to the discovery requests.
3 Many jurisdictions, but not Pennsylvania, require counsel to certify that they have tried to resolve discovery disputes before seeking court intervention. *See* W.D.P.A.L.R. 37.1.

complete a party is required to set forth information then available to it. Discovery before this Board is not a process where discoverable information is released in dribs and drabs, following heavy negotiations between attorneys.

We find it unnecessary in this opinion to review each interrogatory answer, as most of the responses are similar. The Department has asked very specific contention interrogatories which have been answered, in most cases, with generalized objections without any or little supporting information. For example, American Iron Oxide Company's answer to interrogatory number 29, which is illustrative of most of its answers, is as follows:

> 29. State the FACTUAL BASIS for YOUR contention in Paragraph III.B.9 of YOUR Notice of Appeal that the VARIANCE "will continue to create severe adverse economic impact for American Iron Oxide Company..."
>
> **ANSWER:**
>
> In addition to the specific Objections of General Applicability, which are expressly incorporated herein, American Iron Oxide objects to this Interrogatory on the grounds that it seeks information protected by the work product doctrine. American Iron Oxide further objects to this Interrogatory to the extent it seeks legal conclusions. Finally, American Iron Oxide objects to this Interrogatory to the extent it calls for facts, opinions or analyses which have not been fully investigated or developed at the present time.
>
> Subject to and without waiving these objections, see Notice of Appeal ¶¶ III.B.5-10. By way of further response, to the extent American Iron Oxide becomes aware of additional responsive information or documents, it will provide such as required by the Board's Rules of Practice and Procedure. Moreover, American Iron Oxide's investigation is continuing and it reserves the right to supplement its response by way of written discovery, deposition, or otherwise, as the litigation progresses.

The "Specific Objections of General Applicability" consist of 12 very broad objections

including attorney-client privilege and attorney work product. American Iron Oxide Company raises these objections and others without explaining why they apply. Moreover, it provides no authority for its objection that "to the extent it calls for facts, opinions or analyses which have not been fully investigated or developed at the present time" that it is excused from providing the Department with ***any*** factual information supporting its contention that the variance "will continue to create severe adverse economic impact for American Iron Oxide Company."

Even in response to the Department's request to identify each non-expert witness American Iron Oxide Company intends to call at the hearing, American Iron Oxide incorporates all of its Specific Objections of General Applicability and further objects to the interrogatory as being premature. One of the purposes of discovery is so that witnesses can be identified. The other party can then decide whether it wishes to depose that witness. If the Department is not provided with the names of American Iron Oxide Company's nonexpert witnesses until American Iron Oxide files its pre-hearing memorandum, then it will not be able to depose any of these witnesses. Although American Iron Oxide Company may not know every witness it intends to call at the hearing in this case it certainly should have an idea at this point in the process as to *some* of the witnesses it will call.

Where legitimate objections are raised, for example, the attorney-client privilege, counsel are mandated to set forth specific information as to why this privilege applies. Our Rules and the Pennsylvania Rules of Civil Procedure envision broad discovery. The Rules also envision that the information will be provided quickly. The Board's Rules do not allow for unlimited time to complete discovery. In this case, the Department granted two extensions, which it certainly can do

as a matter of professional courtesy. Even so, American Iron Oxide Company objected to every discovery request propounded to it, and took approximately ten weeks to do so. We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

AMERICAN IRON OXIDE COMPANY	:	
	:	
v.	:	**EHB Docket No. 2005-094-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of September, 2005, following a review of the Department's Motion to Compel and American Iron Oxide Company Steel Corporation's Response in Opposition, it is ordered as follows:

1) The Department's Motion to Compel is ***denied*** as to **Interrogatories 1, 2, 3, 4, 5** as those Interrogatories seek expert information and should be answered in accordance with the deadlines for this information previously issued by the Board.

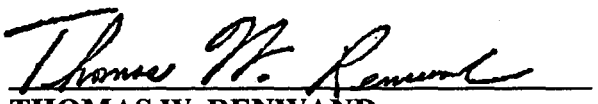
2) The Motion to Compel is ***granted*** as to **Interrogatories 6-55** and **Requests for Productions 1** and **2**.

3) American Iron Oxide Company's objections set forth in its responses to this discovery are ***denied***, except to the extent that American Iron Oxide Company shall provide to the Department on or before **October 15, 2005** a *full and complete* privilege log for any document and communication

American Iron Oxide Company contends is protected by privilege. This privilege log shall describe the document or communication, its author(s) or speakers, all recipient(s) of the document or communication, date, subject matter, and asserted privilege.

4) Except to the extent that American Iron Oxide Company has claimed and adequately asserted any privilege, as set forth above, American Iron Oxide Company shall provide to the Department *full and complete answers* to **Interrogatories 6-55** and **Document Requests 1-2** on or before **October 15, 2005**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: September 19, 2005

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

For the Commonwealth, DEP:
John H. Herman, Esq.
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SECRETARY TO THE BOARD

WHEELING-PITTSURGH STEEL CORPORATION	:	
v.	:	**EHB Docket No. 2005-093-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 19, 2005**

OPINION AND ORDER ON
MOTION TO COMPEL RESPONSES
TO INTERROGATORIES AND REQUESTS
FOR PRODUCTION OF DOCUMENTS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board grants the Department's Motion to Compel Responses to Interrogatories and Request for Production of Documents. Parties are under a duty to provide full and complete answers to interrogatories setting forth all properly requested discoverable information.

Background:

Presently before the Pennsylvania Environmental Hearing Board (Board) is the Pennsylvania Department of Environmental Protection's (Department) Motion to Compel Responses to Interrogatories and Request for Production of Documents (Motion). The Motion was filed on August 22, 2005. The Appellant, Wheeling-Pittsburgh Steel Corporation (Wheeling-Pittsburgh), filed its Response in Opposition to the Department's Motion to Compel (Response) on September 7,

2005. On September 12, 2005 the Department filed a Motion for Leave to File A Reply to the Response. On September 14, 2005 the Board granted the Department's Motion for Leave to File A Reply and ordered that the Department file its Reply on or before September 23, 2005.[1]

This appeal stems from a variance from Waste Classification for spent pickle liquor, also referred to as ferrous chloride solution. Pickle liquor is used as feedstock for the production of iron oxide and hydrochloric acid at the American Iron Oxide Company's Allenport, Pennsylvania facility. The Department served interrogatories and requests for production on or about May 27, 2005. Counsel for the Department granted two requests for extensions to counsel for Wheeling-Pittsburgh to respond to the discovery requests.

The Department contends that "after [taking] ten weeks to ... respond to this discovery, [Wheeling-Pittsburgh] has provided responses filled with generalized objections, and virtually no additional information beyond the vague statements in its Notice of Appeal." Department's Motion to Compel, page 2. Wheeling-Pittsburgh, meanwhile contends, that "the Department's Motion [to Compel] is inappropriate, unfounded, and should be denied." Wheeling-Pittsburgh's Response, page 2. Furthermore, Wheeling-Pittsburgh wrote to the Department expressing its willingness "to cooperate with the Department to provide additional information in the most effective manner to attempt to address the Department's concerns." According to Wheeling-Pittsburgh, despite "its clear intention to cooperate and provide responsive information to the Department, the Department nevertheless chose to engage the Board with its Motion. As an initial matter, the Motion [to Compel] should be denied on the sole basis that the parties should, and still can, attempt to resolve any discovery disputes before engaging the Board in the process."

---

1 We are issuing this opinion prior to receiving the Department's Reply following our review of the Motion to Compel and Response.

Wheeling-Pittsburgh argues that its answers in referring to its Notice of Appeal adequately address the interrogatories. In addition, Wheeling-Pittsburgh contends that it does not yet know some of the answers, such as any witnesses it will call to present its case, and that it will file this information as it becomes available.

Discussion

We have thoroughly reviewed the Department's Motion to Compel and Wheeling-Pittsburgh's Response together with the attached exhibits including Wheeling-Pittsburgh's Objections and Responses to the Department's First Set of Interrogatories and Document Requests.[2] Discovery before the Environmental Hearing Board is governed by both our Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure. It is important to remember that the purpose of discovery is so both sides can gather information and evidence, plan trial strategy, better explore settlement opportunities, and discover the strengths and weaknesses of their respective positions. *George v. Schirra*, 814 A.2d 202 (Pa. Super. 2002). The Board is charged with overseeing ongoing discovery between the parties and has wide discretion to determine appropriate measures necessary to assure adequate discovery where required. *DEP v. Neville Chemical Company*, EHB Docket No. 2003-297-CP-R (Opinion issued January 3, 2005, page 3); *PECO Energy v. Insurance Co. of North America*, 852 A.2d 1230 (Pa Super 2004). In discharging this responsibility, the Board sets discovery deadlines almost immediately after an Appeal is filed by its issuance of Pre-Hearing Order No. 1. Frequently, and in the vast majority of cases, the Board will extend these discovery deadlines.

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2 Before turning to the merits of the respective positions we note that neither party filed a memorandum of law. Although our Rules of Practice and Procedure permit but do not require the parties to support their positions with legal memoranda it is always helpful when these disputes arise for the Board to have the benefit of briefs setting forth the parties' legal positions. It is especially true here when broad issues of attorney-client privilege, attorney

While both our Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure are written so that counsel can seamlessly draft and respond to discovery, both sets of Rules acknowledge the tribunal's responsibility in this area. We certainly agree, as a general proposition, with Wheeling-Pittsburgh's position that parties should first try to work out any discovery disputes before turning to the Board.[3] However, after reviewing Wheeling-Pittsburgh's Responses and Objections, we doubt very much whether counsel would have been able to resolve these discovery disputes. Wheeling-Pittsburgh has filed extensive objections to each of the fifty-five interrogatories and the two requests for production.

Wheeling-Pittsburgh's discovery responses do not seem to include any information not set forth in the Notice of Appeal. Although the Notice of Appeal is detailed the Department's Interrogatories seek further information. This is exactly what the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure allow. Wheeling-Pittsburgh's objections also do not set forth in any way why they are applicable. A party can not simply allege attorney-client privilege, for instance, without any attempt to show why this privilege would protect otherwise discoverable information from being discovered. Wheeling-Pittsburgh failed to provide a privilege log. *See Pennsylvania Trout v. DEP*, 2003 EHB 199, 205. Its Response also does not explain to the Board why its objections should apply to bar the discovery requested.

As we have stated numerous times – the discovery process is not a game. Parties and counsel are obligated by the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure to provide all discoverable information within thirty days. If their answers are not complete a party is required to set forth information then available to it. Discovery before this Board

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work product, and a host of other objections are raised in the Responses and Objections to the discovery requests.
3 Many jurisdictions, but not Pennsylvania, require counsel to certify that they have tried to resolve discovery

is not a process where discoverable information is released in dribs and drabs, following heavy negotiations between attorneys.

We find it unnecessary in this opinion to review each interrogatory answer, as most of the responses are similar. The Department has asked very specific contention interrogatories which have been answered, in most cases, with generalized objections without any or little supporting information. For example, Wheeling-Pittsburgh's answer to interrogatory number 29, which is illustrative of most of its answers, is as follows:

> 29. State the FACTUAL BASIS for YOUR contention in Paragraph III.B.9 of YOUR Notice of Appeal that the VARIANCE "will continue to create severe adverse economic impact for Wheeling Pittsburgh Steel...."
>
> **ANSWER:**
>
> In addition to the specific Objections of General Applicability, which are expressly incorporated herein, Wheeling Pittsburgh Steel objects to this Interrogatory on the grounds that it seeks information protected by the work product doctrine. Wheeling Pittsburgh Steel further objects to this Interrogatory to the extent it seeks legal conclusions. Finally, Wheeling Pittsburgh Steel objects to this Interrogatory to the extent it calls for facts, opinions or analyses which have not been fully investigated or developed at the present time.
>
> Subject to and without waiving these objections, see Notice of Appeal ¶¶ III.B.5-10. By way of further response, to the extent Wheeling Pittsburgh Steel becomes aware of additional responsive information or documents, it will provide such as required by the Board's Rules of Practice and Procedure. Moreover, Wheeling Pittsburgh Steel's investigation is continuing and it reserves the right to supplement its response by way of written discovery, deposition, or otherwise, as the litigation progresses.

The "Specific Objections of General Applicability" consist of 12 very broad objections

---

disputes before seeking court intervention. *See* W.D.P.A.L.R. 37.1.

including attorney-client privilege and attorney work product. Wheeling-Pittsburgh raises these objections and others without explaining why they apply. Moreover, it provides no authority for its objection that "to the extent it calls for facts, opinions or analyses which have not been fully investigated or developed at the present time" that it is excused from providing the Department with ***any*** factual information supporting its contention that the variance "will continue to create severe adverse economic impact for Wheeling-Pittsburgh."

Even in response to the Department's request to identify each non-expert witness Wheeling-Pittsburgh intends to call at the hearing, Wheeling-Pittsburgh incorporates all of its Specific Objections of General Applicability and further objects to the interrogatory as being premature. One of the purposes of discovery is so that witnesses can be identified. The other party can then decide whether it wishes to depose that witness. If the Department is not provided with the names of Wheeling-Pittsburgh's nonexpert witnesses until Wheeling-Pittsburgh files its pre-hearing memorandum, then it will not be able to depose any of these witness. Although Wheeling-Pittsburgh may not know every witness it intends to call at the hearing in this case it certainly should have an idea at this point in the process as to *some* of the witnesses it will call.

Where legitimate objections are raised, for example, the attorney-client privilege, counsel are mandated to set forth specific information as to why this privilege applies. Our Rules and the Pennsylvania Rules of Civil Procedure envision broad discovery. The Rules also envision that the information will be provided quickly. The Board's Rules do not allow for unlimited time to complete discovery. In this case, the Department granted two extensions, which it certainly can do as a matter of professional courtesy. Even so, Wheeling-Pittsburgh objected to every discovery request propounded to it, and took approximately ten weeks to do so. We will issue an Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHEELING-PITTSBURGH STEEL CORPORATION	:	
v.	:	**EHB Docket No. 2005-093-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of September, 2005, following a review of the Department's Motion to Compel and Wheeling-Pittsburgh Steel Corporation's Response in Opposition, it is ordered as follows:

1) The Department's Motion to Compel is ***denied*** as to **Interrogatories 1, 2, 3, 4, 5** as those Interrogatories seek expert information and should be answered in accordance with the deadline for this information previously issued by the Board.

2) The Motion to Compel is ***granted*** as to **Interrogatories 6-55** and **Requests for Production 1** and **2**.

3) Wheeling-Pittsburgh's objections set forth in its responses to this discovery are ***denied***, except to the extent that Wheeling-Pittsburgh shall provide to the Department on or before **October 15, 2005** a *full and complete* privilege log for any document and communication Wheeling-Pittsburgh contends is

protected by privilege. This privilege log shall describe the document or communication, its author(s) or speakers, all recipient(s) of the document or communication, date, subject matter, and asserted privilege.

4) Except to the extent that Wheeling-Pittsburgh Steel Corporation has claimed and adequately asserted any privilege, as set forth above, Wheeling-Pittsburgh shall provide to the Department *full and complete answers* to **Interrogatories 6-55** and **Document Requests 1-2** on or before **October 15, 2005.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: September 19, 2005

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

For the Commonwealth, DEP:
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Southwest Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WILLIAMS TOWNSHIP	:	
	:	
	:	
v.	:	**EHB Docket No. 2005-096-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHRIN BROTHERS, INC., Permittee	:	**Issued: October 4, 2005**

OPINION AND ORDER ON MOTION FOR LEAVE TO AMEND APPEAL

By George J. Miller, Administrative Law Judge

Synopsis

The Board grants a motion to amend a notice of appeal filed by a township from an approval of an NPDES permit. The township's counsel promptly reviewed the Department file to add additional grounds for appeal early in the proceeding so that no significant prejudice will be suffered by the other parties.

OPINION

Before the Board is an amended leave to amend a notice of appeal filed by Williams Township, Northampton County. The Township seeks to add five additional objections to its appeal from the Department's renewal of an NPDES permit issued to Chrin Brothers (Permittee) for a facility located within the Township.

The original notice of appeal was filed on May 12, 2005, in which it objected to the permit on three specific grounds and reserved the right to add additional grounds after counsel had an opportunity to review the Department's files. The twenty-day

amendment-as-of-right period[1] expired on June 5, 2005. On May 31, 2005, the Township filed a motion to extend the time to amend its appeal, because counsel was unable to secure a date to review the Department's files before June 20, 2005. The Board held a conference call with the parties, but deferred a ruling on the motion because the Board's rules do not authorize the Board to grant an extension of time of the amendment-as-of-right period. Accordingly, the Township conducted its review of the Department's files on June 20, and on July 20, 2005, filed an "amended" motion to amend.

This motion seeks to add the following objections to the notice of appeal:

1. The outflow discharge location was shifted to a residential zoned and residentially occupied area in Williams Township and Glyndon Borough respectively, whereas initially, the outfall was proposed and permitted in an industrial area directly piped to the River, not to a park.
2. Neither the permit nor any other relevant document disclosed the fact that the permitted discharge discharges to the Lehigh Canal in Hugh Moore Park which is a major recreational facility. It creates a health hazard in the canal.
3. The permit and the permit renewal do not deal with the contaminant level identified by the ROD, and the impact of the organic toxics on the community, through the shifting of the discharge point to the present location which has an adverse impact on the community.

---

[1] "An appeal my be amended as of right within 20 days after the filing thereof." 25 Pa. Code § 1021.53(a).

4. The renewal permit allows diversion of the processing waste to spray at the landfill, thus generating air and water contamination.

5. The plant is apparently capturing new and unpermitted contamination.

The Permittee and the Department argue[2] that the motion should be denied because the Township was aware of the contents of the permit during the pendancy of the Department's review and had no reasonable excuse for failing to include the proposed objections in its original notice of appeal. In addition, the Permittee claims that the proposed amendments have no merit or are unsupported by appropriate affidavits.[3] This claim focuses on the alleged change of location of the discharge point from an industrial area to direct discharge to a river and not to a park. The Permittee claims that this allegation is contrary to fact. The documents attached to the affidavit of Thomas E. McMonigle in support of the Permittee's Responses tend to show that there was no change in the discharge point and that some representatives of the Township were well aware of the proposed discharge point as early as 1994. The Permittee's documents describe the discharge pipe as proposed to be at a property owned by the Permittee at Morevale Road and Industrial Drive.[4] Whether that in fact is its present location is not clear from the Permittee's affidavit.

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[2] The opposing parties were granted an extension of time to respond to the Appellant's motion until August 25, 2005.

[3] The Appellant's motion was supported by a verification executed by Appellant's counsel. We find that this document, made subject to penalties relating to unsworn falsification to authorities, is sufficient to support the relevant facts of the motion. *See* Section 102 of the Judicial Code, 42 Pa. C.S. § 102; Pa. R.C.P. No. 76 (defining affidavit and verification).

[4] While that may be true, our role here is simply to determine whether it is proper to allow additional objections. Whether there is evidence to support the objections is a question that will be decided at the hearing on the Appellant's claims.

We will grant the Township's motion to amend even though the documents submitted by the Permittee appear to indicate that there has been no change in the discharge point. Generally, the Board is fairly liberal in granting motions to amend appeals when counsel has been prompt in seeking an amendment,[5] and we see no reason to depart from that practice here. The Township's counsel worked diligently to make arrangements to review the Department's file, and put both the Department and the Permittee on notice that it wished to make an amendment. Promptly after reviewing the Department's permit file, the Township sought to add the objections to the Department's action.

The Permittee argues that the Township was well aware of the contents of the permit and has, in fact, been involved in the permitting process. Therefore, according to the Permittee, the amendment is not "based upon facts . . . that the appellant, exercising due diligence, could not have previously discovered" as required by the Board's rules.[6] It may be that the Township had some knowledge of the contents of the permit application before the permit was issued and before a renewal of the permit was obtained, however, we do not believe that it serves any real purpose to get bogged down in an analysis of "what did the Township know and when did they know it" in the context of a request to amend an appeal filed very early in the pre-trial process. Even if Township officials and engineers had some knowledge of the contents of the permit before the appeal was filed, we do not know whether that information was adequately communicated to counsel who prepared the notice of appeal at the Township's request. We have not before denied an

---

[5] *Delaware Riverkeeper v. DEP*, 2003 EHB 603; *Global Eco-Logical Services, Inc. v. DEP*, 2001 EHB 74.

[6] 25 Pa. Code § 1021.53(b)(2).

amendment request based on what may have been known by an appellant before the appeal was filed,[7] unless an amendment request comes late in pretrial proceedings and it was clear that counsel was aware of an issue. Moreover, Section 1021.4[8] of the Board's rules allows us to liberally construe our rules and to disregard an error or defect of procedure. Accordingly, we decline to adopt the strict and literal interpretation of Section 1021.53(b)(2),[9] requiring a municipal appellant to be completely ignorant of issues relating to the approval of a permit renewal based on a large permit file as the Permittee suggests.

We therefore enter the following:

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[7] *Township of Paradise v. DEP*, 2001 EHB 1034.
[8] 25 Pa. Code § 1021.4.
[9] 25 Pa. Code § 1021.53(b)(2).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAMS TOWNSHIP	:	
	:	
	:	
v.	:	**EHB Docket No. 2005-096-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHRIN BROTHERS, INC., Permittee	:	

ORDER

AND NOW, this 4th day of October, 2005, the motion to amend the notice of appeal of Williams Township in the above-captioned matter is hereby **GRANTED** to include the following objections:

1. The outflow discharge location was shifted to a residential zoned and residentially occupied area in Williams Township and Glyndon Borough respectively, whereas initially, the outfall was proposed and permitted in an industrial area directly piped to the River, not to a park.

2. Neither the permit nor any other relevant document disclosed the fact that the permitted discharge discharges to the Lehigh Canal in Hugh Moore Park which is a major recreational facility. It creates a health hazard in the canal.

3. The permit and the permit renewal do not deal with the contaminant level identified by the ROD, and the impact of the organic toxics on the community, through the shifting of the discharge point to the present location which has an adverse impact on the community.

4. The renewal permit allows diversion of the processing waste to spray at the landfill, thus generating air and water contamination.

5. The plant is apparently capturing new and unpermitted contamination.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Member

DATED: October 4, 2005

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

RAVEN CREST HOMEOWNERS ASSOCIATION	:	
	:	**EHB Docket No. 2004-122-MG**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHADDS FORD TOWNSHIP	:	**Issued:** October 5, 2005

OPINION AND ORDER ON
DISCOVERY MOTIONS

By George J. Miller, Administrative Law Judge

Synopsis

The Board grants in part and denies in part a motion to compel the production of documents and a motion for protective order filed by an appellant and a non-party sewer authority.

OPINION

Before the Board are a series of discovery motions spawned by a motion to compel and a motion for an extension of time filed by the Appellant. On September 2, 2005, the Raven Crest Homeowners Association (Appellant) filed a motion to compel compliance with a subpoena for documents issued to the Chadds Ford Township Sewer Authority, which is not a party to this appeal. Although the Board held a conference call to discuss this motion, among other things, counsel for the Authority was not available.

Accordingly, the Board issued a Rule to Show Cause why the motion to compel should not be granted. The Authority timely responded by seeking to quash the subpoena, or in the alternative for a protective order limiting the scope of the documents requested. Specifically, the Authority takes the position that the Board's rules do not provide authority for the subpoenas requesting documents from a non-party and that the subpoena is otherwise defective. The Authority also argues that the majority of the document requests are in the nature of a "fishing expedition" or are available from the government bodies which are parties to the case. Although the Authority also contends that service was not properly executed, it has agreed to accept service of the subpoena, and waive that issue. As we explain in more detail below, the Board's rules do indeed provide for subpoenas to non-parties in discovery. However, we do agree with the Authority that some of the material requested by the Appellant is duplicative of other discovery or is unlikely to lead to relevant evidence.

The Board's Subpoena Authority

The Authority argues that the Board has one rule concerning subpoenas, which adopts rules from the Pennsylvania Rules of Civil Procedure:

> (a) Except as otherwise provided in this chapter or by order of the Board, requests for subpoenas and subpoenas shall be governed by Pa.R.C.P. 234.1—234.4 and 234.6—234.9. When the term ''court'' is used in Pa.R.C.P. ''Board'' is to be understood; when the terms ''Prothonotary'' or ''clerk of court'' are used in Pa.R.C.P. ''Secretary to the Board'' is to be understood.
> (b) Proof of service of the subpoena need not be filed with the Board.

> (c) Subsections (a) and (b) supersede 1 Pa. Code § § 35.139 and 35.142 (relating to fees of witnesses; and subpoenas).[1]

In the Authority's view, the subpoena rules in the Rules of Civil Procedure adopted by the Board explicitly forbid the use of such a subpoena for production of documents:

> A subpoena may not be used to compel a person to appear or to produce documents or things ex parte before an attorney, a party or a representative of the party.[2]

In that respect the Authority is correct. The Rules of Civil Procedure adopted by the Board in Rule 1021.103, do not permit the production of documents outside the context of a court proceeding or a deposition.[3] Subpoenas issued under those rules are for the purpose of securing the presence of a witness at trial:

> A subpoena is an order of the court commanding a person to attend and testify at a particular time and place. It may also require the person to produce documents or things which are under the possession, custody or control of that person.[4]

However, the note to Rule 234.1 directs counsel to the discovery rules for the purpose of "a subpoena upon a person not a party for the production of documents and things other than at a deposition or trial."[5] The Board's rules explicitly adopt the discovery rules of the Pennsylvania Rules of Civil Procedure, including the rules relating to subpoenas for documents and things from non-parties.[6] Accordingly, Rules of Civil Procedure

---

[1] 25 Pa. Code § 1021.103.
[2] Pa. R.C.P. No. 234.1(c).
[3] Pa. R.C.P. No. 234.1(b).
[4] Pa. R.C.P. No. 234.1 (a)
[5] Pa. R.C.P. No. 234.1 (a), Note.
[6] 25 Pa. Code 1021.102 ("Except as otherwise provided in this chapter or by order of the Board, discovery in proceedings before the Board shall be governed by the Pa.R.C.P. When the term ''court'' is used in the Pa.R.C.P., ''Board'' is to be understood;

4009.21-4009.27, which outline the procedure for securing documents and things from a non-party in discovery, do apply to Board proceedings.[7] Just as the Pennsylvania Rules of Civil Procedure clearly provide for subpoenas in two different places in the rules for different purposes, so do the rules of the Board.[8]

Motion for Protective Order

The Authority requests a protective order quashing the Appellant's documents requests 2, 5, 6, 8 through 11, 14, 16, and 18 through 27. The Authority objects on the grounds that the materials are not relevant to the objections raised in the appeal and would cause the Authority undue burden to assemble due to its small staff of one part-time secretary. We will grant in part and deny in part the Authority's motion for protective order.

The Board is generally fairly liberal in allowing discovery, as instructed by the Pennsylvania Rules of Civil Procedure:

> [A] party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.[9]

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when the terms ''prothonotary'' or ''clerk of court'' are used in the Pa.R.C.P., ''Secretary to the Board'' is to be understood.")

[7] Pa. R.C.P. Nos. 4009.21-4009.27.

[8] The Authority contends that the subpoena, even if issued under the correct rules, was defective because it required the production of documents in seven days rather than twenty days, as provided by Pa. R.C.P. No. 4009.23(a). While the Authority is correct, the Board can easily remedy the defect by providing adequate time to respond to the document request.

[9] Pa. R.C.P. No. 4003.1(a).

Discovery of information is permitted even if it would not be admissible at trial, so long as it appears reasonable that the information will lead to the discovery of admissible evidence.[10] With these principals in mind, we turn to substantive claims of the Authority's motion.

Protective Order Granted

We will grant the protective order on Document Request Nos. 5, 6, 16, and 24-27. Request No. 5 seeks information about wetlands which does not appear to be raised in the notice of appeal. Request No. 6 seeks financial reports for the Sewer Authority, which do not appear to be relevant to the appeal relating to the Department's consideration of public input of the Township's Act 537 Plan revision. We will also grant the protective order for Request Nos. 24-27, which relate to financial arrangements for user and tap-in fees between the Township, the Authority and certain property owners and institutions. This request does not appear to be relevant to the issues raised in this appeal.

The Board will also grant the protective order on Request No. 16 for photographs, motion pictures, video recordings, maps, diagrams for models of the Ridings wastewater treatment plant. Although, as we explain below, we will allow some discovery of the Ridings plant because it may be relevant to the alternative analysis challenge in the Appellant's notice of appeal, we believe Request No. 16 is too burdensome and not likely to lead to relevant information.

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[10] Pa. R.C.P. No. 4003.1 (b)

Protective Order Denied

The Board will deny the protective order and grant the Appellant's motion to compel production of Document Request Nos. 2, 8, 9, 10, 11, 14, 18, 19, 20, 21, 22 and 23.

Request Nos. 11, 14, 18, 19, 20, 21, 22 seek information which may be relevant to the Authority's involvement in the Township's consideration of comments from the public or the Township's consideration of alternatives to that selected for the Raven Crest subdivision. Although the Authority states that the planning module was solely a Township matter, and that the Authority was not involved, the Appellant's notice of appeal does state that for many of the concerns raised by the citizens, they were directed to the Authority by the Township for answers to their questions. Accordingly, we believe that the Appellant's are entitled to explore the Authority's role in the planning process and the extent to which the Township may have relied on the Authority's input and expertise. Further, even though some of the documents requested may duplicate discovery received directly from the Township, the Appellant is entitled to ensure that a complete set of correspondence between the Township and the Authority has been secured.

The Authority also objects to Request Nos. 2, 8, and 9 on the basis of relevance. Those requests seek planning or forecasting documents, and information about the Ridings wastewater treatment plant. We believe that these materials may be relevant to the Appellant's charge that the Township did not properly consider alternatives in the planning module submission.

Finally, the Authority also objects to Request Nos. 10 and 23 on the basis of relevance. These requests seek documents related to the purchase of the Ridings wastewater treatment plant and documents related to state or county funding for the proposed project in the planning module. We believe that both of these requests are relevant to the "fair compensation" objection in the Appellant's notice of appeal. Therefore, we will grant the Appellant's motion to compel these document requests.

We enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RAVEN CREST HOMEOWNERS ASSOCIATION	:	
	:	**EHB Docket No. 2004-122-MG**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHADDS FORD TOWNSHIP	:	

ORDER

AND NOW, this 5th day of October, 2005, the Rule to Show Cause issued on September 19, 2005, is hereby discharged. It is ordered as follows:

1. The motion of the Chadds Ford Sewer Authority for a Protective Order is hereby **GRANTED** as to Document Request Nos. 5, 6, 16, and 24-27. The Appellant's motion to compel production of these documents is accordingly **DENIED**.

2. The motion of the Chadds Ford Sewer Authority for a Protective Order is hereby **DENIED**, and the Appellant's motion to compel is **GRANTED,** for the remaining documents requests served on the Sewer Authority.

3. The Authority shall serve the requested documents on the Appellant within 10 days of entry of this order.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Member

DATED: October 5, 2005
Service list on following page

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ALEXANDER AND KRISTINE GORDON-WATSON	:	
v.	:	**EHB Docket No. 2005-213-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 11, 2005**

OPINION AND ORDER ON
MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

The Board dismisses an appeal from a letter written by the Department to the appellants which explains why the Department of Transportation is not required to have a permit to deposit "clean fill" on an adjacent property.

OPINION

Before the Board is a motion by the Department of Environmental Protection to dismiss the appeal of Alexander and Kristine Gordon-Watson (Appellants) from a letter written by the Regional Manager of the Waste Management Program in the Department's Southeast Regional Office. The Department contends that the letter is not an appealable action. The Appellants counter that the letter is appealable because it includes a novel interpretation of the Department's regulations relating to clean fill.

The Appellants allege in their notice of appeal that the Department of Transportation (DOT) disposed of approximately 300 tons of asphalt road millings on a property across the street from the Appellants' home. Sometime thereafter the Appellants complained to DOT,

which informed the Appellants that the millings are covered by the Department's April 2004 Fill Management Policy and that the millings are "recycled asphalt paving," or "RAP." The Appellants then wrote a letter to Secretary McGinty at the Department charging that DOT was illegally dumping waste without a permit and that RAP threatens to contaminate their well water.

By letter dated May 31, 2005, Ronald Furlan, the regional solid waste manager for the Department, responded to the Appellants' complaint, explaining that RAP meets the definition of "used asphalt" in the Department's regulations. According to Mr. Furlan's letter, it is the Department's position that the definition of clean fill explicitly includes used asphalt, and therefore no permit was required.

The Appellants filed their appeal on June 30, 2005. Among their objections, they complain that DOT failed to perform adequate "due diligence" pursuant to the Department's Clean Fill Policy; DOT illegally dumped RAP without a solid waste permit; and that the Department's determination that the definition of "used asphalt" includes RAP is contrary to the regulations and constitutes an improper rulemaking on the part of the Department.

The Department filed its motion to dismiss on August 5, 2005, arguing that the letter merely explains the Department's position and provides information to the Appellants, and is therefore not an appealable action of the Department. The Appellants counter that the letter effectively authorizes DOT to illegally dump pavement millings without a permit and contains a significant departure in the Department's interpretation of "used asphalt" and therefore should be considered an appealable action.

After a careful reading of the Department's letter, we agree that it is not an appealable action. Accordingly, we must dismiss the Appellants' appeal.

The scope of this Board's jurisdiction has often been repeated. Specifically, the Board has authority to review actions of the Department which are both final and also which adversely

affect a person.[1] Not every act of the Department constitutes a "final action" which is reviewable under Section 7514(c), of the EHB Act. Our regulations define an "action" as "[a]n order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification."[2] Since the list of actions included in the regulation is not exhaustive, we have noted that there is no "bright line" rule for which communications from the Department constitute an action.[3] Rather, we must consider several factors in order to assess whether the communication in a letter is a final action adversely affecting a person. Some of those factors include the specific wording of the communication; the purpose, intent and practical impact of the communication; the apparent finality of the letter; the regulatory context; and the relief that the Board may be able to provide.[4] The inquiry is often styled as an assessment of whether a letter is merely "descriptive" or is "prescriptive" and requires the recipient to do something which adversely affects that person.[5]

The Department's May 31st letter clearly falls within the "descriptive" category of communications of the Department. It was written in response to a complaint lodged with the Department by the Appellants concerning the activities of DOT. It explains the Department's position in relation to those activities, and provides an explanation for the Department's position relative to its Clean Fill Policy and its interpretation of "used asphalt" in the clean fill regulations. The Department did not require the Appellants to do anything. Although the letter explains the reason for the Department's decision to not require DOT to secure a permit, it can

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[1] 35 P. S. § 7514(c).
[2] 25 Pa. Code § 1021.2.
[3] Borough of Kutztown v. DEP, 2001 EHB 1115, 1121.
[4] *Beaver v. DEP*, 2002 EHB 666, 673.
[5] Id.

not be said that it actually "authorizes" DOT to engage in any activity. The solid waste regulations simply state that no permit is required to use clean fill:

> A person or municipality is not required to obtain a permit under this article, comply with the bonding or insurance requirements of Subchapter E (relating to bonding and insurance requirements) or comply with Subchapter B (relating to duties of generators) for one or more of the following:
>
> (6) The use as clean fill of materials in subparagraphs (i) and (ii) if they are separate from other waste. The person using the material as clean fill has the burden of proof to demonstrate that the material is clean fill.
>
> (i)The following materials, if they are uncontaminated: soil, rock, stone, gravel, brick and block, concrete and used asphalt.[6]

Although the Department has the discretion to require an individual or general permit, it is not required to do so.[7] Accordingly, the Department's letter explains the reason for its decision to take no action against DOT and to not require a permit for the use of RAP as clean fill.

Ordinarily, a lack of action by the Department is not appealable.[8] Our decision in *Associated Wholesalers, Inc. v. DEP*,[9] is directly on point. In that case occupants of a shopping mall attempted to appeal a letter directed to a developer stating that no encroachment permit was necessary in connection with some demolition activities at the mall. The Board dismissed the appeal because the letter did not affect any personal or property rights, privileges, immunities, duties or obligations of any person. It simply provided the Department's interpretation of regulations and advised the developer that no permit was necessary for the proposed activity.

---

[6] 25 Pa. Code § 287.101(b)(6)(i).

[7] "[T]he Department *may* require a person or municipality to apply for, and obtain an individual or general solid waste permit or take other appropriate action, when the person or municipality is conducting solid waste activity that harms or presents a threat of harm to the health, safety or welfare of the people or environment of the Commonwealth." 25 Pa. Code § 287.101(c)(emphasis added).

[8] *Westvaco v. DEP*, 1997 EHB 275 (the Department's failure to stop the appellant from withdrawing a permit application is not appealable); *see also Scott Township Environmental Preservation Alliance v. DEP*, 1999 EHB 425 (where the Department elected not to proceed with an enforcement action against a municipality for failing to implement its sewage facilities plan in accordance with the schedule provided in the plan, the Board held that there was no action appealable by a third party).

[9] 1997 EHB 1174.

The letter under appeal is similar. It provides the Department's interpretation of regulations and advises the Appellants that no permit is necessary for another agency's activity.

The Appellants argue that the Department's letter constitutes an appealable action because, in their view, the letter is prescriptive because it "changes the status quo to the detriment of personal or property rights," or "lays down rules of usage", citing The Oxford Dictionary. We disagree with the Appellants' understanding of what those phrases mean when used by the Board. The Board has never used "prescriptive" to mean "lays down rules of usage." In fact, communications from the Department which "advise of the agency's interpretation of applicable law" are explicitly defined as "descriptive."[10] Moreover, the Appellants cite no cases, and our research has found none which hold that a Department letter explaining the application of a regulation to a third party is, by itself, an appealable action because it changes the "status quo." The Board has never interpreted a "change in the status quo" to be *any* change in the regulatory landscape. Typically, it means a change that requires a recipient of a Department letter to explicitly do something or refrain from doing something.[11] Here the Appellants are not required by the Department to do anything, or to refrain from doing anything. The letter from the Department does not create an action from which the Appellants can appeal

Accordingly, we enter the following:

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[10] *E.g., Beaver v. DEP*, 2002 EHB 666, 673. The Board has defined "prescriptive" to mean "those which direct the recipient to perform a specific course of conduct, or impose an obligation which subjects the recipient to liability or changes the status quo to the detriment of personal or property rights." *Id.* at 673-74. It is clear from that opinion that the Department's interpretation of a regulation is not a "change in the status quo" without some direction that the appellant take or refrain from taking some action.

[11] *E.g., Borough of Kutztown v. DEP*, 2001 EHB 1115 (letter finding that sewage facilities were in a state of overload and telling the borough to develop a plan to address the overload is a directive and therefore appealable); *Medusa Aggregates Co. v. DER*, 1995 EHB 414 (letter changes the status quo because it prohibits the permittee from mining where it was previously authorized to do so.)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ALEXANDER AND KRISTINE GORDON-WATSON	:	
v.	:	**EHB Docket No. 2005-213-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 11th day of October, 2005, the appeal of Alexander and Kristine Gordon-Watson in the above-captioned matter is hereby **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Dated: October 11, 2005

c: DEP Bureau of Litigation:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PRIZM ASSET MANAGEMENT COMPANY, PREIT SERVICES, LLC, AND DIANN VAN LOUVENDER	:	
v.	:	**EHB Docket No. 2005-279-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HEMINGWAY DEVELOPMENT LIMITED PARTNERSHIP, Permittee	:	**Issued:** October 24, 2005

OPINION AND ORDER ON
PETITION FOR SUPERSEDEAS

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board grants in part and denies in part a petition for supersedeas. The Petitioners' claim that the revised application for an NPDES permit should have been re-noticed to the public because the revision called for drainage to a new watershed which had not been subject to the public notice of the original permit is likely to succeed on the merits. They also may succeed on their claim that the Department failed to adequately consider the potential for flooding along the new receiving stream and its watershed. However, the Board heard evidence at the supersedeas trial which shows that flooding will not be caused by the permit. Also, more fundamentally, there are substantial questions regarding Appellants' standing in this case and they have not shown a likelihood of success on their claims of error which raise substantive technical aspects

of the permit. Accordingly, the Board holds that the Department is required to re-notice the permit application but will leave the permit in place while that happens. The Department will accept new comments and consider those comments in deciding whether it wishes to suspend or revoke the permit or require Hemingway to provide additional information.

OPINION

Factual and Procedural Background

Before us is the Petition for Supersedeas (Petition) of Appellants PRIZM Asset Management Company (PRIZM), PREIT Services, LLC (PREIT) and Diann Van Louvender (collectively Appellants or Petitioners). They seek to have the Board suspend by supersedeas the NPDES Permit for Discharge of Stormwater from Construction Activities, Permit No. PAI023505002 (Permit) which the Department granted to Hemingway Development Limited Partnership (Hemingway or Permittee).

The Department of Environmental Protection (Department or DEP) issued the Permit on September 6, 2005 and it relates to Hemingway's development of an approximately 50 acre parcel of land located in Moosic Borough, Lackawanna County (Site). Hemingway's project is referred to as the "Shoppes at Montage" and the parcel is located in the immediate vicinity of Montage Mountain Ski Resort. The project is a "life-style center" which is basically an upscale retail mall associated with a contiguous Hemingway residential development known as Glenmaura. PRIZM and PREIT own and operate retail malls within a few miles of the proposed Shoppes at Montage. Specifically, PREIT owns and operates the Viewmont Mall in Scranton and the Wyoming Valley Mall in Wilkes-Barre. PRIZM owns and operates the Steamtown Mall in Scranton. Mrs. Van Louvender is a citizen living close to the confluence of the Spring Brook and Lackawanna River in Moosic.

Clearing and grubbing activities on the Site commenced shortly after September 6, 2005. The goal is to place concrete "pads" down at the Site for turning over to the builders on which they will construct the actual buildings that will make up the Shoppes at Montage. It is expected that by December 2005 some or all of the pads will be ready to turn over to the construction company. Indeed, Mr. McDonough of Hemingway, testified that Hemingway must hand over the pads at that time in order for the project to be viable and that work was proceeding six days a week to meet that schedule.

The Appellants allege that the Department erred in issuing this Permit in various respects. We summarize Appellants' claims as we understand them as follows.

"Zoning" Claim. Appellants claim that the Department failed to realize and consider that the zoning of the land does not allow commercial uses. We will refer to this as the "Zoning" claim. Specifically, Appellants claim that at least 60% of the Site is located in the Borough's C-N Conservation Zone. This fact, either as a result of purposeful concealment by Permittee or negligence, was supposedly not considered by the Department in its evaluation of the NPDES permit application.

"Lack of Public Notice" Claim and the "Diversion" Claim. This next claim of error relates to where some of the stormwater will be discharged. This claim has a procedural and a substantive aspect.

As for the procedural point, the public notice of the application for the Permit which appeared in the *Pennsylvania Bulletin* on July 9, 2005 states that the "receiving water/use" is "Stafford-Meadow Brook/HQ-CWF." Board Ex. 1. The newspaper notice for the public hearing on the permit application which appeared in the *Scranton Times-Tribune* of Friday, July 11, 2005 states that the permit would "involve[] the discharge of storm water related to construction into

Stafford Meadow Brook." Ex. P-2. So, as of the August 11, 2005 public hearing ,the stormwater from the entire 47.9 acres of the Site was to be discharged to the Stafford Meadow Brook watershed. The Stafford Meadow Brook watershed is a High Quality water. However, the Permit issued less than a month later calls for discharge from 36.8 acres of the Site to, instead, be discharged into the Spring Brook watershed. The notice of the Permit issuance which appeared in the *Pennsylvania Bulletin* dated September 24, 2005 states that the "receiving water/use" is both Spring Brook and Stafford Meadow Brook.

The Permittee, on its own without any impetus from the Department, had developed the change in the application to provide for re-direction of some of the flow to the Spring Brook in response to public comments at the August 11, 2002 public hearing that the Stafford Meadow Brook and its watershed were prone to flooding. The plan was first disclosed to the Department at a meeting held on or about August 16, 2005. The Permit was then issued on September 6, 2005 along the lines of the revised application allowing discharge to Stafford Meadow Brook and Spring Brook. The revised application calling for the new discharge point was not noticed to the public.

This lack of notice, claims Appellants, violates 25 Pa. Code § 92.61(a), which requires public notice of every "completed application" for an NPDES permit. In short, Appellants claim that the revision to the application required that the application be re-noticed to the public.

The major substantive problem with the diversion of the flow to Spring Brook is that the diversion to Spring Brook could cause flooding along Spring Brook and could cause a threat the levee system protecting Moosic Borough. We choose our words "could" and "could cause a threat" carefully and deliberately because those are the precise words of Appellants' expert, Mr. Ostrowski, a registered professional engineer, in his affidavit submitted in support of the

Petition. Ostrowski Affidavit, ¶ 12(a), (b).

Mr. Ostrowski further states in Paragraph 12 that there could be two other consequences: (1) the water quality of Spring Brook "could" be changed by the redirection due to "potential" increased sediment loadings and scouring of Spring Brook; and (2) Stafford Meadow Brook "could" be deprived of a substantial base flow necessary to maintain the water quality that supported its High Quality designation. This claim relates to the amount of infiltration of water through the Site which reaches Stafford Meadow Brook. Ostrowski Affidavit, ¶ 12(c), (d).

These last two supposed errors, claim the Appellants, would violate the Department's Comprehensive Stormwater Management Policy (CSMP) and the Anti-Degradation regulation at 25 Pa. Code § 93.4. The CSMP is violated in that the "diversion," i.e., the so-called "removal" of 36.8 acres from the Stafford Meadow Brook watershed results in the development not being able to "sustain" ground and surface water quality to the Stafford Meadow Brook. Conversely, the added flow into the Spring Brook watershed violates the CSMP because the CSMP requires the management of both "volume and rate of stormwater discharges" so as to "prevent the physical degradation of the receiving waters, such as scour and streambank destabilization." Ex. P-14, p. 2. The "diversion" violates the Anti-degradation regulations in that Permittee will supposedly no longer need to meet the requirements for special protection watersheds applicable to High Quality waters.

"Sandwort" Claim. This claim relates to indigenous flora on the Site, namely the Appalachian Sandwort. This plant is an S2 (imperiled) species which gives it a PT (threatened) status under the Pennsylvania Department of Conservation and Natural Resources ranking system. It appears that six acres of the Site are populated by sandwort. These acres are part of the planned development activities. However, DCNR has outlined a "mitigation plan" in

connection with Permittee's activities. Ex. P-37. Besides the destruction of the sandwort at the Site, Appellants claim that the mitigation plan is deficient from at least two perspectives. First, they say the plan is basically, fundamentally and legally flawed because it is not sufficiently compulsory and obligatory and is instead merely aspirational. In other words, they say that the plan is too much to the side of having Permittee try its best to replace sandwort if they can, as opposed to requiring it to do so, period. Second, they say that there is no assurance that the sandwort can successfully be repopulated.

The "Zoning" Claim and the "Sandwort" Claim fold into each other, at least in part, in that Appellants allege that of the 60% of the Site which is within the C-N Conservation zone, this 60% area contains nearly 45% of the sandwort population present on the Site. This is the embodiment of what Appellants call the "tragic, unnecessary and irreparable" loss of sandwort at this Site.

A four day supersedeas trial was conducted before the Board in Norristown on Tuesday, October 4, 2005, Friday, October 7, 2005, Wednesday, October 12, 2005 and Thursday, October 13, 2005.[1] The parties were given until Friday, October 21, 2005 to submit briefs. While the parties apparently had transcripts from which to write their briefs, the Board did not receive any.

Standard For Supersedeas

Our standard for reviewing a petition for supersedeas was recently restated by Judge Renwand as follows:

> A supersedeas is an extraordinary remedy that will be granted only where clearly warranted. *UMCO Energy, Inc. v. DEP,* 2004 EHB 979, 802; *Pennsylvania Fish and Boat Commission v. DEP,* 2004 EHB 473, 474; *Oley Township v. DEP,* 1996 EHB 1359, 1361-62. In order for the Pennsylvania

[1] We will be referring to various exhibits introduced into evidence at the supersedeas trial as follows: Ex. P-X (exhibits of the "Petitioners," PRIET, PRIZM and Van Louvender); Ex. C-X (exhibits of the "Commonwealth" Department of Environmental Protection); Ex. A-X (exhibits of Applicant/Permittee Hemingway); and Ex. B-X (Board exhibits).

Environmental Hearing Board to grant a supersedeas, Appellants must prove by a preponderance of the evidence that: (1) they will suffer irreparable harm if the supersedeas is not granted; (2) they are likely to prevail on the merits of their appeal; and (3) there is no or little chance of injury to the public or other parties if the supersedeas is granted. *UMCO Energy, Inc. v. DEP,* 2004 EHB 797; *Global Ecological Services Inc. v. DEP,* 2000 EHB 829; *Pennsylvania Mines Corporation v. DEP,* 1996 EHB 808, 810; *Hopewell Township v. DER,* 1995 EHB 6890; *Kephart Trucking Company v. DER,* 1993 EHB 314, 317; Section 4(d) of Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. Section 7514(d); 25 Pa. Code § 1021.63. We must balance these factors collectively to determine if a supersedeas should be issued. *Pennsylvania Mines Corporation,* 1996 EHB at 810; *Pennsylvania Fish Commission v. DER,* 1989 EHB 619.

Moreover, in order for the Appellants to win a supersedeas, they are required to make a credible showing on each of these three points. Most importantly, they must make a strong showing that they are likely to succeed on the merits of their Appeal. *Pennsylvania Mines Corporation,* 1996 EHB at 810; *Lower Providence Township v. DER,* 1986 EHB 395, 397. In the final analysis, the issuance of a supersedeas is committed to the Board's sound discretion based upon a balancing of all the above criteria. *UMCO Energy, Inc.,* 2004 EHB at 802.

Neubert v. DEP, Docket No. 2005-103-R, *slip op.* at 3-4 (Opinion issued July 15, 2005). Judge Labuskes has also recently recapitulated our standard very nicely as follows:

The standards governing the grant or denial of a supersedeas petition are provided at 25 Pa. Code § 1021.63, as follows:

(a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered:

(1) Irreparable harm to the petitioner.

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

(3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.

(b) A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.

We recently stated in *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 801-02:

> A supersedeas is an extraordinary remedy which will not be granted absent a clear demonstration of appropriate need. *Tinicum Township v. DEP,* 2002 EHB 822, 827; *Global Eco-Logical Services v. DEP,* 1999 EHB 649, 651; *Oley Township v. DEP,* 1996 EHB 1359, 1361-1362. Where the mandatory prohibition against issuance of a supersedeas does not apply, the Board ordinarily requires that all three statutory criteria be satisfied. *Global Eco-Logical Services,* 1999 EHB at 651; *Svonavec, Inc.,* 1998 EHB at 420; *Pennsylvania Mines Corporation v. DEP,* 1996 EHB 808, 810. *See also Chambers Development Company, Inc. v. Department of Environmental Resources,* 545 A.2d 404, 407-409 (Pa. Cmwlth. 1988). Although there have been exceptions, in the final analysis, the issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *Global Eco-Logical Services, supra; Svonavec, Inc.,* 1998 EHB at 420. *See also Pennsylvania PUC v. Process Gas Consumers Group,* 467 A.2d 805, 809 (Pa. 1983).

Stevens v. DEP, Docket No. 2005-198-L, *slip op.* at 4-5. (Opinion issued July 19, 2005).

We think both Judge Labuskes and Judge Renwand provide excellent and correct recitations of our standard with which we agree and by which we will proceed here.

Also, it is important to remember that what we are doing on supersedeas is predicting the future course of the case based upon a snapshot in time of the evidence. As Judge Labuskes said in *Global Eco-Logical Servs., Inc. v. DEP*, 1999 EHB 649:

> It is helpful to remember that the Board is not called upon to decide the case on the merits in the context of a supersedeas application. The Board is, at most, required to make a prediction based upon a limited record prepared under rushed circumstances of how an appeal might be decided at some indeterminate point in the future.

Id. at 651; *Eighty-Four Mining Co. v. DEP*, 2004 EHB 141, 150.

Judgment on the Pleadings and Evidence on Certain Issues At Trial

At the close of the petitioners' case, the Permittee and the Department moved orally for a judgment on some of the issues raised by the Petition based on their contention that Petitioners had not made a sufficient showing of likelihood of success on the merits. The Board issued a detailed ruling with rationale from the Bench granting that request and, thus, narrowing the

issues left in the supersedeas proceeding. The remainder of this section sets forth our written presentation of the oral opinion given from the Bench.

Zoning Claim.

We find that Appellants have not shown a likelihood of success on the merits of their claim on the zoning question. All Act 67 requires is that DEP consider local zoning and land use when reviewing a permit application. *See* 53 P.S. § 11105(a)(2).[2] Here the testimony shows that the Department did consider the zoning of the parcel in question. The record shows that the Department considered both a letter from Moosic Borough and the Moosic Borough Solicitor stating that the zoning for the property was appropriate for its intended use for development as a commercial mall and that such use is in compliance with the Borough's Comprehensive Plan. (Ex. C-3; Ex. P-12). Also, Mr. Chernesky, Chief of the Department's Soils and Waterways Section in Northeast Regional Office, testified that the Department considered the zoning and land use of the parcel.

The Appellants make much of the allegation that the zoning line making the border between the C-N Conservation District and the Planned Development District (PDS) was either misrepresented to be outside the borders of the parcel in question or mistakenly so represented when it actually traverses directly through the parcel. We do not find that the Appellants' evidence shows that they are likely to establish as a matter of fact that the zoning line traverses the parcel.

It seems that this line is difficult to pinpoint with precision because it is not a formally surveyed line. Appellants' main evidence that the line traverses the Site is their consultant, Mr. Ostrowski's, drawing of an "overlay" of the zoning line showing that the line traverses the Site.

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[2] Acts 67 and 68, enacted on June 22, 2000, amended the Municipalities Planning code, Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101-11107.

Ex. P-10. We are skeptical about this. First, it is unclear what sources the consultant used. Second, we are not sure about the consultant's expertise in drawing zoning maps. Third, we are wary in light of the consultant's admission that the statement in his affidavit that the C-N Conservation zone "does not allow for the proposed retail use" was admittedly made without any basis or knowledge whatsoever. He called that assertion an "assumption" and he admitted he never looked at the zoning ordinance to see what uses were allowed and what uses were not allowed.

The Site has been subject to two land subdivision plan procedures before both the Moosic Borough Planning Commission and Lackawanna County Planning Commission. In both procedures before both Commissions, the PDZ-CN Conservation zoning line is well north of the Site and the entire Site is within the Planned Development Zone. (Ex. A-4; Ex. A-3). In addition, Mr. Pomento, Executive Vice President of Hemingway, testified how he interacted with the Borough officials and he provided a logical and credible account of the basis for the zoning line being where the Permittee claims it is. The essence of that explanation is that the Planned Development Zone ends and the Conservation Zone begins at the point where the topography becomes unsuitable for development. That is at a point off the Site to the north where the Permittee claims the zoning line lies.

We have reviewed the deposition transcript of the Moosic Borough zoning officer taken in anticipation of the supersedeas hearing and his testimony supports the conclusion that the zoning line is north of the Site and that the entire Site is within the Planned Development Zone. Ex. P-24. He testified four times that this is and was his conclusion. Ex. P-24 (Durkin Tr. 11, 38-39, 45, 46). His conclusion in this regard is credible in that he is the zoning officer of the Borough and he provided details how he came to his conclusion. His testified,

> [The Site] is well within the PDZ zone by familiarity with the area, the topography and the fact that we had both been there many times, being that the PDZ zone was way up over the hill and the conservation zone was at the bottom. I was satisfied, as I had been before, that it is, in its entirety, in the PDZ zone and a distance from the CN.

Ex. P-24 (Tr. 38-39).

The proper place for the complete and authoritative resolution of this dispute about the precise location of the zoning line is not with this Board, it is with the local zoning tribunal, the County Common Pleas Court, the Commonwealth Court and the Supreme Court. As we said in *Berks County v. DEP,* Docket No. 2002-155-MG (Opinion Issued March 31, 2005), "Act 67/68 does not require the Department to become a "super zoning board" and independently re-evaluate local zoning and land use issues." *Id., slip op.* at 37. In *Berks County*, we dispensed with an argument very similar in nature to the one made here. There, the County had argued that the expansion is not a "permitted use" in the Township, and that the Host Agreement which purports to resolve any issues in that regard is illegal. There, the review was called "cursory at best[.]" *Id.* Here, the record shows that DEP conducted a review of the zoning and land use and that review was actually more than cursory. Act 67 requires review and the Department fulfilled that requirement. Even if we thought that Appellants did have a likelihood of succeeding in establishing as a fact that the PDZ-CD zoning line traverses the Site, that would not mean they win. As we pointed out in *Berks County*, Act 67 does not require the Department to deny a permit even where a land use anomaly is detected. *Id., slip op.* at 37-38. Act 67 requires that the Department consider local land use and zoning. It did that here.

For all the reasons just reviewed, we do not think that Appellants would be able to successfully establish the right to relief based on Act 67.

Compliance With Comprehensive Stormwater Management Policy.

Much of petitioners' presentation was devoted to attempting to show that the Permit as granted violates the CSMP. Even if that were so, and we cannot conclude on the basis of the evidence that it is, it would not by itself constitute error. A policy is not binding as would be a regulation. *Dauphin Meadows, Inc. v. DEP*, 2000 EHB 521. *See also DER v. Rushton Mining Co.*, 591 A.2d 1168, 1173 (Pa. Cmwlth. 1991), *petition for allowance of appeal denied*, 600 A.2d 541 (Pa. 1991); *Defense Logistics Agency v. DEP*, 2001 EHB 337, 249 n.4 ("We most certainly could not grant summary judgment on the ground that the Order may be in violation of the enforcement policy memorandum because that statement of policy is not a legally binding regulation that has the force of law."); *Stevens v. DEP*, 2000 EHB 438, 444 ("A policy, by definition, is not binding."). The CSMP is not a regulation. *Home Builders Ass'n of Chester and Delaware Counties v. DEP*, 828 A.2d 446 (Pa. Cmwlth. 2003), *aff'd*, 844 A.2d 1227 (Pa. 2004).

Furthermore, the CSMP itself states that:

> The policies and procedures outlined in this guidance document are intended to supplement existing requirements. Nothing in the policies or procedures shall affect regulatory requirements. The policies and procedures herein are not adjudications or regulations. There is no intent on the part of DEP to give the rules in these policies that weight or deference. This document establishes the framework within which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from the policy statement if circumstances warrant.

Comprehensive Stormwater Management Policy, Ex. P-14. Of course the same is applicable to the "Greater Environmental and Public Health Protection As a Driver of Economic Growth: The Rendell Administration's Agenda for DEP" document which Appellants allege this Permit violates. That is not a regulation.

Thus, Petitioners have not demonstrated a likelihood of success on the merits of their claims based on supposed violations of the CSMP or the Rendell Administration's Agenda for

DEP document. The Permit would not be invalid merely by a showing that the Permit somehow contradicted those two documents.

Sandwort Claim.

We do not think that Appellants have established a likelihood of success on the merits of this claim. Based on the evidence at this stage, the Department acted appropriately and the mitigation plan is an appropriate one.

The regulation, 25 Pa. Code § 102.6(a)(2), requires that an applicant show proof of consultation with the Pennsylvania Natural Diversity Inventory (PNDI). There is no dispute that this was done in this case. If the PNDI shows that a species or habitat may be adversely impacted, then, if the impact cannot be avoided or prevented the applicant shall demonstrate how impacts will be minimized in accordance with Federal and State law. In this case, since the impact to the sandwort on the Site could not be avoided or prevented, the applicant drafted and submitted a mitigation plan.

Simply stated, the law does not prohibit the landowner, Hemingway in this case, from destroying sandwort on its development. The law requires that if the sandwort is to be destroyed at the Site that a suitable mitigation plan to be in place. The evidence shows that the basic steps of 25 Pa. Code § 102.6(a)(2) were complied with. Hemingway and DCNR entered into a mitigation plan/agreement memorialized by letter from Ms. Fike of DCNR to Mr. McDonough of Hemingway dated August 26, 2005 with respect to sandwort, which agreement is incorporated as an enforceable condition of the Permit. Ex. P-37.

The Appellants' expert botanist, Dr. Schuyler, failed completely to establish any deficiency in the Hemingway/DCNR sandwort mitigation plan. While he complained that the mitigation plan was "vague and not much of a plan at all," Dr. Schuyler provided no basis for

that opinion and no basis to even begin to question its adequacy

Dr. Schuyler testified that there were other suitable habitats for the sandwort in the area. Indeed, his affidavit submitted with the Petition states that, "the sandstone ridges near Scranton, that provide habitat for the sandwort, run in a northeast/southwest direction for over four miles." Schuyler Affidavit, ¶ 9. He further testified that that area designated by the mitigation plan for compensatory sandwort development was suitable habitat for the sandwort. All he could say was that the Site is a "better" habitat. At the end of the day, Dr. Schuyler gave no evidence whatsoever that the mitigation plan is inadequate.

After hearing Dr. Schuyler testify, it was quite clear that Dr. Schuyler's "opinion" that the mitigation plan is "vague" and "not much of a plan at all" was basically a statement of Dr. Schuyler's value judgment that this particular habitat should not be allowed to be destroyed. As alluded to earlier, that value judgment has already been made by the Legislature, the DCNR and the Department through its regulations. That value judgment is that the owner can destroy sandwort on his property if that landowner makes sufficient mitigation for the loss. Here, there is no evidence at all that the mitigation plan is insufficient.

It is significant to note at this point that the sandwort claim was the most time critical for Appellants. The emergent need to stop further activities at the Site revolved primarily around the fact that once the construction activities were completed that the sandwort and its habitat at the Site would be gone forever without possibility to restore them.

Discussion of The Remainder of The Case

Standing.

We begin our discussion of the remaining aspects of the Petition with the standing question. Permittee and the Department argue that none of the Appellants in this case have

standing. On that basis alone we should deny the Petition. We conclude that, at this point, it is very clear that Mrs. Van Louvender has not established a likelihood that she will be able to show that she has standing in this case and that PRIZM's and PREIT's claim to standing is clouded at best.

Mrs. Van Louvender

It is very clear that Mrs. Van Louvender has not established that she is likely to have standing in this case. She said that her interest in the case is that she does not want to see any more development of the mountain. She said that she had been against the development of the ski resort there and she just did not want any more development. With respect to any potential interest she might have regarding Spring Brook, she lives on Boise Street in Moosic about four blocks away from Spring Brook in the general vicinity where Spring Brook flows into the Lackawanna River. However, with reference to the Lackawanna River, her house is upstream of where Spring Brook flows into the Lackawanna River. Her house is not only outside the 100 year flood plain of Spring Brook, it is outside of even its 500 year flood plain. Ex. C-7, Ex. C-7a. Not surprisingly, she admitted that her house has never been effected by flooding from Spring Brook. She admitted that it was not she but her sister-in-law, family and friends whom she was worried about being affected by past or potential future flooding of Spring Brook. She further admitted that she does not use or enjoy the Spring Brook watershed. There was no offer of evidence that she used or enjoyed the Stafford Meadow Brook or its watershed.

Her only testimony which even comes close to raising a glimmer of hope for her on standing is her account of how development on the mountain, in her view, had caused wild birds of prey such as turkey vultures and hawks to descend into her neighborhood and her yard. According to Mrs. Van Louvender, these wild birds of prey had eaten birds using her backyard

bird-feeder. This claim seems to be unrelated to Spring Brook or its watershed as such. Even presuming that such allegations if true might establish Mrs. Van Louvender's standing, there was no proof whatsoever that this supposed predatory bird behavior is due to any development on the mountain or that it would be an effect of the development of the Shoppes at Montage.

Based on the above we do not think it is difficult to conclude that there is very little chance that Mrs. Van Louvender will be able to demonstrate that she has standing in this case to challenge the Permit. *See Greenfield Good Neighbors v. DEP*, 2003 EHB 555, 564-569.

PRIZM and PREIT

PRIZM's and PREIT's claim to standing is different and very discreet. Their claims are that their nearby competing malls will be economically devastated if the Shoppes at Montage opens. Testimony on that point was provided by Mr. Snyder, the Vice President of Leasing for PREIT whose responsibility covers about 10 malls in the northeast area, including Viewmont in Scranton and Wyoming Valley Mall in Wilkes-Barre, and Mr. Walsh of Boscovs, the anchor tenant of the Steamtown Mall in Scranton. Mr. Snyder and Mr. Walsh also made vague claims that the areas surrounding their malls will be adversely economically impacted by their malls being adversely economically impacted.

These witnesses from PRIZM and PREIT provided credible testimony that their commercial ventures would be "devastated" if the Shoppes at Montage opened. There is no allegation that PRIZM or PREIT use or enjoy the Spring Brook or its watershed or that they will in any way be effected, other than economically, by the proposed Shoppes at Montage.

The testimony of "doomsday" for the competing malls was not un-contradicted as Mr. McDonough, the developer of the Shoppes at Montage, explained that the Shoppes at Montage would compete head to head for only a small percentage the retail vendors currently in the other

malls. Thus, whether the other malls would really be "devastated" by the Shoppes at Montage is an open question and expert testimony on both sides would be needed to resolve the question. For now, however, for the purposes of the Petition, we will accept PRIZM and PREIT's testimony that the Shoppes at Montage would be "devastating" to their malls.

Even taking Mr. Snyder's and Mr. Walsh's testimony as true, the standing of PRIZM and PREIT is not without serious challenge. As we have noted, the main complaint is that the public notice of the permit application did not provide notice that the point of discharge of some of the flow would be Spring Brook and its watershed. None of the three competing malls are located near Spring Brook nor are they within the Spring Brook watershed. PRIZM and PREIT do not contend that they have any connection to Spring Brook or its watershed. Permittee and the Department would argue that this leaves their standing as rising or falling solely on their economic/commercial interest as competitors.

The Board has precedent which would indicate that standing can be based upon the economic interest of a competitor. *See, e.g., Perkasie Borough Auth. v. DEP*, 2002 EHB 75; *Highridge Water Auth. v. DEP*, 1999 EHB 27; *Wazelle v. DEP*, 1984 EHB 748; *Mill Service, Inc. v. DER*, 1980 EHB 406. We also have contrary precedent. *See McCutcheon v. DER*, 1995 EHB 6. In *McCutcheon*, we held that a company which had developed an alternative daily landfill cover (ADC) had no standing to appeal a permit modification for a landfill to use a competing form of ADC. The Board held that this interest was not within the scope of the interests protected by the Solid Waste Management Act in that the Act's enumerated purposes does "not contain any statement regarding the protection of one private enterprise's interest over that of another." *Id.* at 9. The *McCutcheon* case has been cited with approval on that point, albeit in a different context, within the last three years in *Brunner v. DEP*, 2003 EHB 186, 189.

Permittee points out that even in the cases in which economic interest was enough to support standing, the competitive injury flowed directly from the DEP action or permit at issue. For example, in *Mill Service*, a competitor in the waste disposal business is impacted by DEP's granting of a waste disposal permit to another party. Here, they say the injury is remote because the Permit only allows the moving of dirt and that activity does not cause competitive injury. Permittee refers us to *Tessitor v. DER*, 682 A.2d 333, 337-38 (Pa. Cmwlth 1996) as being instructive. There the Court found that an appellant had not established a direct causal connection and did not have standing to challenge the grant of a water obstruction permit on the basis that such permit would increase traffic congestion and potentially impact air quality.

Without deciding the issue now, we think that Permittee's argument on that point can be seen as a bit narrow. A mall project such as this one requires a host of different permits. No one permit itself allows or permits the mall but there would be no mall without every one of the required permits.

Permittee also points us to the case of *Nernberg v. City of Pittsburg*, 620 A.2d 692 (Pa. Cmwlth. 1993) as commanding a result that PRIZM and PREIT would have no standing here. The facts of that case are simple and its lesson is clear. In *Nernberg*, a zoning conditional use was granted to a developer to build student apartments near the University of Pittsburgh. The appellant was a competing landlord. The trial court had dismissed the appeal for lack of standing finding that "the policies underlying [the zoning code] do not appear to be designed to protect someone in [appellants'] position." *Id.* at 696. The trial court had further noted that the harm alleged was the possibility of competition and that competitive harm was not a sufficient basis to confer standing in a zoning case. *Id.* The Commonwealth Court affirmed.

The Commonwealth Court analyzed the issue under the standing provisions of Section 752 and 702 of the Administrative Code which it specifically noted provided a more liberal standard for standing than does *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 296 (Pa. 1975), which is the standard the Board uses. Nevertheless, the Court noted that in *William Penn Parking Garage* the Court had noted that standing will be easier to find where protection of the type of interest asserted is among the policies underlying the legal rule relied upon by the person claiming to be aggrieved. *Id.* at 695 *citing William Penn Parking Garage*, 346 A.2d at 284. The Commonwealth Court then went on to say, "[w]hile some laws and regulations are designed to protect against competitive injuries, many are not". 620 A.2d at 696. For example, disappointed bidders do not have standing on the basis of competitive injury to sue the awarding of a contract. On the other hand, the Liquor Code, the Court observed, does give rise to standing to challenge the granting of a liquor license on the basis of competitive injury alone. *Id.* The Court concluded that the zoning laws are "not part of a regulatory scheme to protect against competitive injury which gives rise to standing in a zoning case." *Id.*

Employing the rationale of *Nernberg*, it is questionable whether it would be concluded that the Pennsylvania Clean Steams law and its regulations would be recognized as part of a regulatory scheme aimed at protecting against competitive injury. On the other hand the issue is not clear cut. In *Mill Service* the Board noted that:

> Clearly, a competitor has a more pecuniary and less abstract interest in an administrative agency action affecting his competitors than one whose interest is merely that other citizens should comply with the law and this interest is immediate and direct in that if one competitor can avoid the law while the other must abide by it the latter is placed at a competitive disadvantage. Thus, standing should be accorded a competitor pursuant to the tests set forth in *William Penn, supra.*

1980 EHB 406, 408. PRIZM and PRIET have asserted in this case that they are seeking to make

sure that Hemingway complies with the law just like they did when they built their malls. It could be concluded that PRIZM and PREIT are trying to make sure their competitors comply to the same degree with environmental laws as they did when they built their malls. That interest is thus very much an environmental one and is certainly of the same type that is among the policies underlying the clean streams law and the NPDES permitting program. That point was made, *albeit* in a different context, in the undersigned's concurring opinion in *DEP v. Leeward Constr.*, 2001 EHB 870. In that case, a civil penalty case, the undersigned noted that the Department should be more aggressive in making sure that intentional violators are stripped of all profits that might be associated with the job because allowing the violator to retain any profit at all,

> is not only wrong, but also it puts at a competitive disadvantage companies that take the steps and incur the costs to perform their activities in a law abiding fashion. This latter situation creates a synergy of adverse effect by simultaneously promoting the degradation of the environment and undermining the competitive free market system.

2001 EHB at 918 (Krancer, J., concurring).

In addition, there is more than just a bare economic competitive interest of PRIZM's and PREIT's in this case. In addition to their interest as competitors, they are members of the public who were entitled to notice of the change in the permit application but did not receive it. That interest is distinct and separate from their interest as competitors. The right to public notice, by its very nature, is a right granted to everyone in the public. That would include economic competitors and everyone else. It is virtually definitional that the notice provisions of the law are intended to protect the right of the public to have proper notice and that protection of that right to receive public notice is the essence of the policy underlying the legal rules requiring public notice.

Everyone has the right to try to convince the Department to not issue the permit before

the permit is issued. The Appellants here are within the definition of those intended to be served and protected by the public notice provision governing the NPDES permitting process. Each of the Appellants here was entitled to have the change of plan re-noticed before the Permit was issued.

PRIZM and PREIT may also have a *Florence Township* problem here. Even if their standing as to public notice were clear, they may have trouble asserting any other claim relating to the supposed substantive deficiencies of the Permit. Under *Florence Township*, an appellant must have standing on each individual objection the appellant wishes to challenge. *Florence Township v. DEP*, 1996 EHB 282, 289-90. It is doubtful that under *Florence Township* PRIZM and PREIT would have standing to assert any claim beyond lack of notice.

It is true that the Board has expressed doubt about the continuing validity of the *Florence Township* approach. *See Riddle v DEP*, 2001 EHB 355, 361 (a number of Board Judges believe Florence Township and holdings like it are out of date). *Florence Township* has not yet been overruled though. If, but only if, *Florence Township* were overruled would PRIZM and PREIT's standing as to lack of notice, if indeed they have even that, constitute standing to challenge the substantive allegations regarding alleged supposed flooding of Spring Brook, the alleged supposed increased sediment and scouring or the alleged supposed reduced infiltration to Stafford Meadow Brook.

The upshot of this discussion is not to come to any definitive conclusions about the standing of PRIZM and PREIT. This is but a supersedeas decision. However, what is clear from what we have discussed is that PRIZM's and PREIT's claim to standing in this case is far from clear. If we were talking about property title then we would have to say that PRIZM's and PREIT's claim to the title of standing is quite clouded and there are some substantial questions

regarding that title. In short, one can say about standing that there is a real question whether PRIZM and PREIT will be here at the end of the day.[3] There is further question whether even if they were here to assert the lack of notice claim whether they would be able to assert any claim beyond that.

Lack of Public Notice.

We think that the Appellants have shown that they are likely to succeed in showing that the Department erred in issuing this Permit, which the substantial change effectuated after the public hearing, without public notice of the substantial change and that, therefore, a supersedeas is warranted. One need only compare the *Pennsylvania Bulletin* notice of the permit application and the newspaper notice of the public hearing with their reference to discharge to Stafford Meadow Brook only and the notice of the Permit issuance with its reference to discharge to the Stafford Meadow Brook and the Spring Brook against the legal backdrop of 25 Pa. Code § 92.61(a)(4) which requires that public notice of NPDES applications contain, specifically and particularly, notice of the waterway to which each discharge will occur to see that this situation is very problematic.

William Manner, Acting Environmental Program Manager, Watershed Management Director, the senior official responsible for approving the Permit who testified, characterized the change of plans from discharge to the Stafford Meadow Brook and its watershed to discharge to the Stafford Meadow Brook watershed and the Spring Brook and its watershed as a "substantial change." We agree and as such, we think that re-notice was required. *See Hughey v. Gwinnet County*, 609 S.E.2d 324 (Ga. 2004) (if a change to a pending NPDES permit is a substantial one then re-notice to the public is required). The Department's Regulations recognize that a change

[3] The same can be said about Mrs. Van Louvender. Her claim to standing is weaker than PRIZM's and PREIT's. She does not even have the economic interest as a competitor that PREIT and PRIZM have.

which involves discharge to a new or different discharge stream and watershed is a substantial matter. 25 Pa. Code § 92.61(a) requires "[p]ublic notice of every complete application for an NPDES permit will be published by the Department in the *Pennsylvania Bulletin*[,]" and subsection 92.61(a)(4) provides that the public notice shall include "the name of the waterway to which each discharge is made and a short description of the location of each discharge on the waterway indicating whether the discharge is a new or an existing discharge." 25 Pa. Code § 92.61(a)(4). While it is true as Permittee says in its brief, "[c]learly, it is not contemplated that every change made to a project would warrant new public notice and a new public comment period." Clearly as well, though, the addition of a new waterway to which a discharge is to be made is not just any change. It is a "substantial" one the subject matter of which the regulations specifically make a point must be part of the public notice process. Thus, if there is any change in an application which would warrant new public notice, this is such a change. Also, even if the amendments to the application which were effectuated after the August 11, 2005 public hearing are characterized as a new "complete application," it is clear from this regulation that, at a minimum, the change, involving as it does a plan to discharge to a different waterway and watershed, has to be considered a substantial one. Being a substantial change, public notice was required.

Permittee's and the Department's attempt to disarm the lack of notice problem is quite lame. They attempt to turn this into a defective notice case instead of a no notice case by arguing that there was anecdotal historical knowledge that discharge into the Stafford Meadow Brook was known to also be a discharge into the Spring Brook. They brought three witness who live in Moosic who testified, basically, that it is common knowledge in the area that, to paraphrase, "water comes down the mountain both ways." They attempted to make the point that people

must know this because, low and behold, people from Moosic which is on the Spring Brook did appear at the public hearing. They also tried to render that argument in a more technical fashion. Permittee attempted to elicit testimony from two expert witnesses that water flowed from Stafford Meadow Brook into Spring Brook at a point where the Stafford Meadow Brook "bifurcated."

Both of these attempts by Permittee fail. First, anecdotal legend of the mountain does not get over the problem of what the notice said, what it did not say, the "substantial change" that was wrought by the revision after the public hearing and what 25 Pa. Code § 92.61(a)(4) provides. The Permittee's "technical" basis is infested with problems and its attempt to establish it actually resulted in two of their experts contradicting and disagreeing with each other. Mr. Stachokus testified, without contradiction, that the two watersheds are separate and distinct watersheds. He also specifically disagreed with a statement in the original Hemingway permit application that the Stafford Meadow Brook drains into the Spring Brook. He disavowed that statement of the application saying that this statement was from a "prior engineer" and that it was wrong. According to Mr. Stachokus, the only exception would be that in the 100 year storm event there may be some cross over of water into the Spring Brook. Mr. Palumbo, Mr. Stachokus's boss, testified that on "high water occasions" water would flow over from Stafford Meadow Brook into Spring Brook at the point of "bifurcation." Mr. Palumbo disagreed with Mr. Stachokus's disagreement about the statement in the application about the Stafford Meadow Brook draining into the Spring Brook.

It is likewise not significant in this regard that the original permit application happened to list Spring Brook as a "secondary receiving water." The fact remains that the public notice in the *Pennsylvania Bulletin*, the notice of the public hearing, provided notice of the discharge to only

the Stafford Meadow Brook and the Permit issued less than a month after the public hearing called for discharge to the Stafford Meadow Brook and Spring Brook.

For these reasons we find that the Appellants are very likely to succeed on the merits of their claim that the Department erred in issuing this NPDES permit without re-noticing to the public the substantial change effectuated to the permit application after the August 11, 2005 public hearing.

Diversion/Substantive Issues.

There is no disagreement that the Permit results in more drainage to the Spring Brook and its watershed than exist today under pre-development conditions. However, we heard testimony at the supersedeas trial which convinces us that there is no danger that this additional drainage will cause any flooding problems along Spring Brook. Mr. White of the Department provided convincing testimony that flooding is a function not of the amount of drainage but the flow rate thereof and that the flow rate post-development is equal to or less than the flow rate pre-development. Mr. Palumbo also provided convincing testimony that flooding of Spring Brook would not be caused by the additional drainage to Spring Brook. On the other hand, Mr. Ostrowski, Appellants' expert, provided no testimony or evidence that his "could" scenarios were anything other than that.

As for the "potential" for increased sediment loadings which "could" occur, we heard evidence to the contrary from Mr. D'Onofrio, who was the Department official who was responsible for reviewing that aspect of the revised permit application. He testified that he reviewed the revised permit application and its proposed "best management practices" which would be employed and that he had concluded that there would not be an increase in sediment loading to the Spring Brook. There was no evidence that Mr. Ostrowski's "could" scenario as to

sediment loadings was anything other than that.

We think that the evidence that the rate of flow to Spring Brook shows that no "scouring" effect would happen along that brook. In any event, Mr. Ostrowski was not able to provide any evidence that this "could" scenario was anything more than that.

As for PRIZM's and PREIT's allegation that Stafford Meadow Brook "could" be deprived of substantial base flow necessary to maintain its water quality, we heard testimony from Permittee and the Department which convinces us that the rate of infiltration to Spring Brook will be higher post-development than pre-development. In any event, again, Appellants were not able to provide any evidence that this "could" scenario was anything beyond a "could."

As Judge Renwand wrote in words which are applicable here:

> At this stage in cases involving the issuance of a permit, the burden of proof is no longer on the permit applicant but on the *party challenging the permit* to show the permit should not have been issued. Appellants, therefore, must prove by a preponderance of the evidence that the permit should not have been issued. 25 Pa. Code § 1021.122 (a) and (c) (2). To establish one's case by a "preponderance of the evidence" means that "the evidence in favor of the proposition must be greater than that opposed to it. . . 'It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established.'" *Noll v. DEP*, EHB Docket No. 2003-131-K (Adjudication issued May 20, 2005), *slip op.* at 11 (citing *Bethenergy Mines, Inc. v. DER*, 1994 EHB 925, 975 (quoting *Midway Sewerage Authority v. DER*, 1991 EHB 1445, 1476)).
>
> In other words, the appellants may not simply raise an issue and then speculate that all types of unforeseen calamities may occur. They must come forward and prove their allegations by a preponderance of the evidence. When they raise technical issues they must come forward with technical evidence. In many cases, they need expert testimony to establish their position.
>
> Where the appellants argue that the granting of a permit will destroy or pollute a valuable natural resource it is not enough to meet their burden to simply focus on the value of the natural resource. The natural resource's value is usually acknowledged by all parties involved, including the Department whose primary function it is to protect the environment. They must come forward with evidence, usually in the form of expert testimony, to prove their claims. In some cases, not only does the party making the claim not come forward with evidence proving their claims, but often, in cases of this type, the Department and permittee will

> come forward with a tremendous amount of expert testimony refuting the claims of the third-party appellant. In such situations, the Board has no choice but to follow the law and dismiss the appeal. We cannot revoke a permit because someone raises a concern about a natural resource if that concern is not supported by a preponderance of the evidence. An appellant cannot simply come forth with a laundry list of potential problems and then rest its case. It must prove by a preponderance of the evidence that these problems have occurred or are likely to occur. We are a trial court, expert in environmental issues including technical matters and, as such, our decisions must be based on the record developed before us.

Shuey v. DEP, No. 2002-269-R, *slip op.* at 54-56 (Opinion Issued August 10, 2005) (emphasis in original).

We are quite bothered though by the evidence which showed that the Department did not meaningfully consider whether the additional flow to Spring Brook could cause a flooding problem. It relied primarily on a letter from the Moosic Borough Engineer which reported that the revised application was in conformance with the Borough's stormwater management plan.

The Department's own pre-permit analysis of that fact amounted to nothing more than an off-the-cuff reaction that the Stafford Meadow Brook is a small watershed and the Spring Brook a big one, so adding the additional flow would be fine. At trial, Mr. Chernesky summed up DEP's pre-permit analysis in terms that we think was dismissive and even somewhat cavalier. He said that the revision to the application was nothing that made bells or whistles go off and that drainage into the other watershed did not present a concern because it was a much larger drainage area and it could accommodate the additional drainage. He said the additional drainage to Spring Brook was "like a drop in the bucket." Appellants' Brief, p. 19 citing Chernesky Tr. 149). The more deliberate, thoughtful and detailed consideration and analysis of the issue came only in anticipation of the supersedeas trial. As a hedge, the Department says that it was either not allowed to consider potential flooding impacts on Spring Brook or that it was not required to. It cites *O'Reilly v. DEP*, 2001 EHB 19, 34-37, which it says establishes that the NPDES

program, which is a DEP responsibility, focuses on sediment during construction issues only and that the flooding question is a question of long-term storm water management which is a municipal matter and never the twines shall meet.

Based on what we have heard in testimony and projecting the flooding issue out to the end of this case it appears likely that, regardless of the Department's failure to meaningfully consider the issue before it issued the Permit, we would conclude, as a matter of our *de novo* review, that flooding on Spring Brook is not a danger here. Thus, the legal question presented by DEP's lack of review of the question before issuing the Permit may not need to be resolved in the context of this case.

However, there are reasons that even under our *de novo* review approach that it may be unlikely that the Board would adopt the extremely compartmentalized approach to the NPDES permit application review process in this case. Mr. White testified that the *raison d'etre* and the genesis for the proposed change in the permit application to take some flow which had been planned to discharge into Stafford Meadow Brook and put it into the Spring Brook was concerns raised at the public hearing on August 11, 2005 about potential flooding on Stafford Meadow Brook. He testified that the revision was in response to comments at the public hearing that Stafford Meadow Brook and its watershed are prone to flood. The "Comment/Response Document" which the Department published after the August 11, 2005 public hearing shows quite clearly that the reason for the change was the concerns raised by residents along the Stafford Meadow Brook about potential flooding along Stafford Meadow Brook and that the change effectuated in the revised permit application to direct some flow to Spring Brook "addresses concerns regarding the potential for the project to exacerbate the potential for flooding in Scranton's South Side District." Ex. P-9, p. 3.

Moreover, Department witnesses Mr. Chernesky and Mr. White testified that the revised application "made sense" and was "conceptually okay" because, in essence, the Spring Brook and its watershed were less prone to flooding than the Stafford Meadow Brook and its watershed. As eluded to earlier, these sentiments can be characterized either "gut sense" or "educated guesses." There were no contemporaneous calculations to confirm that what sounded like it made sense or was conceptually okay actually did make sense and was okay.

Under the facts here, both the genesis and attempted rationale for the revision of the application had to do with the supposed flood prone nature of the Stafford Meadow Brook and the ability of the Spring Brook and its watershed to handle the new flow. Under those circumstances it is very difficult to credibly maintain, as DEP does, that it was either not allowed to or not required to analyze whether Spring Brook and its watershed would be adversely impacted in terms of potential flooding from the additional flow being directed thereto.

Moreover, even if we did adopt the Department's highly compartmentalized concept of who may and may not review what, we are not sure whether the Board would conclude that the Department did enough here. The letter it relies on from the Borough Engineer states that "it is our opinion that the revised stormwater management plan is [in] accordance with the Moosic Borough [Act 167] Stormwater Management Plan." Ex. C-6. It is not clear what this letter means with reference to the question of potential flooding along Spring Brook. We would need to hear more about this letter and probably from the Moosic Borough Engineer to conclude that even this letter constitutes sufficient consideration by the municipality of the potential of flooding along Spring Brook related to this project. In this regard, Appellants point out, we think quite correctly, that the Act 167 Stormwater Management Plan for Spring Brook would include existing flow to Spring Brook and not drainage which had previously been directed to the

Stafford Meadow Watershed as does this project.

We do not have to nor will we resolve this quandary now on supersedeas. It is sufficient for our supersedeas analysis that we think that the Appellants do have a likelihood of showing that the Department committed error, under the facts of this case, by not undertaking meaningful analysis to confirm that directing Spring Brook to more drainage would not cause a flooding problem but that such error is likely harmless in that under our *de novo* review we would likely conclude that, in fact, there is no threat of flooding from this additional drainage to Spring Brook.

Balance of the Equities and Harms, Relief.

We have already discussed we will take on face value for now PRIZM's and PREIT's claim that the development of the Shoppes at Montage will be "devastating" to their respective commercial ventures. We also heard testimony from Mr. McDonough of Hemingway, which we accept, that a delay now in the earthmoving activities associated with the Permit will spell doom for the Shoppes at Montage project.

So what we have at the end of the supersedeas trial is the following. PRIZM and PREIT have to overcome some ominous challenges to their standing to make any claims in this appeal. If they do have standing, they may very well have standing only to challenge the procedural defect of lack of proper notice. They have made a substantial showing of likelihood of success on the merits of that claim. They have also shown a reasonable likelihood of success on their claim that the Department failed to consider the potential for flooding along Spring Brook. However, as noted before, the future of that claim is seriously in question due to the host of evidence prepared for and presented at the supersedeas trial which showed that flooding along Spring Brook would not result from the issuance of this Permit. Appellants have not shown a

likelihood of success on the merits of their substantive claims regarding possible flooding of Spring Brook, increased sediment and scouring along Spring Brook and less infiltration to Stafford Meadow Brook. We also know that even if challenges to the Permit relating to the discharge to Spring Brook are successful that all that would need to be done to correct the problem to remove the discharge to Spring Brook would be to effectuate some engineering changes to the discharge facilities to remove the discharge to Spring Brook and make the discharge completely to Stafford Meadow Brook which was the original plan.

Under other circumstances where the petitioner had shown a highly likelihood of success on standing or on its substantive technical claims we would not hesitate to revoke the Permit and send the Permit back for re-noticing due to the Department's error in that regard. In terms of timing, the Permit is new and fresh and we are not facing a case where we are at trial one or two years later and have the quandary of what to do so far down the road with a clear case of Department error in failure to render public notice. After all, once the permit is issued, the situation changes permanently for anyone challenging it. Judge Renwand pointed this out in *Shuey* when he wrote:

> At the *permitting* stage, the burden is on the *permit applicant* to convince the Department that it meets all the requirements necessary for issuance of the permit. This includes, among other things, ensuring that the permitted operation will not pollute the air or waters of the Commonwealth and that it complies with all relevant environmental statutes and regulations. At the permitting stage, the Department receives input from the public, including concerned citizens. Those citizens are provided with an opportunity to come forward with their concerns which are then investigated by the professional staff at the Department. Many times concerns are raised by citizens that must be addressed by the technical staff and other professionals hired by the permit applicant. In some cases, issues raised by concerned citizens are such that, after more investigation by the Department and further response by the professionals employed by the permit applicant, the Department decides not to issue the permit or imposes substantial conditions in the permit.

> If the Department issues the permit, third parties, including concerned citizens, have the right to appeal the permit issuance to the Pennsylvania Environmental Hearing Board. The Environmental Hearing Board is the state trial court for environmental matters. At this stage in cases involving the issuance of a permit, the burden of proof is no longer on the permit applicant but on the *party challenging the permit* to show the permit should not have been issued. Appellants, therefore, must prove by a preponderance of the evidence that the permit should not have been issued. 25 Pa. Code § 1021.122 (a) and (c) (2). To establish one's case by a "preponderance of the evidence" means that "the evidence in favor of the proposition must be greater than that opposed to it. . . 'It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established.'" *Noll v. DEP*, EHB Docket No. 2003-131-K (Adjudication issued May 20, 2005), *slip op.* at 11 (citing *Bethenergy Mines, Inc. v. DER*, 1994 EHB 925, 975 (quoting *Midway Sewerage Authority v. DER*, 1991 EHB 1445, 1476)).

Shuey, slip op. at 54-55 (emphasis in original). Thus, the balance of power shifts after permit issuance in favor of the Permittee and the Department.

Revocation here, however, would not be appropriate. Revocation, as a practical matter, would be to grant Appellants total victory at this stage because to revoke the Permit and send it back for re-noticing would be to kill the Shoppes at Montage. In light of the very precarious status of Appellants' case both in terms of standing and in terms of the technical aspects of its challenges to the Permit's inclusion of Spring Brook as a discharge stream that would not be fair or appropriate. Moreover, even if Appellants' standing is vindicated and they would succeed in any aspect of the technical challenge to the discharge to Spring Brook, all that would have to be done is some engineering at the Site to remove flow to Spring Brook and put it all into Stafford Meadow Brook. That could be done at any time. As we noted before, the Appellants' major claim for immediate relief on a technical basis is related to their sandwort claim. That claim has shown no likelihood of success on the merits. With that claim went the Appellants' strongest assertion to require that the Permit be revoked now.

With all of this in mind, we think that the appropriate relief here is that which Judge

Labuskes talked about in *Kleissler v. DEP*, 2002 EHB 737. In that case, which involved a challenge to the adequacy of public notice, Judge Labuskes said this in denying summary judgment of the issue:

> [i]t would seem that the appropriate remedy, in the event he prevails in proving the claim, would be to leave the permits in place, but require the Department to readvertise the permits, accept new comments, and consider those comments in deciding whether *it* wishes to suspend or revoke the permits or require PGE to provide additional information. *See Fontaine v. DEP*, 1996 EHB 1333, 1356. Other than vindicating the principle of public involvement, we question whether such relief would have any practical value at this stage, but we look forward to receiving evidence and argument on the question.

Id. at 750-51 (emphasis in original). The eventuality never came to be in *Kleissler* as the case settled before Judge Labuskes could decide what to do with the notice issue in that case. In this case, though, the eventuality is here now. We will thus, require the Department to re-notice the permit application but we will leave the Permit in place while that happens. The Department will accept new comments and consider those comments in deciding whether it wishes to suspend or revoke the Permit or require Hemingway to provide additional information. We realize that PRIZM, PREIT and Mrs. Van Louvender may find this less than satisfactory in light of what we have just said and cited Judge Renwand saying in *Shuey* regarding the burden of proof pre-permit issuance and post-permit issuance. However, in light of the substantial weakness in their case as we have been discussing, that is the most they are entitled to at this time. We also think this approach strikes the appropriate balance between the substantial interest in effective and proper public notice and PRIET's, PRIZM's and Mrs. Van Louvender's showings in this litigation.

An appropriate order follows.

COMMONWEALTH OF PENSYLVANIA
ENVIRONMENTAL HEARING BOARD

PRIZM ASSET MANAGEMENT COMPANY, PREIT SERVICES, LLC, AND DIANN VAN LOUVENDER	:	
v.	:	**EHB Docket No. 2005-279-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HEMINGWAY DEVELOPMENT LIMITED PARTNERSHIP, Permittee	:	

ORDER

AND NOW, this 24th day of October 2005, it is hereby ordered that the Petition For Supersedeas is **granted in part** and **denied in part**. The Department shall re-notice the revised permit application with the notice stating, at a minimum, that the revised application calls for discharge into the Stafford Meadow Brook and the Spring Brook. The Department will accept public comments for a period of 30 days from the date of the publication of the notice. The Department shall consider those comments in deciding whether is wishes to suspend or revoke the Permit, to require Hemingway to provide additional information or to take no action with respect to the Permit. The Permit shall remain in effect during the time that the Department re-notices the revised application, accepts comments and considers them.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

DATED: October 24, 2005
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LOWER SALFORD TOWNSHIP AUTHORITY AND UPPER GWYNEDD-TOWAMENCIN MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2005-100-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 25, 2005**

OPINION AND ORDER DENYING MOTION TO DISMISS

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Department's Motion to Dismiss this appeal of a TMDL on the basis that the TMDL is an action of the federal Environmental Protection Agency and not the Department of Environmental Protection is denied because there is a legitimate factual and legal dispute regarding whether this TMDL was promulgated by EPA or DEP.

Introduction

This case involves Appellants' appeal to this Board of the Total Daily Maximum Load (TMDL) for Skippack Creek. The TMDL was promulgated, depending on whom you ask, either by the federal Environmental Protection Agency (EPA) or the state Department of Environmental Protection (DEP or Department). The Department says it was promulgated by

EPA and that is the crux of its Motion to Dismiss (Motion) which is before us. The Department says we have no jurisdiction because the TMDL was not its action, it was the action of the EPA. The Appellants say that it was promulgated by DEP, or, at the very least, there is a live dispute about who promulgated it.

Factual, Legal and Procedural Background

The federal Clean Water Act, 33 U.S.C. §§ 1251-1387 (CWA), prohibits discharges of pollutants from point sources other than those allowed by a permit. These permits are commonly known as NPDES permits, NPDES being an acronym for National Pollutant Discharge Elimination System. NPDES permits apply to point sources. The CWA does not have a direct permitting program for non-point sources but it requires states to reduce non-point source pollution through functions such as best management practices for water bodies that cannot maintain or attain water quality standards. Water quality standards consist of a designated use for a water body and criteria that specify the levels of a pollutant or pollutants that the water body can assimilate without impairing that designated use. An example of a designated use would be recreation or fishing.

The TMDL program implements water quality standards and is based on the relationship between pollution sources and actual in-stream water quality conditions. The TMDL establishes allowable loadings or other quantifiable parameters for a water body thereby providing a basis to establish quantifiable water quality-based controls.

Section 303(d) of the CWA, 33 U.S.C. § 1313(d), requires states to identify and prioritize those water bodies within their boundaries for which applicable technology-based effluent limitations or other pollution control mechanisms required by the CWA are not stringent enough to achieve water quality standards applicable to such water bodies. These are so-called Section

303(d) Lists. States are required to send their respective Section 303(d) Lists to EPA for review and approval.

Under Section 303(d)(1) of the CWA, states must develop TMDLs for all water bodies on their respective Section 303(d) Lists. A TMDL is the total maximum daily load of a pollutant or pollutants that a water body can receive and still meet applicable water quality standards. DEP designated the Skippack Creek as impaired and put it on the Commonwealth's Section 303(d) List in 1996.

Many states, including Pennsylvania, did not meet the CWA's original deadlines for establishing Section 303(d) Lists and promulgating TMDLs. Consequently, EPA was sued in federal court in January 1996 in a case captioned, *American Littoral Society and Public Interest Research Group of Pennsylvania v. United States Environmental Protection Agency, Region III*, Civ. No. 96-489 (TMDL Lawsuit). The TMDL Lawsuit was settled by the entry of a Consent Decree in April 1997 (Consent Decree). The Consent Decree set forth deadlines for the development of TMDLs for certain waters on the Commonwealth's Section 303(d) List including the Skippack Creek watershed.

The EPA and DEP entered into a Memorandum of Understanding (MOU) regarding Section 303(d) of the CWA in April 1997. We assume that the MOU was related to the TMDL Lawsuit. In relevant part, the MOU provides that DEP, "subject to available resources," will use "its best efforts" to work with EPA to establish required TMDLs remaining on the 1996 Section 303(d) List within 10 years of the execution of the MOU. Appellants' Brief, Ex. B, ¶ IV. C.

Activity regarding the Skippack Creek TMDL picked up in late 2004. Various public meetings were held and a draft Skippack Creek TMDL became available in early 2005. We will not now get into any detail about the process which culminated in the appearance of the final

Skippack TMDL because those issues are not germane to the issue we deal with here which is DEP's Motion to Dismiss on the basis that the TMDL is not a DEP action. Those "process" issues may become relevant later in this litigation. To get to the point, the final Skippack Creek TMDL appeared on EPA's website on or about April 15, 2005. The TMDL established is 0.24 milligrams per liter total phosphorus, a level which must be met throughout the entire Skippack Creek Watershed. The document itself, once printed out, is about one and a quarter inches thick and bears an EPA coversheet. It states that it is "established on April 9, 2005" and bears a signature line for "John Capacasa, Director, Water Protection Division, EPA, Region III."

The Department expressed a desire early in this case to bring a motion to dismiss on what it considers a threshold matter. The Department asserts that this TMDL is not an action of DEP at all, it is an action of the EPA. As such, the Board has no jurisdiction and the matter should be dismissed. The Department filed its motion and supporting memorandum on September 6, 2005. Appellants filed their response and memorandum on October 11, 2005. The Department filed its reply on October 21, 2005.

The basis for DEP's argument rests upon two documents. First, DEP submits the four paragraph affidavit of Thomas M. Henry of the EPA in which he states in paragraph No. 3 that, "in compliance with Paragraph 15 of the Consent Decree, EPA Region III established a TMDL for Skippack Creek...on April 9, 2005." Henry Affidavit, ¶ 3. This is an apparent reference to the second sentence of Paragraph 15 of the Consent Decree which provides that, "[i]f Pennsylvania fails to establish TMDLs...according to [schedule], then EPA shall establish [the applicable] TMDLs." DEP Brief, Ex. 2, ¶ 15. Mr. Henry further states in paragraph No. 4 that:

> The Pennsylvania Department of Environmental Protection ("PADEP") cooperated with and provided technical support to the EPA in the development of the TMDL for the Skippack Creek. The TMDL itself, however, was established by EPA Region III and was signed by the Director, Water Protection Division for

> EPA Region III. The TMDL was not signed by any representative of PADEP or the Commonwealth of Pennsylvania.

Henry Affidavit, ¶ 4. Second, the Department points to the TMDL itself which, on its face, says that it was promulgated by the EPA. The TMDL document, on its second page, states that the Skippack TMDL was established on April 9, 2005 by EPA and it has a signature space for John Capacasa, Director, Water Protection Division, EPA, Region III.

Based on these two items, the Department contends that the Notice of Appeal (NOA) which alleges that the TMDL is a state DEP action cannot stand. The legal support for dismissal of the NOA based on these two items just described is a line of cases which provides that when the sufficiency of a complaint is challenged and it appears that an allegation of fact therein is based upon the interpretation of a document attached to the complaint and the document itself does not warrant the allegation, the allegation may be disregarded as a mere legal conclusion. It is the document that controls. *See Pennsylvania State Spiritualist Ass'n v. First Church of Spiritual Research and Healing*, 244 A.2d 31, 34 (Pa. 1968); *South Union Township v. DEP*, 839 A.2d 1179, 1189 n.16. (Pa. Cmwlth. 2003), *aff'd,* 854 A.2d 476 (Pa. 2004). The Department says in its memorandum, "[h]ere, the Skippack TMDL itself and EPA's Declaration [the Henry Affidavit] properly attached to the Department's Motion to Dismiss, make it clear that there is no genuine factual dispute to prevent dismissal; only an unsupported conclusion of law. EPA made the decision in this appeal." DEP Memorandum at 4.[1]

Discussion

As we have stated before, "[t]he Board evaluates motions to dismiss in the light most

[1] There is, of course, a fundamental problem with DEP's *Pennsylvania State Spiritualist Association* theory *ad initio*. Even if we considered Appellants' NOA as the analog of a complaint, the Henry Affidavit was obviously not attached to it. The Henry Affidavit was generated by and comes from Mr. Henry and DEP. In any event, as we describe in more detail in the text which follows, we find the Department's *Pennsylvania State Spiritualist Association* theory unconvincing not only in spite of the Henry Affidavit but, in large measure, because of the Henry Affidavit.

favorable to the non-moving party. A motion to dismiss may only be granted where there are clearly no material factual disputes and the moving party is entitled to judgment as a matter of law." *Neville Chemical Co. v. DEP*, 2003 DEP 530, 531 (citations omitted). *See also Cooley v. DEP*, 2004 EHB 554, 558. Based upon the Department's theory for dismissal, we have no problem denying its Motion. Even given the validity of its recitation of the *Pennsylvania State Spiritualist Association* case, the theory would not apply to this case so as to require dismissal. Just limiting our discussion at the moment to documents, there are documents, including those on which the Department relies, which interpose themselves to prevent the matter from being as clear cut as the Department would like.

First, there is the federal CWA itself. The CWA provides that TMDLs are to come from the states and it is only when the EPA rejects a state promulgated TMDL that the EPA then promulgates a TMDL. Section 303(d)(1)(c) requires states to establish TMDLs. 33 U.S.C. § 1313(d)(1). Section 303(d)(2) requires states to submit their TMDLs to EPA for approval. *Id.* § 1313(d)(2). EPA has 30 days to approve or disapprove the state submitted TMDL. *Id.* If the EPA is to establish a TMDL it must do so within 30 days of the date of disapproval of the state submitted TMDL. *Id.* As Appellants point out in their brief, Section 303(d) does not provide EPA with authority to develop TMDL's under any other scenario. The regulation governing the promulgation of TMDLs provides for the same type of scenario of the state promulgating the TMDL with the EPA doing so upon EPA's rejection of the state submitted TMDL. 40 CFR § 130.7(c), (d).

Second, there is the Consent Decree; the very same Consent Decree relied upon by Mr. Henry in his affidavit. It will be recalled that he stated that, "in compliance with Paragraph 15 of the Consent Decree, EPA ... established [this TMDL]." Henry Affidavit, ¶ 3. However,

Paragraph 15 of the Consent Decree states clearly that, "[t]he parties understand that the Commonwealth of Pennsylvania has responsibility for the establishment of TMDLs pursuant to Clean Water Act Section 303(d), 33 U.S.C. § 1313(d)." DEP Memorandum, Ex. 2, ¶ 15. Paragraph 15 of the Consent Decree goes on to provide that if Pennsylvania fails to establish certain TMDLs, including the one for Skippack Creek, pursuant to the schedule set forth in Paragraph 15, then EPA shall do it. *Id.* As Appellants point out, we have no assertion or evidence here that DEP has failed to establish the TMDL under the Consent Decree. As Appellants also point out, it appears that the Consent Decree read together with its appurtenant MOA provides that DEP's time for promulgating the TMDL does not run out until April 2007. Thus, the time trigger for EPA to be the agency to promulgate this TMDL has not yet occurred.

Thirdly, there is the Henry Affidavit itself. The Henry Affidavit begs the question of which agency promulgated the TMDL. Mr. Henry's affidavit is very bare and lacks details. What exactly does Mr. Henry mean when he says that EPA "established" the TMDL and the DEP cooperated and provided technical assistance? While EPA and DEP may wish that the use or utterance of those words alone would have automatic objective legal significance, like the words "I accept" in a contract case, these words do not have such significance in this case. These words are an interpretation of underlying facts. In that sense, it is DEP through the Henry Affidavit, not Appellants, that has, to paraphrase the *Pennsylvania State Spiritualist Association* analysis, made a bare legal conclusion.

In this case we need to get behind those words to find out what those underlying facts are so the legal significance of those facts can be determined. What specific actions of EPA stand behind its claim to have "established" this TMDL? What exactly did DEP do to cooperate and provide technical support? Did its actions of cooperating and providing technical support in this

case constitute enough to establish that the action is really DEP's action and not EPA's? Some of these facts will, no doubt, have to come from Mr. Henry himself. In any event, these are some of the as of yet unknown facts to which an interpretation must be brought which will constitute the answer to the question of who established this TMDL.

Finally, there is the aforementioned MOU. It says, "[w]hereas under Section 303(d) of the CWA, DEP has the lead responsibility for the designation of WQLs and the establishment of TMDLs." Appellants' Memorandum, Ex. B, at 1. This is consistent with the CWA, 40 CFR § 130.7 and the Consent Decree.

None of these documents establish that the TMDL in this case was promulgated by DEP. That is not the point. What they do establish is that DEP could have promulgated this TMDL. Indeed, DEP was supposed to have done so and EPA was to do so only if, paraphrasing Paragraph 15 of the Consent Decree, DEP failed to do so. There is a total absence of any allegation or evidence that it failed to do so. Thus, there are documents attached to the parties' papers which support the view that EPA promulgated the TMDL and there are documents which are consistent with the view that DEP must have promulgated this TMDL. Thus, dismissal under the *State Spiritualist Association* document focused approach is not warranted. It is certainly impossible to conclude as a matter of undisputed fact and as a matter of law that EPA established this TMDL and not DEP.

DEP proffers that the argument that DEP "should have been" the agency that established the TMDL "is simply not relevant to the jurisdictional question pending." DEP Reply, at 1. That is incorrect. We are simply recognizing that various seminal documents, including one on which DEP relies for the underpinning of its Motion, which indicate that DEP should have been the agency that established the TMDL present a question whether DEP did in fact establish the

TMDL in accordance with the plan and obligation imposed upon DEP by them. When the law, regulation and source documents all indicate that it should have been party X who was to do something and those documents do not on their face or as a matter of law conclusively show that party X did not do that something, then it becomes a question of fact whether party X did that something. The answer to that question is the essence of the jurisdictional question before us. Thus, the "should have been" point is relevant to the jurisdictional question pending. For the same reason, the "should have been" points in the law and especially the documents offered by the Department to try to make its *State Spiritualist Association* argument show why its Motion cannot be granted on the basis of that case.

There are other very good reasons to deny a dismissal motion at this time. The Department's seminal case that it says supports dismissal is *Monongahela Power Co. v. Division of Envtl. Prot.*, 567 S.E.2d 629 (W.Va. 2002). The Department says that this case shows that "a TMDL prepared by EPA 'in cooperation with the [West Virginia] DEP' ... to be beyond state administrative and judicial review as EPA's decision." DEP Memorandum, at 6 (quoting *Monongahela Power*) (alteration in original, emphasis added). We emphasize the last three words as we think this is what DEP is telling us is the basis of the Supreme Court of West Virginia's decision. We do not agree with that conclusion. We agree that the Court held that the TMDL was not reviewable but that was not because it had been developed by EPA or by EPA in cooperation with the state DEP. We do not think who developed the TMDL or how it was developed was a factor in the Court's decision that the TMDL was not reviewable in that case. The Court's decision rested upon its conclusion that the TMDL was not an appealable "order" under the particular West Virginia statute which provided for appeals of "orders" of the West Virginia DEP. In any event, its decision was based on the particularity of West Virginia law on

appealability and did not involve the resolution of a dispute over who promulgated the TMDL.[2]

We actually think that the *Monongahela Power* case supports Appellants' view of this Motion in various respects. First, the Court reminds us twice that it is first and foremost a state responsibility to promulgate TMDLs. It is only when the state fails to do so, or when EPA disapproves a state promulgated TMDL, that EPA then can promulgate a TMDL. *Id.* at 633-634.[3] We are reminded that, here, we do not see DEP saying, for any reason, that it could not prepare the TMDL. Again, the CWA itself requires the state to do the TMDL first and then, only if it fails to do so, EPA steps in to promulgate the TMDL. Also, the Consent Decree and the MOU which are resultant from the TMDL Litigation against EPA provide and reinforce that the state is in the first instance responsible for promulgating the TMDLs.

The West Virginia Supreme Court provided a very cogent explanation why the CWA was built that way, why its approach is a smart one and persuasive reasons why courts, if they need reasons other than the language of the statute itself, should respect that approach. The Court said:

> [T]he federal statutory scheme contemplates that the responsible state agency is to initially prepare the [TMDL] and the EPA is to review it. This guarantees that [TMDLs], which have such a significant impact on local

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[2] It is most fascinating that at the end of the day the West Virginia Supreme Court was so taken aback by the obvious flaws in the TMDL that, despite the action not being appealable, it *sua sponte* remanded the case to the lower court for the entry of an order directing the state DEP to "immediately update and revise the [TMDL] in order to correct its flaws." *Id.* at 639, 640-41.

[3] The West Virginia DEP had told the Court that it did not have the financial resources or professional expertise to prepare a TMDL and that, therefore, pursuant to a Consent Decree, the EPA had done it. The West Virginia Supreme Court said that was ridiculous. It stated that:

> This court finds the DEP's reasons for not preparing its own [TMDL], even though authorized to do so by the Clean Water Act, to be completely unacceptable. State agencies simply cannot refuse to perform statutory duties because of an alleged lack of financial or professional resources. Indeed, if these were valid reasons for government inaction, many crucial government functions simply would not get done. In this era of tight government budgets, agencies somehow manage to continue to fulfill their legal obligations. We expect no less of DEP.

Id. at 634 n.8

> landowners and business, will undergo a thorough and professional review prior to their implementation. When the responsible state agency fails in its obligation to prepare the [TMDL] so that the EPA must do it, an important part of the process is eliminated.

Id. at 634 n.8.

Based on the above, although this is not the time or the place for such discussion, the CWA and the *Monongahela Power* case could be seen as providing substantial support for the notion that if this TMDL really was an EPA action and not a state action and there is no evidence that DEP defaulted on its obligation to promulgate it in the first place or that it submitted its TMDL to EPA which rejected it, such an EPA TMDL would be illegal under the CWA and violative of the Consent Decree and the MOU.

The Department says that there can and ought to be a necessary "division of labor" between DEP and EPA in the promulgation of TMDLs and that is what occurred here. However, the CWA, the Consent Decree and the MOU do not provide for a "division of labor" as a matter of mere convenience. They all require the state to devise the TMDL and the EPA does so only when the state has failed to do so or has submitted one which the EPA rejects. Also, the more DEP tries to distance itself from being the promulgator or moving force behind the TMDL, *i.e.*, the more it disowns the TMDL, the stronger is the argument that such a TMDL process has, to paraphrase the *Monongahela Power* court, eliminated a required and important part of the CWA process.

The "division of labor," theory, in any event, is beside the point of the question the Department's Motion presents. Regardless of whether there can or ought to be a "division of labor" and whatever the appropriate division might be, the question remains which agency "established" the TMDL in this case. In other words, even given the "division of labor"

approach, who did the labor in this case amounting to promulgation? That question cannot be answered definitively now.

The Department's "division of labor" cases are for that reason inapposite to the instant Motion. Neither *City of Arcadia v. EPA*, 265 F.Supp.2d 1142 (N.D. Cal. 2003), *aff'd*, 411 F.3d 1103 (9th Cir. 2005), nor *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003), lend any support to the Department's Motion. Neither case involved a factual question of which agency actually "established" the TMDL as does this case and this Motion.

In *Arcadia*, the state of California was supposed to have developed a TMDL for trash in the Los Angeles River, pursuant to a Consent Decree, by March 2001 but it failed to meet that deadline. *Arcadia*, 411 F.3d at 1106. The EPA then established the TMDL but later the state submitted its TMDL to the EPA, *albeit* late. *Id.* The EPA approved the state TMDL and announced simultaneously that its approval of the state established TMDL acted to supersede the one it had established. *Id.* The court challenge presented the question whether EPA acted within its authority to approve the state established TMDL even though it had already promulgated one upon the state's default in doing so. *Id.* The court answered yes and rejected that challenge as well as some other procedural challenges to the TMDL. *Id.* If anything, the *Arcadia* case underscores the importance of and the respect that must be and is accorded to the state's responsibility and obligation to be the maker of TMDLs.

Pronsolino was a substantive challenge to whether the Section 303 CWA TMDL program could be applied to rivers polluted only by non-point sources. 295 F.3d 1123, 1126. The answer was yes. *Id.* at 1140-41. In that case the state of California's Section 303(d) List, which it submitted to EPA for approval, was rejected by EPA, in part because it did not include the Garcia River. *Id.* at 1129. EPA then established its own Section 303(d) List which included

the Garcia River. *Id.* Pursuant to a Consent Decree, California had a deadline of March 18, 1998 to promulgate a TMDL for the Garcia River. *Id.* It missed that deadline so EPA established the TMDL for the Garcia River. *Id.* There was no question in *Pronsolino* about which agency established the TMDL, the EPA did it upon California's default under the Consent Decree. The appellants then challenged EPA's authority under Section 303(d) to apply any TMDL to the Garcia River. *Id.* at 1130. The case presented a question of the scope of the Section 303(d) program, not a question about which agency promulgated the TMDL. If anything, the *Pronsolino* case illustrates that the CWA envisions the EPA establishing a TMDL only when the state has defaulted in doing so first.

Thus, neither *Pronsolino* nor *Arcadia* can be read as the Department says in its brief as exemplary of cases where "EPA has entered into federal consent decrees in other jurisdictions providing for federal establishment of TMDLs...as part of a division of labor with the relevant state or states." DEP Memorandum, at 5. We do not see either case as involving that question or as giving blessing to a "division of labor" based on convenience where EPA and the state agency decide to divvy up the work of establishing TMDLs. In both cases the Consent Decrees required the state to submit a TMDL by a certain date and in both cases the state defaulted on that obligation. The CWA, the Consent Decree and the MOU say that establishing TMDLs is DEP's duty and EPA steps in if and only if DEP defaults. Here there is no evidence of any default by DEP to establish the TMDL and, from what we can tell, the deadline for DEP to establish the Skippack Creek TMDL is not until April 2007. Even if *Pronsolino* and *Arcadia* did give a blessing to an open-ended division of labor, the critical question presented by this Motion would remain and that question is which agency established the TMDL in this case.

In addition to what we have already said, Appellants have pointed us to some documentary evidence which would seem to support their interpretation of the facts. At the very least this evidence shows that we have a disputed unresolved question about which agency promulgated this TMDL. We refer specifically to an email dated January 24, 2005 from a Mr. McDonnell of DEP to Mr. Henry which states as follows:

> We had a meeting at the SERO office right after Christmas to come up with this. The 0.24 was the consensus of the group, and it was based on the upper bound of what could be a healthy stream based on periphyton. That range in Hunter's paper was from 50 to 100 mg/m3. We decided to use the upper limit of this study so that we would not be doing something that would be more stringent than what we anticipate for the upcoming P criteria. Our logic was that we can always go back and make the instream goal more stringent, however, it would be more difficult if we had to raise it. Since this [is] such a big change from what we have done in the past (ref watershed/nothing) we wanted to stay at the high end of the scale.

Appellants' Brief, Ex. C (emphasis added). Appellants say that the "we" and "our" clearly means DEP. If we view this evidence in the light most favorable to the Appellants as the non-moving parties, which we must and will do, then there is evidence which appears to show that the actual number of 0.24 came from DEP, it was DEP that decided that the limit would be 0.24 and fed that number to the EPA. That could lead to a conclusion that the statement that EPA "established" the limit would be incorrect. Under this view, the Department's having decided upon the actual number and then feeding it to EPA and EPA's publishing the number on EPA letterhead, reciting on the document that this is promulgated by EPA and having an EPA person sign it would all be a sham. The Department's actual deciding on the number would make it an action of the Department, albeit one published on someone else's letterhead. As such, it would be appealable as would any action or determination of the Department. *See* 35 P.S. § 7514(c) (no action of the Department shall be final until a person adversely affected thereby has had the opportunity to appeal the action to the Environmental Hearing Board); 25 Pa. Code § 1021.2 (an

action is any order, decree, decision, determination, or ruling by the department including, but not limited to, a permit, license, approval or certification)

DEP points out in its reply brief that this email is only one in a series of emails which, taken together, "show that EPA, while clearly evidencing its view that it is the ultimate decision-maker regarding the Skippack TMDL, attempted to reach out to the Department and to take into account the Department's views on evolving issues as the Skippack TMDL was being drafted." DEP Reply, at 4. The Department says that the pronoun "we" refers to EPA, not DEP. *Id.* at 3 n.3. But therein lies the essence of why the DEP's Motion cannot be granted. These emails and these facts can be interpreted in various ways; Appellants' way and DEP's way. As DEP so correctly points out, we cannot even be sure who "we" is in the emails. No definitive interpretation of these emails is possible now.

Whatever might be the conclusion to be drawn from the emails and, of course, we cannot and will not now reach any such conclusion, we have no problem at all concluding from them, and from everything else we have discussed, that there is a very live factual and legal dispute about whether the TMDL was "established" by EPA or by DEP. Since the grounds for DEP's Motion is its contention that this TMDL, as a matter of undisputed fact and/or as a matter of law, is not a DEP action, with that contention as of now being neither an undisputed fact nor established as a matter of law, the Motion must be denied.

An appropriate order follows.

COMMONWEALTH OF PENNSYVANIA
ENVIRONMENTAL HEARING BOARD

LOWER SALFORD TOWNSHIP AUTHORITY: AND UPPER GWYNEDD-TOWAMENCIN MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2005-100-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 25th day of October 2005, the Department's Motion to Dismiss is **DENIED.**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

DATED: October 25, 2005

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

NATIONAL FUEL GAS SUPPLY CORPORATION	:	
v.	:	EHB Docket No. 2005-168-MG
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: October 26, 2006

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis

The Board denies a motion for summary judgment which seeks judgment as a matter of law that the Department improperly refused to grant a plan approval for an increased emissions limit for an engine at the appellant's gas distribution facility. The Board finds that there are disputes of material fact which preclude the entry of summary judgment. These include whether the increase in capacity of the source involved a modification of the source and whether the requested increase in emission limits should be deemed contrary to the terms of the plan approval.

OPINION

Before the Board is a motion for summary judgment filed by the National Fuel Gas Supply Corporation (Appellant). The Appellant contends that the Department erred as a matter of law by denying its application for a plan approval for an increased emission limitation for formaldehyde. The Department of Environmental Protection, in response,

argues that there are outstanding issues of material fact and that the Appellant's motion should be denied. As we explain below, we will deny the Appellant's motion.

Factual and Procedural Background

Many of the underlying facts in the matter appear to be undisputed. The Appellant owns and operates the Ellisburg Compressor Facility in Allegany Township, Potter County.[1] The Appellant uses the facility to transmit natural gas from its pipelines to customers. In order to transmit gas, the Appellant employs, among other things, commercial class reciprocating internal combustion engines.[2] In April 1998 the Appellant submitted an air quality plan approval application which included the installation of a new single engine built with a "low-emission combustion" system (LEC). This engine, the subject of the current appeal, is known as Engine 1A.[3] Engine 1A is a 3,200 brake horsepower (BHP), 4-cycle, lean-burn reciprocating internal combustion engine fueled by pipeline quality natural gas.[4] At the time of the 1998 application there were no requirements related to formaldehyde (the pollutant relevant to this appeal) but the Appellant did report other contaminants which would be emitted by the engine and which were controlled by best available technology (BAT) for stationary reciprocating internal combustion engines. The application was approved by the Department in October, 1998.

Shortly thereafter the Appellant began construction on Engine 1A, but in April 1999, it submitted a second plan approval application in order to increase the rating of the engine from 3,200 BHP to 4,445 BHP. At this time the Department began requesting

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[1] Appellant Motion for Summary Judgment, Affidavit of Gary A. Young (Young Affidavit), ¶ 4.

[2] Young Affidavit, ¶ 5.

[3] Young Affidavit, ¶ 6-7.

[4] Young Affidavit, ¶ 8.

emission information for formaldehyde, an incidental byproduct of incomplete combustion generated by internal combustion engines.[5] The Appellant had no emission data for formaldehyde, therefore for the purpose of the plan approval application it relied upon Gas Research Institute literature reporting data obtained using the CARB Method 430 test for formaldehyde to provide emission information on formaldehyde. Based on this information, the Department approved the plan application,[6] but required further stack testing for formaldehyde and other contaminants.[7] The emissions limit for formaldehyde was established as .991 pounds per hour and 4.34 tons in any 12 consecutive month period. According to the Department, this limit was based on information provided in the Appellant's plan application.[8] The Appellant contends that the Department "applied a generic determination that the use of LEC sufficed to demonstrate use of BAT for all engines like Engine #1A."[9] The Department disagrees with this characterization, and contends that BAT determinations are not done generically, but on a case-by-case basis.[10] The Department takes the position that the additional stack testing required in the 1999 Plan Approval was for the purpose of ensuring that LEC was in fact BAT for formaldehyde emissions.[11]

The Appellant performed the changes to Engine 1A in December 1999. The increase in the rate of operation caused "severe unanticipated vibrations" which was not

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[5] Young Affidavit, ¶ 20. Formaldehyde is a hazardous air pollutant. Clean Air Act, 42 U.S.C. § 7412(b)(1).

[6] Maxwell Affidavit, ¶ 10.

[7] Appellant Ex. E, Condition 3; Maxwell Affidavit, ¶ 14.

[8] Maxwell Affidavit, ¶ 10; Appellant's Ex. D.

[9] Young Affidavit, ¶ 20.

[10] Maxwell Affidavit, ¶ 43.

[11] Maxwell Affidavit, ¶ 43.

resolved until June 2002.[12] Also, by 2002 CARB Method 430 had been discredited as a method for testing formaldehyde emissions. The Department and the Appellant negotiated a new testing protocol and in June 2003 stack testing for formaldehyde was performed on Engine 1A. The results of that testing indicated that formaldehyde emissions were higher than the limit provided in the 1999 Plan Approval. The average rate was reported as 1.15 pounds per hour and 5.04 tons per year.[13] Accordingly, the Department advised the Appellant that they would have to submit another plan approval application for the increased emission rate.[14]

In May 2004 the Appellant submitted a Plan Approval application to the Department which sought an increase in formaldehyde emissions from .991 pounds per hour (4.34 tons per year) to 2.25 pounds per hour (9.9 tons per year).[15] The Appellant took the position that the increase in emissions was required to account for "engine fluctuations, measurement error and meteorological conditions."[16] The Appellant also included another BAT assessment, wherein it concluded that an alternative control technology, catalytic oxidation, was not economically feasible.[17] The Department disagreed and denied the plan approval. The sole reason given was that the Appellant had failed to demonstrate BAT for formaldehyde emissions:

> [T]he Department hereby denies plan approval for the modification of the above-referenced air contamination source for the following reason:

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[12] Young Affidavit, ¶ 21.
[13] Maxwell Affidavit, ¶ 14; Appellant Ex. F.
[14] Young Affidavit, ¶ 29; Maxwell Affidavit, ¶16; Appellant Ex. F.
[15] Young Affidavit, ¶ 30 and Exs. G, H.
[16] Maxwell Affidavit, ¶ 18; Young Affidavit, Exs. F, H.
[17] Young Affidavit, ¶¶ 31-33, and Ex. G, Section 4.0.

> National Fuel Gas Supply Corporation failed to demonstrate that the emission of formaldehyde, a hazardous air pollutant, from Engine 1A will be controlled to the maximum extent, consistent with best available technology, as is required pursuant to 25 Pa. Code § 127.1 and 127.12.[18]

The Appellant thereafter filed a timely appeal. Both the Appellant and the Department believed that the most salient issues raised in the appeal may include a controlling legal issue that lent itself to resolution by summary judgment. Accordingly, at the request of the parties, the Board permitted the filing of early motions for summary judgment and a stay discovery pending the Board's resolution of the motions.

The Appellant filed a motion arguing 1) the amendment to the plan approval did not render Engine 1A a "new source" requiring a new BAT assessment; 2) the requested change in emission rate for formaldehyde did not constitute a "modification" as that term is defined by Department regulations; and 3) even if BAT were required, the low-emission combustion system meets the BAT requirement for Engine 1A at the higher emission rate. Therefore, there was no requirement for the emission controls to meet a new BAT standard. The Department filed a response, and takes the position that the new emission rate is a modification because it constitutes a "change in operation," and therefore the motion should be denied.

First, we disagree that Engine 1A does not qualify as a "new source" under the air pollution regulations. "New source" is simply defined as:

> A stationary air contamination source which:
>
> (i) Was constructed and commenced operation on or after July 1, 1972.

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[18] Young Affidavit, Ex. A.

(ii) Was modified, irrespective of a change in the amount or kind of air contaminants emitted, so that the fixed capital cost of new components exceeds 50% of the fixed capital cost that would be required to construct a comparable entirely new source; fixed capital costs means the capital needed to provide the depreciable components. [19]

The obvious purpose of this definition and of section 6 of the Air Pollution Control Act[20] is to subject the construction or modification of any stationary air contamination source to the plan approval requirements of the Act.[21] This definition was essential to prevent any unreasonable retroactive application of air quality requirements to a source that was existing at the time of the effective date specified in the Act. At the same time, obtaining plan approval enables industry to invest in the construction or modification of their facilities with some knowledge as to what emission standards would be applied to the facility. Since the definition of "new source" in the Department's regulations remained unchanged after the 1992 amendments, the construction of Engine 1A under a plan approval in 1998 was necessarily a "new source" for purposes of the Department's air quality regulations.

However, the extent to which the issuance of a plan approval for construction or modification of a source may be binding on the Department when the time comes for the issuance of an operating permit is not so easily resolved. While a plan approval normally authorizes operation of the source for a temporary period, section 6(b)(2) of the Act[22]

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[19] 25 Pa. Code § 121.1.

[20] Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. § 4006.1.

[21] The Air Pollution Control Act prior to the 1992 amendments to the Act required a plan approval for sources constructed on and after July 1, 1972. The 1992 amendments simply prohibit the construction or modification of any stationary air contamination source without a written plan approval. 35 P.S. § 4006.1.

[22] 35 P.S. § 4006.1(b)(2).

authorizes the issuance of a permanent operating permit where "there has been performed upon such source a test operation or evaluation..." which satisfies the Department that the source will not emit air contaminants "in excess of that permitted by applicable regulation of the board, or in violation of any performance or emission standard established....by the Department for such source, and which will not cause pollution."[23] In addition, section 6(c) of the Act[24] authorizes the Department to terminate or revoke a plan approval if the permittee constructs or operates the source in such manner as to be contrary to, among other things, the plan approval.

In these circumstances, we believe that there are questions of material fact outstanding which preclude us from granting summary judgment. It may be that the emission revision requested by the Appellant was required because of a modification of the source that would require a new plan approval. Section 127.1 of the Department's regulations defines "modification" as

> A physical change in a source or a change in the method of operation of a source which would increase the amount of an air contaminant emitted by the source or which would result in the emission of an air contaminant not previously emitted, except that routine maintenance, repair and replacement are not considered physical changes. An increase in the hours of operation is not considered a modification if the increase in the hours of operation has been authorized in a way that is Federally enforceable or legally and practicably enforceable by an operating permit condition.[25]

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[23] In *Rochez Bros., Inc. v. Department of Environmental Resources*, 334 A.2d 790 (Pa. Cmwlth. 1975), the Court held that the Department had no power to issue a permit where there was no test operation or any evaluation conducted which would indicate that reactivated coke ovens would meet the regulations of the Environmental Quality Board.

[24] 35 P.S. § 4006.1(c).

[25] 25 Pa. Code § 121.1.

Both the Department and the Appellant agree that the change in emission limit is not a "physical change" to Engine 1A. Therefore the issue is whether or not the change in emission is a change in the "method of operation." In the Appellant's view, the new emission rate simply reflects a refinement of the method used to calculate formaldehyde emission, but reflects no other change in the operation of Engine 1A. However, the Appellant sought an increased limit in excess of the emission results from the stack testing. Therefore there is a question as to how much of the requested increase is due to the measurement error from the CARB 430 testing methodology and how much is due to other factors. It is not clear whether considerations such as "engine fluctuations, measurement error and meteorological conditions" were factors that the Appellant took into account when it proposed an emission limit in the 1999 Plan Approval, and to what degree the engine might be operated differently in 2004 from what was originally proposed in 1999.

The Department's view is that the inability of Engine 1A to operate within the 1999 emission limits is, by itself, a "change in operation." Yet, there does not appear to be any judicial decision in either the state courts or federal courts which support that view of the regulation. Moreover, we are not convinced by the facts that are before us at this point, that the Department's position is completely justified in view of what appears to be a change in testing technology which may have been beyond the Appellant's control.

There are also many factual issues as to whether or not the Department improperly required a new plan approval because the stack test results and the Appellant's request for an increase in the emission limits may be deemed contrary to the

plan approval. The emission limits for formaldehyde set forth in the plan approval were tentative in nature and admittedly based on what both the Department and the Permittee thought would be required. The Permittee presumably relied upon the issuance of the plan approval in constructing the source based on the CARB 430 testing standard for formaldehyde. Whether Appellant should now be required to meet a much more restrictive and expensive standard to protect an overriding public interest involves many disputes of material fact.

In short, the only fact that seems clear to us is that there are many unanswered questions which need to be resolved before this Board can make a reasoned decision as to whether or not it is appropriate to consider the requested change in the emission standard as a "modification" or being contrary to the plan approval and whether these facts opened the door to a renewed BAT analysis.[26] Accordingly, we will deny the Appellant's motion for summary judgment, and enter the following:

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[26] By separate order the Board will lift the stay of discovery and schedule further pre-hearing proceedings.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NATIONAL FUEL GAS SUPPLY CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2005-168-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of October, 2005, the motion for summary judgment of National Fuel Gas Supply Corporation is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Member

DATED: October 26, 2005

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SECRETARY TO THE BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	**Issued: November 15, 2005**

OPINION AND ORDER ON MOTION TO EXPEDITE HEARING AND MOTION TO EXTEND DISCOVERY

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Pennsylvania Environmental Hearing Board grants, in part, a Motion to Expedite Hearing and grants, in part, a Motion to Extend Discovery and Other Pre-hearing Deadlines. Appellants have presented compelling reasons why the expedited discovery, dispositive motion, and hearing schedule proposed by the Permittee is not workable. Therefore, the Board has balanced the respective interests of all parties and

set forth an aggressive schedule for an expedited hearing while at the same time assuring that adequate time is available to conduct all needed discovery, retain expert witnesses, file and decide dispositive motions, and adequately prepare for trial.

OPINION

Background:

Presently before the Board are two diametrically opposed Motions. The first filed by Permittee Wellington Development-WDVT, LLC, Permittee (Permittee or Wellington) on October 21, 2005 and supplemented by direction of the Board on October 28, 2005 seeks an Order expediting the scheduling of discovery, dispositive motions, expert filings, and the hearing. The second motion was filed by Appellants, Dennis Groce, National Parks Conservation Association, Group Against Smog and Pollution, and Phil Coleman (appellants) seeking the extension of the initial pre-hearing deadlines set forth in the Board's standard Pre-hearing Order No.1. The Appellants filed a Response to the Permittee's Motion to Expedite Hearing on November 2, 2005 while the Permittee filed its Response to Appellants' Motion to Extend Discovery on November 4, 2005. On November 3, 2005 the Pennsylvania Department of Environmental Protection advised the Board that it was taking no position on the respective motions. Wellington filed a Supplemental Response on November 9, 2005 and Appellants filed a Response to the Response on November 10, 2005.

Wellington has requested that we expedite the hearing and pre-hearing deadlines so as to resolve Appellants' Appeal as quickly as possible. Wellington is a limited

liability corporation comprised of five individual members who, according to the Motion to Expedite Hearing, have placed approximately twenty million dollars of their own funds at risk to develop this project. The project, approved by the Pennsylvania Department of Environmental Protection in June 2005, eleven months after Wellington submitted its final approval application, will be located in Greene County, Pennsylvania on an 800-acre site of an old coal mine. The project is an electrical generating facility that will be powered by waste bituminous coal, most of which is in vast refuse piles, called "gob piles", that have scarred Pennsylvania's beautiful forests and hills for decades. The gob piles are the result of past mining operations.

According to Wellington, over the thirty year life of the plant millions of tons of waste coal will be reclaimed, electrically will be generated, and the Commonwealth of Pennsylvania and its citizens will benefit greatly. The cost of this project is approximately 895 million dollars. Wellington indicates that it is the project "developer" and "upon obtaining all critical regulatory approvals and contractual arrangements, [it] will sell its interest in the project to an equity investor with the resources to raise the capital required to complete the project." Wellington's Motion to Expedite Hearing, paragraph 7, page 4.

The Appeal filed by Appellants has evidently prevented Wellington from selling its interest in the project "to an equity investor." Indeed, according to Wellington, all negotiations ceased when the Appeal was filed. Therefore, Wellington claims its investment and the project are at serious risk because of the Appellants, which

according to Wellington, merely wish to rehash issues already thoroughly reviewed by the Pennsylvania Department of Environmental Protection and other government agencies. In fact, Wellington claims that the Appeal has the practical effect as a Supersedeas and the Pennsylvania Environmental Hearing Board should not only deny the Appellants' Motion to Extend Discovery and Other Pre-hearing Deadlines but should drastically shorten the deadlines set forth in Pre-hearing Order No. 1 and schedule the case for a two day trial to commence on January 30, 2006.

Appellants oppose the Permittee's Motion to Expedite and contend through their own Motion to Extend Discovery and Other Pre-hearing Deadlines that the deadlines need to be extended and not shortened. Appellants argue that the Permittee's project will add to the region's air pollution rather than represent the environmental friendly project set forth by Permittee. They contend that although some of the Appellants publicly opposed the granting of the project approval they were not afforded a meaningful role in the preapproval part of the project. They contend that the Department's public file is dwarfed by the documents produced by the Department and the Permittee through the discovery process afforded them in the litigation. They claim now for the first time, they have been provided with in excess of eleven thousand documents and they need time to review this mountain of paper prior to proceeding to a trial of their Appeal.

Appellants' counsel argues that it is involved in not only this appeal of a power plant on behalf of *pro bono* clients, but also an earlier appeal involving another power

plant. Appellants contend that Permittee should certainly have been aware of the legal requirement that no decision of the Department is final until the statutory appeal period has passed or, more importantly in this instance, the Pennsylvania Environmental Hearing Board has decided the issue(s) after an Appeal. Appellants contend they are acting diligently and that Permittee is simply trying to force them to a quick resolution of their Appeal before they can adequately complete all Pre-hearing practice including discovery of evidence, identification of witnesses, development of issues, retention of experts, resolution and development of appropriate Pre-hearing motions, and preparation for trial. Appellants point out that before the Environmental Hearing Board they have the burden of proof on most if not all of the issues they have raised. This was not the case prior to approval of the application by the Department. In fact, they argue that Permittee's Motion to Expedite is an ill disguised attempt by a party with vastly superior economic resources to simply overwhelm them and short circuit their statutory due process rights.

The Pennsylvania Department of Environmental Protection advises that it takes no position on either of the two motions.

Discussion

The Pennsylvania Environmental Hearing Board was established to hear appeals from final actions of the Pennsylvania Department of Environmental Protection. 35 P.S. Sections 7511– 7516. The Pennsylvania Environmental Hearing Board Act provides that "no action of the Department adversely affecting a person shall be final as

to that person until the person has had the opportunity to appeal the action to the Board." 35 P.S. Section 7514 (c). However, the Environmental Hearing Board Act clearly provides that "No appeal shall act as an automatic supersedeas." In other words, there is nothing under Pennsylvania law which prevents the Permittee from fully moving forward with its project. It has obtained the Pennsylvania Department of Environmental Protection's approval for its project and can proceed accordingly. Of course, it is understandable that the presence of an Appeal may result in the Permittee or, evidently, in this case, investors proceeding carefully. After all, an adverse decision from the Pennsylvania Environmental Hearing Board and affirmed by the Pennsylvania Appellate Courts would stop the project completely.

Nevertheless, the Permittee, in fact, is in no different position than any other permit holder facing objections to the Department's approval of the underlying permit. Therefore, the issue before the Pennsylvania Environmental Hearing Board as set forth in the motions is the balancing of the due process rights of the Appellants while at the same time recognizing the practical and difficult position the Appeal places the Permittee and its desire for an expedited resolution of the issues raised by the Appellants.

Prior to deciding the issue, it is important to review the Pennsylvania Environmental Hearing Board's statutorily mandated role in the Appeal process. We are the tribunal established by law to decide this matter. As fully explained by Judge (now Chief Judge) Krancer in *Smedley v. DEP*, 2001 EHB 131, appeals before the

Board are tried *de novo*.

> As the Commonwealth Court in *Warren Sand & Gravel Co., v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975), pointed out, the Board conducts its hearings *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by DEP....Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it.

2001 EHB at 156.

Therefore, it is imperative that the Board balance the competing interests of the parties in order to assure that the issues are resolved expeditiously but assuring that adequate time is allotted to prepare for hearing.

The Board's Rules of Practice and Procedure provide detailed time frames for the conduct of discovery, the identification of experts and expert reports, and the filing of Pre-hearing motions. In fact, the Rules of Practice and Procedure envision that the Board, in the vast majority of cases, will not schedule hearings until all Pre-hearing dispositive motions are resolved. 25 Pa. Code Section 1021.101(c). Of course, although the judges of the Pennsylvania Environmental Hearing Board are given the power to override these time frames, the general framework as set forth in the Board's Rules of Practice and Procedure call for far more time to reach trial than that requested by the Permittee.

It is also important for purposes of our discussion of these issues to note that although the Pennsylvania Environmental Hearing Board Act provides for an initial

discovery period of 90 days (which will be increased to 180 days as soon as the most recent regulatory Rules package is approved) in the vast majority of cases the discovery period and other deadlines are extended multiple times at the joint request of the parties, including the Pennsylvania Department of Environmental Protection. *City of Titusville v. DEP and Hasbrouck Sand & Gravel, Inc.*, 2004 EHB 467, 469. In fact, initial time periods set forth above are just that – the initial time periods set forth in the Rule. Moreover, in the vast majority of cases it is the Board's role to gently prod the parties to either a hearing or settlement. In this regard, the Pennsylvania Environmental Hearing Board has adopted its own internal operating procedures to resolve all appeals within two years of the date of filing. In the vast majority of cases, we are successful in working with counsel for the parties, in resolving the appeals within this time frame.

We have carefully reviewed all of the legal and factual arguments raised by the Appellants and Permittee in their Motions. We certainly appreciate their respective positions. We directed the Permittee to set forth an Order in support of its Motion to Expedite Hearing as required by our Rules of Practice and Procedure. Permittee's proposed Order completely ignores the time frames established by our Rules of Practice and Procedure. For example, our Rules provide that the Permittee and Department of Environmental Protection must file their Pre-hearing Memorandum 20 days prior to the hearing. The reason underlying this requirement is to afford the Appellant adequate time to prepare. Permittee has proposed that it file its Pre-hearing Memorandum seven

days before hearing. It has also proposed that the Department file its Pre-hearing Memorandum a mere three days before hearing.

After fully reviewing all of the parties' arguments we are amendable to scheduling an expedited hearing and pre-hearing practice. However, the schedule advocated by the Permittee, in our view is simply unworkable. Even if the parties, witnesses, and counsel worked like college students studying all night for final exams we are quite certain the schedule proposed by Permittee would break down. Moreover, unless the issues raised in the Appeal are substantially narrowed, which Permittee's own schedule does not provide adequate time to do, the hearing in this case will take far more time than the mere two days allotted in Permittee's proposed Order.

Indeed, Permittee itself implicitly recognizes that the parties are not ready to proceed to a hearing in just over two months. One of the fundamental purposes of discovery is to afford the other party the opportunity to identify the witnesses its opponent expects to call at hearing. It can then depose them. In support of its Response to Appellants' Motion to Extend Discovery, Wellington filed numerous exhibits. In one of these exhibits, Wellington specifically objected to an Interrogatory prepared by Appellants requesting Permittee to identify the non expert witnesses it intends to call at the hearing. Instead of identifying even a single witness, Wellington specifically objected to the Interrogatory on the basis that it was premature and that it had not yet made this determination!

Likewise, we think it would be totally premature and unworkable to adopt the

pre-hearing and hearing schedule proposed by the Permittee. We have set forth a schedule in the attached Order which, despite the fact that no dispositive motions have even been filed yet alone decided, sets an early hearing date and an aggressive discovery and pre-hearing schedule.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	

ORDER

AND NOW, this 15th day of November, 2005, following review of the Permittee's Motion to Expedite Hearing, Appellants' Motion to Extend Discovery and Other Pre-Hearing Deadlines, the Responses to the Motions, and the Department's letter response, it is ordered as follows:

1) *All Discovery* shall be served on or before **February 17, 2006**.

2) All parties shall serve their answers to expert interrogatories or serve their expert reports on or before **Monday, February 13, 2006**.

3) All parties may file supplemental expert reports or answers to expert interrogatories in rebuttal or response to any other expert reports on or before **Wednesday, March 1, 2006**.

4) *All Dispositive Motions* shall be filed on or before **Friday, March 10, 2005**. *Responses* to Dispositive Motions shall be filed on or before **Wednesday, April 5, 2006**. *Replies to Responses* shall be filed on or before **Wednesday, April 19, 2006**.

5) Appellant's Pre-Hearing Memorandum shall be filed on or before **Wednesday, April 26, 2006.**

6) The Permittee and the Department of Environmental Protection shall file their Pre-hearing Memoranda on or before **Monday, May 8, 2006.**

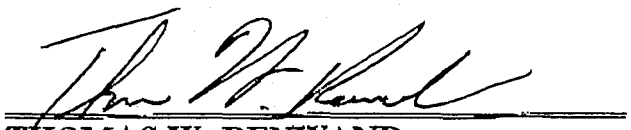
7) *Motions in Limine*, if any, shall be filed on or before **Tuesday, May 16, 2006.**

8) *Responses* to Motions in Limine shall be filed on or before **Wednesday, May 24, 2006.**

9) *A pre-hearing conference* with counsel shall be held in **Pittsburgh** on **Thursday, June 1, 2006** beginning at **10:00 a.m.**

10) The hearing in this case will commence in **Pittsburgh** at **9:30 a.m.** on **Tuesday, June 6, 2006** and *continue* on **June 7, 8, 9, 13, 14, 15, 16, 20** and **21, 2006.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: **November 15, 2005**

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LOWER SALFORD TOWNSHIP AUTHORITY AND UPPER GWYNEDD-TOWAMENCIN MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2005-100-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** November 17, 2005

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION AND PETITION TO AMEND ORDER TO ALLOW INTERLOCUTORY APPEAL

Per Curiam Opinion

Synopsis:

The Board denies a Petition For Reconsideration *En Banc* which requests the Board to reconsider its decision to decline to decide unresolved factual issues via a Motion to Dismiss. For the same reasons, the Board denies the Department's Petition to Amend Order To Allow Interlocutory Appeal.

Discussion.

Before us is the Department's Petition For Reconsideration *En Banc* of our October 25, 2005 Opinion and Order denying its Motion to Dismiss and the Department's simultaneously filed Petition to Amend Order to Allow For Interlocutory Appeal.

This matter does not qualify for reconsideration under the standards outlined in 25 Pa. Code §§ 1021.151 (final orders) and 1021.152 (interlocutory orders). Thus, we need not discuss whether the matter qualifies for reconsideration under whatever higher standards may be applicable to granting *en banc* review of a one-judge interlocutory order nor do we need to describe those higher standards.

The Department's Petition For Reconsideration just repeats the arguments it made and that we dealt with in the Opinion and Order denying its Motion to Dismiss. Put simply, the Department just does not agree with our decision and it does not like it. Although the Department says that the opinion contains "crucial factual errors," the error alleged is our "error" in not agreeing with the Department that the "evidence" requires dismissal at this stage in the appeal.

All that has happened is that we have determined that the Department has not demonstrated, to the standard necessary on a motion to dismiss where there is no record at all, there are no issues of disputed fact and that the Department is entitled to judgment as a matter of law. Our October 25th decision is not based on some novel or revolutionary principle of law nor does it even deal with any substantive law. It is based on the very narrow procedural grounds of the Department's motion, *i.e.*, the *Pennsylvania State Spiritualist Association* case.[1] Our decision merely stands for the quite non-revolutionary propositions that motions to dismiss are viewed in the light most favorable to the non-moving party, the *Pennsylvania State Spiritualist Association* document focused approach does not require dismissal in this case, and there are disputed facts which, without a record, we cannot now determine.

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[1] *Pennsylvania State Spiritualist Ass'n v. First Church of Spiritual Research and Healing*, 244 A.2d 31 (Pa. 1968).

We cannot decide factual issues in a motion to dismiss. A petition for reconsideration which asks us to reconsider our declination to do so is not well taken and will be denied.

For the same reasons just discussed in connection with the Petition for Reconsideration, we will deny the Petition To Amend Order For Interlocutory Appeal.

An appropriate order follows.

COMMONWEALTH OF PENNSYVANIA
ENVIRONMENTAL HEARING BOARD

LOWER SALFORD TOWNSHIP AUTHORITY AND UPPER GWYNEDD-TOWAMENCIN MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2005-100-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 17th day of November 2005, the Department's Petition For Reconsideration *En Banc* is **DENIED** and its Petition To Amend Order To Allow Interlocutory Appeal is **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: November 17, 2005

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-183-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY	:	**Issued: November 21, 2005**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis

The Board denies the permittee's motion to dismiss an appeal by a municipality on the basis of mootness. The permittee's motion is based upon a Department letter stating that the provisions of an Administrative Order requiring the permittee to perform a hydrogeologic study required by an order of the Board in a related matter, have been complied with. However, the appellant raises much broader issues relating to the Department's conduct concerning compliance with the Board's order. Accordingly, it is not appropriate to dismiss the appellant's appeal on the narrow issue raised by the permittee.

OPINION

Before the Board is a motion to dismiss filed by New Hope Crushed Stone & Lime Company (Permittee). The Permittee seeks to dismiss an appeal filed by Solebury

Township on grounds of mootness because, in the Permittee's view, the basis of the appeal is an Administrative Order which the Department has discharged. As we explain more fully below, we read the Township's appeal to encompass a great deal more than the narrow parameters of the Administrative Order. Accordingly, we will not dismiss the Township's appeal on the basis of mootness.

The Permittee operates a stone quarry in Solebury Township. In 2002 the Department approved a renewal of the Permittee's NPDES permit. The Township appealed the permit renewal arguing that the continued discharge at the rate approved in the renewal was dewatering the Primrose Creek Basin and upsetting the hydrogeologic balance. In an adjudication issued on March 5, 2004, the Board found that the Department had failed to adequately consider the effect of the continuing discharge and remanded the permit to the Department for further consideration. Specifically, the Board required the Department to consider what limits on the permit might be necessary to minimize disturbance on the hydrogeologic balance; to conduct an in-depth hydrogeologic study of the Primrose Creek Basin; and to amend the permit to authorize pumping at a rate sufficient to keep the quarry pit dry, but not to exceed four million gallons per day on a monthly average, until the study had been completed.[1] Both the Permittee and the Township appealed the Board's order to the Commonwealth Court. By order dated June 1, 2004, that court quashed both appeals, finding that the order of the Board was interlocutory.

On June 10, 2005, the Township filed the above-captioned appeal, charging generally that the Department was not acting diligently to comply with the Board's 2004

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[1] *Solebury Township v. DEP*, 2004 EHB 95, 123-24.

Order and that the Permittee was effectively operating without a permit. As a result, the Township argued, residential water supply wells have experienced problems due to the pumping and discharge at the quarry. An Administrative Order issued by the Department on May 19, 2005, requiring the Permittee to complete the study ordered in March 2004 was included as a basis of the objection by the Township. Also included was a May 19, 2005 letter from the Department to the Township, and a complaint filed in federal court. Read as a whole, the Township's appeal complains not of a single act of the Department, but of a series of actions or mode of conduct in complying with the Board's March 2004 Order.

On October 14, 2005, the Permittee filed a motion to dismiss. The sole basis for dismissal is that with the Department's determination that the terms of the May Administrative Order have been complied with, the Township's appeal is rendered completely moot and must be dismissed. The Township filed a response arguing that its appeal encompasses much more than just the Administrative Order but instead objects to a pattern of dilatory conduct by the Department and the Permittee, and a failure to comply with the Board's directive at the expense of the citizens of the Township who reside in the Primrose Creek Basin.

We do not believe that it is appropriate to dismiss the Township's appeal on the basis of mootness. First, the scope of the appeal as filed is not simply a challenge to the May 19 Administrative Order, as described by the Permittee.[2] Rather, it is a challenge to the conduct of the Department and the Permittee as a whole, resulting in the exclusion of

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[2] The Board held an oral argument on the Permittee's motion via telephone conference on November 7, 2005. We have considered both the written materials submitted by the parties and the oral arguments made in rendering our ruling.

the Township from the permitting process and the alleged continued upset of the hydrogeologic balance in the basin. Specifically, the Township claims that the Department and the Permittee have improperly withheld information from the Township, such as the extension of time for compliance with the Administrative Order. Further the Township claims that the Permittee has improperly refused to provide the Township with documentation regarding quarrying activities, nor has it provided the Township with the study which the Permittee claims provides the basis for the Department's discharge of the Administrative Order. In short, the Administrative Order is but a small part of the Township's body of objections to the Department's and the Permittee's conduct, and its discharge by the Department does not resolve all of the Township's claims.

Second, in addition to narrowly construing the Township's notice of appeal, the Permittee's motion is narrowly drawn and based solely on the discharge of the Administrative Order. It may well be that some of the objections raised by the Township are ultimately not cognizable by the Board as was suggested by counsel for the Permittee in the Board's conference call on November 7, 2005. However the Permittee has filed *no motion challenging the legal sufficiency of any of the Township's claims.* The Permittee's motion to dismiss does not even address any of the other claims and basis for objection raised by the Township in the notice of appeal. Accordingly, the Township has not had a fair opportunity to respond to the claim that only the objection relating to the Administrative Order are properly before the Board. It is only in its reply brief that the Permittee responds to the other issues raised in the Township's notice of appeal. Yet a significant part of the Township's complaint is that the permitting process is taking too

long and that in the circumstances, the Permittee is effectively operating the quarry without a permit.

The Permittee's reply brief argues that the Township is attempting to involve the Board in what is essentially an enforcement proceeding or a citizen's suit. *Yet that argument is not the legal basis upon which the Permittee's motion rests.* The case law of the Board is very clear that there is no bright-line rule for determining what conduct by the Department is an appealable action.[3,4] Rather, those determinations are made on a case-by-case basis, considering a variety of factors and circumstances.[5] This Board will not *sua sponte* dismiss the Township's case on the basis of the appealability of the objections raised in the notice of appeal under the auspices of a motion to dismiss based solely on mootness of a claim relating solely to the Administrative Order.

We are also concerned that the Permittee has failed to respond to the Township's discovery requests and has declined to supply the Township with a copy of the study ordered by the Board. Whether all of the claims raised by the Township are cognizable by the Board may very well depend on what develops by a response to those discovery requests. The Township must at least be given an opportunity to obtain that discovery.

We therefore enter the following:

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[3] *E.g., Borough of Kutztown v. DEP*, 2001 EHB 1115.

[4] At least one opinion of the Commonwealth Court has taken the position that a course of action by the Department over a period of time may impact property rights to such a degree that the conduct should be considered an appealable action. *Middle Creek Bible Conference v. Department of Environmental Resources*, 645 A.2d 295 (Pa. Cmwlth. 1994).

[5] *E.g, Beaver v. DEP*, 2002 EHB 666, 673.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-183-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY	:	

ORDER

AND NOW, this 21st day of November, 2005, the motion to dismiss of the New Hope Crushed Stone & Lime Company in the above-captioned matter is hereby **DENIED.**

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Member

DATED: November 21, 2005

c: **DEP Litigation/Regular Mail:**
Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-004-CP-C**
RICHARD C. ANGINO, ESQUIRE, KING DRIVE CORPORATION, and SEBASTIANI BROTHERS	:	**Issued:** November 29, 2005

OPINION AND ORDER
ON PETITION FOR RECONSIDERATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition for reconsideration of an interlocutory order is denied. The Board will not reconsider an order granting in part and denying in part a motion for partial summary judgment where the petitioner has failed to demonstrate extraordinary circumstances that warrant interlocutory reconsideration.

OPINION

This matter was initiated by the Department's January 9, 2003, filing of a complaint for civil penalties pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. 691.1 *et seq.*[1] The complaint alleged that Richard C. Angino, Esquire (Angino), King Drive Corporation, and the Sebastiani Brothers (collectively, Defendants),

[1] The Department has been delegated the authority to administer and enforce the Clean Streams Law.

conducted earth disturbance activities at various sites located on the Felicita Resort,[2] without acquiring a National Pollutant Discharge Elimination System (NPDES) Permit for Stormwater Discharges Associated with Construction Activities, without having an approved Erosion and Sediment Control Plan in place, and without implementing and maintaining Best Management Practices (BMPs) at these sites.

On September 30, 2004, the Department filed a Motion For Partial Summary Judgment, requesting the Board to hold the Defendants liable for violations identified in: Earth Disturbance Inspection Report No. 1, issued on October 4, 2001; Earth Disturbance Inspection Report No. 2, issued on April 8, 2002; Earth Disturbance Inspection Report No. 3, issued on April 26, 2002; Earth Disturbance Inspection Report No. 5, issued on July 10, 2002; and a compliance order, issued on May 2, 2002. In its motion, the Department claimed that: (1) Defendants conducted earth disturbance activities at Straw Hollow Road, the Boy Scout Tract, and Hole 15 and the Cart Path without the authorization of an NPDES permit, without developing an approved erosion and sediment control plan, and without implementing and maintaining BMPs at these sites; (2) Defendants' alleged activities at Straw Hollow Road resulted in sediment pollution to an unnamed tributary (UNT) to Fishing Creek; (3) Angino violated the terms of an NPDES permit by conducting earth disturbance activities at Straw Hollow Road and the Boy Scout Tract without having a pre-construction meeting or an approved erosion and sediment control plan; and, (4) deterrence is a relevant factor in the calculation of a civil penalty in this case.

On October 13, 2005, the Board ruled on the Department's motion. Viewing the record in the light most favorable to the Defendants, the Board determined that, based on the parties' submissions, it was unable to draw an informed conclusion regarding the issues raised in the

[2] The Felicita Resort is a 810 acre golf and spa resort located at 2201 Fishing Creek Valley Road, Harrisburg, Pennsylvania 17112. A golf course, various gardens, and a spa are situated on approximately 650 acres of the resort. *See* Department's Complaint, at Page 2.

Department's Motion for Partial Summary Judgment, except in regard to a single violation identified in Earth Disturbance Inspection Report No. 3. Thus, the Board issued an order granting summary judgment, in favor of the Department, on the issue of whether Defendants failed to develop an erosion and sediment control plan for earth disturbance activities that are alleged to have occurred at the Boy Scout Tract and, denying summary judgment on all of the remaining issues raised in the Department's motion.

On October 24, 2005, the Department filed a petition for reconsideration[3] of our decision. Defendants filed a response opposing reconsideration on November 3, 2005.

I. THE STANDARD FOR RECONSIDERATION

Section 1021.151 of the Board's rules, 25 Pa. Code § 1021.151, provides that a petition for reconsideration of an interlocutory order must demonstrate that "extraordinary circumstances" are present.[4] To show that "extraordinary circumstances" exist, the petition must meet the criteria for reconsideration of final orders, and in addition, show that special circumstances are present which justify the Board taking the extraordinary step of reconsidering an interlocutory order. *Miller v. DEP*, 1997 EHB 335, 339. Section 1021.152 of the Board's rules, 25 Pa. Code § 1021.152, provides that the Board will reconsider final orders for "compelling and persuasive reasons," including:

> (1) The final order rests on a legal ground or factual finding, which has not been proposed by any party.
> (2) The crucial facts set forth in the petition:
> (i) Are inconsistent with the findings of the Board
> (ii) Are such as would justify a reversal of the Board's decision

[3] The Department's petition for reconsideration was filed in the form of a motion. Since the Board's rules require that requests for reconsideration of interlocutory orders be submitted in the form of a petition, we have interpreted the Department's motion for reconsideration as a petition for reconsideration.

[4] A *Comment* to the rule provides that: "[t]here is no need to file a petition for reconsideration of an interlocutory order in order to preserve an issue for later argument. Reconsideration is an extraordinary remedy and is inappropriate for the vast majority of rulings issued by the Board."

(iii) Could not have been presented earlier to the Board with the exercise of due diligence.

Therefore, for the Department to demonstrate that it is entitled to reconsideration of its Motion for Partial Summary Judgment, it has to show that reconsideration would satisfy the aforementioned criteria and -- in addition -- that special circumstances are present which justify the Board reconsidering an interlocutory order.

II. PETITION FOR RECONSIDERATION

The Department requests that we reconsider the issue of whether the Department is entitled to summary judgment for violations alleged in a May 2, 2002 compliance order.

The Department issued a compliance order to Angino after an inspection of the Boy Scout Tract on May 2, 2002. The compliance order alleged that Defendants (Angino and King Drive Corporation) engaged in "clearing, grubbing, stockpiling, and earth disturbance activities" at the Boy Scout Tract, without installing BMPs to limit accelerated erosion and sediment pollution, or implementing measures to stabilize the exposed areas. The compliance order further alleged that Defendants' conduct resulted in sediment pollution to an UNT to Fishing Creek. Angino did not file an appeal of the compliance order at that time.[5]

The Department argues that the Board's denial of summary judgment for said violations is inconsistent with settled precedent. The Department contends that the doctrine of administrative finality bars any attack on the content or validity of an administrative action in any subsequent proceeding. *See Dept. of Environmental Resources v. Wheeling-Pittsburgh Steel*

[5] The compliance order alleged that Defendants committed the following violations: (1) caused or allowed earth disturbance without a NPDES Stormwater Permit for Stormwater Discharges Associated with Construction Activities; (2) caused or allowed earth disturbance without an erosion and sediment control plan resulting in potential for pollution (the Department alleges that said violation occurred for a minimum of 69 days); (3) caused or allowed earth disturbance without an erosion and sediment control plan resulting in pollution; (4) failure to implement or maintain effective erosion and sediment control BMPs that minimize the potential for accelerated erosion and sedimentation, resulting in potential pollution (the Department asserts that said violation lasted for 120 days); (5) failure to implement or maintain effective erosion and sediment control BMPs that minimize the potential for accelerated erosion and sedimentation, resulting in pollution.

Corp., 348 A.2d 765 (Pa. Cmwlth. 1975), aff'd, 375 A.2d 320 (Pa. 1977), cert. denied, 434 U.S. 969 (1977). Further, while the Department recognizes that there are circumstances where the failure to appeal an enforcement order does not bar a party from challenging the underlying facts of said enforcement order in an appeal of a subsequently filed civil penalty action, it insists that the instant matter does not present such a situation. Conversely, Defendants assert that the Department's motion fails to allege any extraordinary circumstances that warrant reconsideration. Defendants contend that the Department's motion merely rehashes arguments that were already raised in its motion for partial summary judgment and considered by the Board. As such, Defendants insist that the Department has not demonstrated sufficient grounds for granting reconsideration.

We agree with the Defendants. The Department's motion for reconsideration does not provide any compelling or persuasive reasons to reconsider our October 13 Order. The Department failed to assert that the Board's Order rests upon a legal ground or a factual finding, which has not been proposed by any party. The Department also failed to allege extraordinary circumstances, which demonstrate that reconsideration is appropriate in the instant matter. Further, the Department failed to allege a crucial factual error committed by the Board. Finally, the Department's argument that the Board's denial of summary judgment for the violations contained in the compliance order denotes a departure from previous Board rulings is unfounded.

The Department relies on the doctrine of administrative finality to support its position that it is entitled to an award of summary judgment on the aforementioned violations. Under the doctrine of administrative finality, "one who fails to exhaust his [or her] statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his [or her] statutory remedy." *Id.* at 765. The Department contends that the

Defendants' failure to appeal the compliance order renders the action final and precludes Defendants from challenging the violations and factual determinations contained therein.

The Board has consistently held that, under the doctrine of administrative finality, "the factual and legal bases of unappealed administrative orders are final and unassailable" unless an exception applies. *Ingram Coal Co. v. Dept. of Environmental Resources*, 1988 EHB 800, 803. The Commonwealth Court's ruling in *Kent Coal Mining Co. v. Dept. of Environmental Resources*, 550 A.2d 279 (Pa. Cmwlth. 1988), provides such an exception.

In *Kent Coal*, the Commonwealth Court held that where initial Department compliance orders are followed by civil penalty assessments based on the same alleged violations, the alleged violator is not barred from challenging the fact of the violation when he or she challenges the amount of the penalty by reason of a failure to appeal the compliance order. In that case, the Appellant failed to appeal the Department's compliance order but appealed the facts of the violation addressed in that order when the Department later assessed a civil penalty for the violation. The court determined that the language of Section 18.4 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.*, and its corresponding regulation permitted the appellant to contest either the amount of the penalty or the fact of the violation in the appeal from the civil penalty assessment regardless of whether the Appellant failed to appeal the earlier compliance order. The court reasoned that this practice should be permitted since the Department "does not assess a civil penalty when it issues the compliance order, [and therefore] the alleged violator does not have this possibly crucial information when deciding whether to appeal." *Kent Coal* at 281. The Board applied the same reasoning in *White Glove, Inc. v. Dept. of Environmental Protection*, 1998 EHB 372, in which the violation was of the Air Pollution Control Act (APCA), Act of

January 8, 1960 P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001-4106, which contains the same language allowing a violator to contest the amount of the penalty or the fact of the violation. Further, the Board applied this rationale in *Berwick Township v. Dept. of Environmental Protection*, 1998 EHB 487, in which it determined that language contained in the Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20(a), also allowed an alleged violator to challenge both the fact of the violation and the amount of the civil penalty. *See also F.R.& S., Inc. d/b/a Pioneer Crossing Landfill v. Dept. of Environmental Protection,* 1998 EHB 336, and *Colt Resources, Inc. v. Dept. of Environmental Protection*, 2002 EHB 660. We believe this interpretation is also applicable to the facts presented in this case.

Section 691.605 of the regulations pertaining to the assessment of civil penalties under the Clean Streams Law provides in relevant part as follows:

> The person or municipality charged with the violation shall then have thirty (30) days to pay the proposed penalty in full, or if the person or municipality wishes to contest either the amount or the fact of the violation, to forward the proposed amount to the department for placement in an escrow account with the State Treasurer or any Pennsylvania bank, or post an appeal bond in the amount of the proposed penalty...

35 P.S. § 691.605 (b)(1).

The language cited above is analogous to that contained in the SMCRA and APCA. Therefore, we find that the doctrine of administrative finality cannot serve as a basis for granting summary judgment on the violations contained in the compliance order. Thus, the Defendants are not foreclosed from challenging both the fact of the violations and the civil penalty underlying the charged violations of the Clean Streams Law even though the Defendants failed to appeal the earlier compliance order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-004-CP-C**
RICHARD C. ANGINO, ESQUIRE, KING DRIVE CORPORATION, and SEBASTIANI BROTHERS	:	

ORDER

AND NOW, this 29th day of November, 2005, it is ordered that the Department's Petition for Reconsideration is **denied**.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: **November 29, 2005**

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

For the Commonwealth, DEP:
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Southcentral Regional Office

For the Defendants:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

GREGG LUCAS	:	
	:	
v.	:	**EHB Docket No. 2005-058-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 30, 2005**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

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

Synopsis:

The Board grants the Department's motion for partial summary judgment in an appeal from a civil penalty assessment under the Waste Transportation Safety Act. Under that statute, an appellant waives its legal right to challenge a violation or the amount of a civil penalty if it fails to prepay a civil penalty assessment, post an appeal bond in the amount of the assessment, or claim a financial inability to prepay the penalty or post a bond.

OPINION

The Department of Environmental Protection issued a civil penalty assessment to Gregg Lucas for the unauthorized transportation of waste tires. Lucas was assessed $2,000 for a violation of the Waste Transportation Safety Act, 27 Pa. C.S. §§ 6201-6209, and $4,000 for violating the Waste Tire Recycling Act, 35 P.S. §§ 6029.10-6029.115. Lucas filed this appeal from the assessment, but he has not prepaid the Waste Transportation Safety Act penalty, filed

an appeal bond in the amount of that penalty, or made a claim of financial inability to pay that penalty.

The Department has filed a motion for judgment on the Waste Transportation Safety Act portion of the penalty assessment.[1] The Department argues that Lucas's failure to pay the amount of the penalty, post a bond in the amount of the penalty, or assert his financial inability to do so has resulted in a waiver of his appeal rights. Lucas has not responded to the Department's motion.

Dispositive motion practice before the Board is governed by Pa.R.C.P. 1035.1 through 1035.5. 25 Pa. Code § 1021.94(b). Those rules provide that summary judgment may be entered against a party who does not respond to a motion for summary judgment. Pa.R.C.P. 1035.3(d). The Board has not hesitated to dismiss appeals or grant summary judgment when no response is filed to a dispositive motion. *See, e.g., Steinman Hauling v. DEP*, 2004 EHB 846, 848; *Pirolli v. DEP*, 2003 EHB 514, 518; *Hamilton Brothers Coal v. DEP*, 2000 EHB 1262, 1263; *Concerned Carroll Citizens v. DEP*, 1999 EHB 167, 170. In light of Lucas's unexplained failure to file any response to the Department's motion, we will grant the Department's motion pursuant to Pa.R.C.P. 1035.3(d).

Alternatively, the Department's motion is also granted on its merits. Section 6208 of the Waste Transportation Safety Act provides:

> When the department assesses a civil penalty, it shall inform the transporter of the amount of the penalty. The transporter shall then have 30 days to pay the penalty in full or, if the transporter wishes to contest either the amount of the penalty or the fact of the violation, the transporter shall forward the proposed amount of the penalty to the department for placement in an escrow account with the State Treasurer or with a bank in this Commonwealth or post an appeal bond in the amount of the penalty....Failure to forward

[1] The Department's motion does *not* pertain to Lucas's appeal of the $4,000 penalty assessed under the Waste Tire Recycling Act.

> the money or the appeal bond to the department within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

27 P.S. § 6208(b)(2). Lucas has neither paid the penalty nor posted an appeal bond in the amount of the penalty.

Of course, constitutional considerations afford Lucas the opportunity to present a timely claim that he is financially unable to prepay the penalty, *Twelve Vein Coal Co. v. DER*, 561 A.2d 1317 (Pa. Cmwlth. 1989), *app. denied*, 578 A.2d 416 (Pa. 1990), but Lucas has presented no such claim here. Here, Lucas has not responded in any way to the Department's motion. To repeat, he has *never* claimed a financial inability to pay. Accordingly, under Section 6208(b)(2) of the Waste Transportation Act, Lucas's failure to prepay the penalty, post a bond, or claim an inability to do either results in a waiver of his legal rights to contest the violation or the amount of the penalty. The Department's motion is, therefore, granted and an appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREGG LUCAS	:	
	:	
v.	:	**EHB Docket No. 2005-058-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of November, 2005, the Department's unopposed motion for partial summary judgment is granted. Lucas is precluded from challenging the fact of the violation of the Waste Transportation Safety Act or the amount of the civil penalty assessed under that Act. This Order does not affect the penalty assessed under Waste Tire Recycling Act.

ENVIRONMENTAL HEARING BOARD

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Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: November 30, 2005

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

For the Commonwealth, DEP:
John H. Herman, Esquire
Southwest Regional Counsel

For Appellant, *Pro Se*:
Gregg Lucas
254 Mill Street
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kb

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ELJEN CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2005-257-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 2, 2005**

OPINION AND ORDER GRANTING THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION TO DISMISS

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board grants the Department's Motion to Dismiss an appeal challenging a letter issued by the Department that does not contain a final decision, thus is not an appealable action. An earlier letter issued by the Department to the Appellant was an unequivocal denial of Appellant's application and an appealable action. Appellant had the opportunity and right to challenge that action by filing an appeal with this Board within 30 days of obtaining actual notice of the action. 25 Pa. Code. § 1021.52(a). Having failed to file an appeal within the 30 day time period, the departmental action embodied in the November 23, 2005 Letter is final as to Eljen and not subject to appeal now. 35 P.S. § 7514(c). Appellant's arguments and the facts before us do not demonstrate fraud or a breakdown in the Board's operation or a non-negligent failure to file a timely appeal; thus, the request to file an appeal *nunc pro tunc* is denied.

Introduction

This case involves the denial by the Department of Appellant Eljen's proposal to designate its on-lot wastewater treatment system for use as an alternate technology for sewage treatment. Neither party disputes that the Department denied the application and that such denial is appealable. The question presented in this appeal, as Eljen states in its brief, is *when* did the decision become final and appealable? (emphasis Eljen's).

The appeal was filed from a July 16, 2005 letter from counsel for the Department which Eljen claims is the final appealable denial letter. Eljen filed a Notice of Appeal from that letter on August 16, 2005 and an Amended Notice of Appeal (ANOA) on August 24, 2005. The Department, on the other hand, claims that the appealable denial came months earlier and was not appealed. The denial, according to the Department, came via letter dated November 23, 2004 to Eljen which Eljen did not appeal.

The Department's Motion to Dismiss the appeal of the July 16, 2005 letter is based on the failure to file a timely appeal. Moreover, the Department argues that Appellant's request in its ANOA that the appeal be permitted as an appeal *nunc pro tunc* should be denied.

Factual Background

Eljen is a corporation with a location in Connecticut that manufactures the Eljen In-Drain System, an on-lot wastewater treatment system. ANOA ¶¶ 1, 2. Eljen started in 1997 to take the necessary steps to obtain approval of its In-Drain System as an alternate technology for on-lot wastewater treatment in the Commonwealth of Pennsylvania as provided in 25 Pa. Code § 73.72. In 1997 Eljen presented its In-Drain System to the Department and obtained listing as an experimental technology for on-lot wastewater treatment in the Commonwealth. ANOA ¶¶ 3, 4; April 29, 2005 letter from Straub to Myers, ANOA Exhibit M (April 29, 2005 Letter) at 1. Eljen

installed five In-Drain Systems in Pennsylvania and collected monitoring data according to a protocol for testing the In-Drain System created by the Department. ANOA ¶¶ 5-8. In September 2000 Eljen submitted its first set of data from the monitored installations within Pennsylvania and requested that DEP approve the In-Drain System as an alternate on-lot wastewater technology. ANOA ¶9; September 12, 2000 letter from Donlin to Lauch, ANOA Exhibit D.

At that time and prior to July 2004, the Department evaluated proposals for alternative on-lot systems by criteria and methods referred to as the Experimental Systems Guidance (ESG). Under the ESG, a company requesting approval as alternate technology submitted a protocol and testing data obtained by implementing the protocol. The Department would approve the technology as an alternate technology if the testing demonstrated the technology met the applicable requirements and performed as the manufacturer claimed. Motion ¶ 4; Affidavit of Karen J. Fenchak, Sanitarian Program Specialist for DEP, Motion Exhibit D (Fenchak Affidavit); Experimental Systems Guidance, Motion Exhibit D, Attachment 1.

DEP advised Eljen on or about January 17, 2002 that the number of In-Drain Systems installed in Pennsylvania constituted a "statistically significant sample for monitoring and evaluation purposes." January 17, 2002 letter from Lauch to Donlin, ANOA Exhibit E. Accordingly, the In-Drain System would be removed from the list of experimental on-lot wastewater systems in the next publication of the ESG and the monitoring data Eljen had submitted would be reviewed to determine whether the In-Drain System would be approved as an alternate technology. *Id.*

During pendency of Eljen's application, on February 14, 2004, the Department published a draft technical guidance providing public notice of the Department's intent to rescind the ESG

and adopt a new guidance, the Experimental On-Lot Wastewater Technology Verification Program (TVP). 34 Pa. Bull. 917. Eljen was specifically and particularly notified by the Department of this change-over and what it would mean. By letter dated July 1, 2004 from Mr. Milt Lauch of the Department to Eljen, Eljen was informed specifically about the change from the ESG to the TVP that would become effective in two days. July 1, 2004 letter from Lauch to Eljen Corporation, Motion Exhibit D, Attachment 4 (July 1, 2004 Letter). The July 1, 2004 Letter further advised that "[a]ll future proposals for onlot technology in Pennsylvania will be administered under the [TVP]." *Id.* General notice to the public of the change-over and adoption of the TVP criteria was provided, as Mr. Lauch had said in the July 1, 2004 Letter, in the *Pennsylvania Bulletin* dated July 3, 2004.[1] That notice in the July 3, 2004 *Pennsylvania Bulletin* specifically provided that "[t]he Experimental System Guidance [ESG] is hereby rescinded." 34 Pa. Bull. 3463.

The Department, however, had continued to consider the then pending Eljen application under the ESG criteria even after the July 3, 2004 change-over from ESG to TVP. Unfortunately for Eljen, the Department notified it on September 27, 2004 that its proposal had not met the

---

[1] The Fenchak Affidavit explains the two procedures and program guidance documents:

> The Department provides a procedure for allowing on-lot wastewater permits to be issued for experimental technology. Under the guidance in effect prior to July of 2004, called the Experimental Systems Guidance (ESG), a company requesting experimental evaluation leading to possible approval as alternate technology submitted a protocol and underwent testing pursuant to the protocol. Monitoring results were to have been submitted to DEP regional and central offices for evaluation. If the testing demonstrated the company's claims concerning the technology, the Department approved of the technology as an alternate technology. A true and correct copy of the Experimental Systems Guidance is attached to this affidavit and is incorporated here by reference. ...
>
> In 2004, the Department rescinded the ESG and adopted a new procedure called the Experimental On-Lot Wastewater Technology Verification Program (TVP). Testing under the TVP is administered by the National Sanitation Foundation International. Independent third parties, using nationally recognized testing protocols, review the test results at test centers. ...

Fenchak Affidavit, Motion Exhibit D ¶¶ 3,4.

requirements of ESG. In an e-mail dated September 27, 2004, Thomas Franklin of the Department's Bureau of Water Supply and Wastewater Management to James Donlin, Vice President of Eljen, Mr. Franklin states,

> In response to your recent request to approve the Eljen In-Drain system as an alternate onlot technology, I have completed review of the information we have in our files related to Eljen In-Drain experiment. My review revealed that the installation and monitoring data submitted by your office has not met the requirements outlined in the Experimental Systems Guidance...As per the July 1, 2004 letter from Milt Lauch to the Eljen Corporation, all future proposals for technology approval in Pennsylvania will be administered under the Technology Verification Program (TVP)...

September 27, 2004 e-Mail Franklin to Donlin, ANOA Exhibit F (September 27, 2004 E-Mail).

The September 27, 2004 E-mail triggered an exchange of additional e-mail messages and letters between Eljen and the Department. In a November 1, 2004 letter from Mr. Donlin to Mr. Franklin, Mr. Donlin suggests that the Department "re-review the Eljen In-Drain system as an alternate system." November 1, 2004 letter Donlin to Franklin, Motion Exhibit D, Attachment 6 at 3. In a November 16, 2004 letter from Mr. Donlin to Mr. Franklin, Mr. Donlin complains that the Department has provided, "different reasons for your denial" and "has not provided any creditable justification for denial of our application as Alternate technology." November 16, 2004 letter Donlin to Franklin, Motion Exhibit D, Attachment 6 at 4.[2] By letter dated November 16, 2004 from Mr. Donlin to Secretary McGinty, Mr. Donlin states that, "we were denied an approval based not on code, or performance rather opinions or other reasons within the Division of Wastewater Management that quite frankly change from one day to the next depending on the person you are talking with." November 16, 2004 letter Donlin to McGinty, ANOA Exhibit K at 1. The same letter to Secretary McGinty states that, "[w]e have been asked to provide

[2] Motion Exhibit D Attachment 6 contains both the letter dated November 1, 2004 and the letter dated November 16, 2004 from Mr. Donlin to Mr. Franklin. The page reference given is for the page in Motion Exhibit D Attachment 6, not the actual page number in the letter dated November 16, 2004.

information based on protocols that do not exist and denied approval based on same." *Id.* at 1-2. Finally, the letter says that "we are writing you as our final appeal to be listed as an Alternate technology, not based on politics but rather by science and demonstration and our experimental listing in November 1997." *Id.* at 2.

Then came the critical letter of November 23, 2004 from Mr. Franklin to Mr. Donlin. In that letter Mr. Franklin summarizes the history of Eljen's technical efforts under the ESG criteria and he concludes as follows:

> In summary, Eljen Corporation has not provided complete sampling for five Pennsylvania sites as originally required by the Department, and some of the test results indicate degraded effluent quality following treatment. **Based on this information, the Eljen In-Drain system will not be approved as an alternate technology in Pennsylvania. Any further evaluation of this experimental technology will be conducted under the Department's *Experimental Onlot Technology Verification Program.*** A copy of this guidance is available on line....
>
> If you have any further questions regarding testing and approval of the In-Drain system in Pennsylvania, please contact me at the above phone number or by e-mail[.]

November 23, 2004 Letter, ANOA Exhibit G at 2 (emphasis added). Eljen did not file an appeal with this Board challenging the decision outlined in the November 23, 2004 Letter.

Although Eljen did not appeal the November 23, 2004 Letter, it did not stop asking the Department to reconsider its rejection of the In-Drain System under ESG. Counsel for Eljen, Steven Bosio, corresponded by e-mail with Cathleen Myers, Deputy Secretary for Water Management in January 2005. Counsel wrote that, "PADEP has denied approval inexplicably." January 17, 2005 e-Mail Bosio to Myers, Motion Exhibit D Attachment 7. Furthermore, counsel writes, "Eljen's most recent correspondence/denial in November 2004 came from [Mr. Franklin]. Without explanation, Mr. Franklin added new 'Guidance' criteria. This is obviously a source of great frustration for our client." *Id.*

Counsel for Eljen, J. Curt Straub, wrote a letter to Ms. Myers dated April 29, 2005 in which he states, "the Department's denial of Alternative Technology approval per Mr. Franklin's e-mail dated September 27, 2004, was mistaken and erroneous, and has worked an unjust denial of Eljen's rights." April 29, 2005 Letter, ANOA Exhibit M at 1. The letter further states that the Department's move from ESG to TVP is "an excellent idea" and "long overdue, ..."

> However, Eljen's application here cannot be subject to this new program, because it was submitted *and decided* under the previous regime, the [ESG]. I wish to stress that not only does Eljen have a right to have its application decided under the ESG, but the PADEP has recognized same and in fact decided (and denied) the application under ESG.

Id. at 2 (emphasis in original). Counsel further states that, "Mr. Franklin decided the Eljen application under the protocols of the ESG, and this was correct; however, he made the wrong decision, denying the application when he should have approved it." *Id.* Moreover, the letter states that "Mr. Franklin was kind enough to send a detailed letter of November 23, 2004, setting forth the reasons why the Eljen application was denied.... [However], every reason given by Mr. Franklin for the denial was demonstrably wrong." *Id.* at 4. Counsel then engages in a lengthy explanation why, in his view, Mr. Franklin's conclusion that Eljen's system did not qualify under ESG was technically incorrect. Id. at 4-8. Counsel concludes the letter with a plea and a veiled threat. The letter states, "Cathy, ... I am reaching out to you here in order to give the Department once more a chance to 'get it right'...Eljen has invested an enormous quantity of time and money in obtaining the approval sought, and it still prefers to achieve that goal by voluntary consensus with PADEP." *Id.* at 8.

In a follow-up June 10, 2005 letter from Mr. Straub to Ms. Myers, Mr. Straub refers to his letter of April 29, 2005 as having "ask[ed] for reversal of the decision" to deny Eljen's application for approval under ESG. June 10, 2005 letter Donlin to Myers, Motion Exhibit H at

11.[3] Mr. Straub says that if the Department is intent on "maintain[ing] its denial" he would appreciate what he calls a "formal communication" from DEP on Eljen's application "without any further instructions of other steps to take in order to secure approval" so that Eljen may have what Mr. Straub calls "an unambiguously appealable decision." *Id.*

This letter elicited the July 19, 2005 Letter from the Department's counsel, Mr. Cummings, to Mr. Straub. July 19, 2005 Letter from Cummings to Straub, ANOA Exhibit A (July 19, 2005 Letter). The July 19, 2005 Letter provides as follows:

> Your letter of June 10, 2005 to Deputy Secretary Myers regarding the above-referenced matter has been referred to me for response. You are seeking reversal of the Department's denial of Eljen's application for approval of its "In-Drain system" as an Alternate Technology for on-lot wastewater treatment.
>
> In a letter dated November 23, 2004, the Department responded to a letter from Eljen requesting that it approve the Eljen In-Drain System as an alternate onlot wastewater technology. For the reasons stated therein, the Department unambiguously stated that the "Eljen In-Drain System will not be approved as an alternate technology in Pennsylvania." There appears to have been no follow-up or appeal of this letter from Eljen until your letter of April 29, 2005 – a period of just over five months.
>
> Final actions of the Department are appealable to the Environmental Hearing Board (the Board). Such appeals must be filed with the Board within 30 days of the date of receipt of the notice of action of the Department. 25 Pa. Code § 1021.52(a).
>
> If you have any questions, please fell free to contact me.

Id.

Eljen filed an appeal with this Board challenging the July 19, 2005 Letter claiming that it is the final appealable action of the Department with respect to Ejen's In-Drain System. Recognizing the obvious timeliness question regarding its appeal, Eljen's ANOA also states that, alternatively, "Eljen should be permitted to take an appeal *nunc pro tunc* from any previous

---

[3] Motion Exhibit H contains more than the letter from Mr. Straub to Ms. Myers, the page reference is to the eleventh page of the exhibit, not the eleventh page of the letter.

action deemed to be the "final action" of the PADEP." ANOA ¶ 34.

Discussion

DEP's Motion to Dismiss

"The Board evaluates motions to dismiss in the light most favorable to the non-moving party. A motion to dismiss may only be granted where there are clearly no material factual disputes and the moving party is entitled to judgment as a matter of law." *Neville Chemical Co. v. DEP*, 2003 DEP 530, 531 (citations omitted). *See also Cooley v. DEP*, 2004 EHB 554, 558.[4]

Eljen states the issue we face here succinctly and correctly as follows, "[i]t is beyond dispute that a *final* decision of the Department rejecting Eljen's application to designate its onlot wastewater treatment system for use as an alternate technology is an appealable decision. The issue presented here is *when* did this decision become the Department's *final* decision for purposes of appeal." Eljen Memo at 1 (emphasis in original).

We have stated before that there is no simple rule to apply which mechanically determines for us whether an action is appealable or not. In *Beaver v. DEP*, 2002 EHB 666, we said,

> A review of the caselaw reveals certain principles which guide the determination of whether a particular DEP action is appealable. Although formulation of a strict rule is not possible and the "determination must be made on

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[4] As we noted in *Beaver v. DEP*:

> As a matter of practice the Board has authorized motions to dismiss as a "dispositive motion" and has permitted the motion to be determined on facts outside those stated in the appeal when the Board's jurisdiction is in issue. *Florence Township and Donald Mobley v. DEP*, 1996 EHB 282, 301-03; *Felix Dam Preservation Association v. DEP*, 2000 EHB 409, 421 n.7; *see also Grimaud v. DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994) ("Where there are no facts at issue that touch jurisdiction, a motion to quash may be decided on the facts of record without a hearing."). Accordingly, the Board has considered the statements of fact and the exhibits contained in the parties' pleadings when resolving these Motions to Dismiss.

2002 EHB 666, 671 n.4. In the present matter, the pertinent filings by the parties are: ANOA on August 24, 2005; Department's Motion with exhibits and a Brief in Support of the Motion on September 30, 2005; Response of Eljen Corporation in Opposition to the Department's Motion on October 31, 2005 and Memorandum of Law opposing the Motion (Eljen Memo); and the Department's Reply Brief on November 10, 2005.

> a case-by-case basis," *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121, the Board has articulated certain factors which should be considered. These include: the specific wording of the communication; its purpose and intent, the practical impact of the communication; its apparent finality; the regulatory context; and, the relief which the Board can provide. *See Borough of Kutztown*, 2001 EHB at 1121-24.

2002 EHB at 673. In this case the answer to the question is that the final appealable action was embodied in the November 23, 2004 Letter; the July 19, 2005 Letter is not the appealable action.

We start with the specific wording of the November 23, 2004 Letter. The language of the November 23, 2004 Letter, which we have already set forth above, and do so again here is as follows:

> In summary, Eljen Corporation has not provided complete sampling for five Pennsylvania sites as originally required by the Department, and some of the test results indicate degraded effluent quality following treatment. **Based on this information, the Eljen In-Drain system will not be approved as an alternate technology in Pennsylvania. Any further evaluation of this experimental technology will be conducted under the Department's *Experimental Onlot Technology Verification Program.*** A copy of this guidance is available on line....

November 23, 2004 Letter, ANOA Exhibit G at 2 (emphasis added). This language unequivocally and unmistakably communicates that the Eljen application is denied under ESG and that any further application will have to proceed under TVP. There can be no doubt based on the language that this was the intent of Mr. Franklin's letter. Objectively, no other conclusion can be drawn from that letter with respect to whether the letter was a decision rejecting Eljen's application under ESG and whether that decision was final.

While Eljen correctly points out that the November 23, 2004 Letter does not specifically contain a notification of Eljen's right to appeal, we have never held that such a "Mirandization" is required for a decision to be appealable. Likewise, the presence of such words would not in itself make a non-appealable communication appealable. There is no such rule, nor should there

be, which makes the presence or absence of such language be the definitive determinate whether an action is appealable or not. On the contrary, as just noted, we have applied a host of factors to determine the question of appealability. The presence or absence of a specific notice of appealability is but one factor in the analysis. *Lehigh Township v. DER,* 624 A.2d 693 (Pa. Cmwlth. 1993)*; Franklin Township Mun. Sanitary Auth. v. DEP*, 1996 EHB 942.[5] *See also Olympic Foundry, Inc. v. DEP*, 1998 EHB 1046, 1051-52 ("The Board has held that the Department is not obligated to inform the appellant of its appeal right. ... Therefore the lack of specific language does not affect the appealability of the March 16, 1998 letter.").

The final paragraph of the November 23, 2004 Letter stating that if Eljen has any further questions regarding testing and approval of the In-Drain System to please contact Mr. Franklin, does not, as Eljen maintains, preclude the conclusion that the letter is final and appealable. As we have said, the plain language of the letter before the final paragraph communicates an unequivocal and unmistakable denial of the application under the ESG criteria. The last paragraph does not contradict the earlier plain language. As we have noted earlier, the criteria for review of alternate on-lot systems changed from ESG to TVP. Eljen could still apply for acceptance under TVP. Indeed, that is exactly what the November 23, 2004 Letter states. The last paragraph, then, can only refer to further possible testing and approval under TVP. It does not undo the unequivocal denial and the finality of that denial under ESG.

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[5] In *Franklin Township* the Board specifically noted:

> It is true that the Department's November 1995 letter contains no language notifying Franklin Township of its right to appeal. However, the Court in *Lehigh Township* made it clear that it was not merely the lack of any language notifying the Township of its appeal rights, but the absence of such language coupled with the letter's conditional language, which prevented the letter from being a final action of the Department. Moreover, it is well-established that the lack of specific language advising a person of his right to appeal does not, *per se*, prevent a Department letter from being a final, appealable action; rather, it is the content of the letter which determines whether it is an appealable action.

1996 EHB 946 n.1 (citations omitted).

This change-over from ESG to TVP was not unknown to Eljen. Public notice had been provided in the *Pennsylvania Bulletin* of February 14, 2004 of the intent of DEP to effectuate the change-over. Eljen had been specifically told in the July 1, 2004 Letter about the upcoming change-over and what it would mean to Eljen. Finally, on July 3, 2004, the Department provided public notice in the *Pennsylvania Bulletin* of the actual change-over from EGS to TVP criteria. It is not possible or reasonable to conclude now or have concluded then that the last paragraph of the November 23, 2004 Letter could refer to anything other than potential further attempts by Eljen to have its system approved in the future which at that point would have to be under the TVP criteria, not the ESG criteria.

Along the same line of thinking, although we are convinced that, objectively, the plain language of the November 23, 2004 Letter communicates an unequivocal and final denial of Eljen's application under ESG, the context of the letter makes clear that Eljen viewed its proposal as rejected under ESG. The November 23, 2004 Letter came after the public and particular notification to Eljen in February and July 2004 of the change-over from ESG to TVP and what that would mean and Eljen's receipt of the September 27, 2004 E-mail. Correspondence from Eljen and its counsel both before and after the November 23, 2004 Letter show that Eljen understood that its application under ESG had been denied and that it would have to proceed under TVP. Even before the November 23, 2004 Letter, Eljen refers repeatedly to the denial of its application, how the application showed approvability under ESG and that it would be unfair to subject Eljen to TVP. In the letter to Secretary McGinty, Eljen tells her that this is its "final appeal." November 16, 2004 letter Donlin to McGinty, ANOA Exhibit K at 2. Under those circumstances, it is clear that, although Eljen did not agree with the decision, thought it was wrong and sought reconsideration and retraction thereof, Eljen regarded and

treated its application under ESG as having been denied and that any further consideration would have to be under TVP.

While the correspondence from counsel for Eljen after November 23, 2004 is not necessary to our conclusion, it does bolster it. That correspondence even seems to move the final decision to the earlier September 27, 2004 E-mail. In January 2005, counsel wrote to Ms. Myers complaining that DEP had denied approval. January 17, 2005 e-mal Bosio to Myers, Motion Exhibit D Attachment 7. In April 2005, counsel writes that the change-over from ESG to TVP is a good idea but Eljen's application "cannot be subject to [the new TVP] program because it was submitted *and decided* under the previous regime, the [ESG]." April 29, 2005 Letter, ANOA Exhibit M at 2 (emphasis in original). Eljen's counsel refers to this letter as "asking for a reversal of the decision." The question whether the September 27, 2004 E-mail may itself have been a final appealable action is not presented here. What is clear from all of this, however, is that the final action denying the Eljen application under ESG came no later than the November 23, 2004 Letter. The point is that these statements in the various letters indicate that Eljen was treating the decision to reject Eljen's application under ESG as having already been made.

For the reasons we have outlined about the plain language of the November 23, 2004 Letter and its context, we do not find Eljen's proffer to us of *Lehigh Township v. DER*, 624 A.2d 693 (Pa. Cmwlth. 1993), requires a different conclusion. Indeed, our decision here is very much in concert with *Lehigh Township*. Although there are some surficial similarities between the letter here and the ones discussed in *Lehigh Township* with respect to the absence of specific language announcing the decision is appealable and the closing of the letter directing questions to a department staff member, the decision of the Court in that case focused on the plain language of the letter. In *Lehigh Township*, the Court saw the plain language of the letter and its

context in light of those two features as not communicating a final appealable decision. We have outlined why in this case, the plain language of the letter and its context in light of those two features do communicate a final appealable decision. Furthermore, to the extent that the *Lehigh Township* court looked to the parties' subsequent words and actions to help shed light on letters in that case, we need not do that since the plain language of the letter here reveals its decisive finality. In any event, as we have discussed, the parties' words and actions in this case subsequent to the November 24, 2004 Letter confess that both treated Eljen's request for approval under ESG as having been decided by the Department in the negative. Eljen tried unsuccessfully to have the Department reconsider and retract that decision.

Also, unlike in *Lehigh Township*, here the Department did not request, accept or evaluate any additional data or information regarding the In-Drain System under the ESG criteria subsequent to November 23, 2004. *See Lehigh Township*, 624 A.2d at 651-52. In fact, Eljen complained to Deputy Secretary Myers that she had not undertaken a further review of the denial. The letter from Eljen's counsel to Deputy Secretary Myers dated April 29, 2005 states,

> As I read your letter of February 28, 2005 to Eljen, you did not engage in any independent evaluation of Mr. Franklin's decision under the ESG, but simply noted his denial decision, assumed it was correct, and instructed Eljen to proceed in the future under the TVP. Cathy, what I am now requesting you to do is to make an independent evaluation and assessment of whether the Eljen In-Drain application should have been approved under the ESG. I am confident that such an independent review by yourself will yield the conclusion that, indeed, the In-Drain System should have been approved, and you will correct the unjust and wrong result which had been reached by the Department. Please allow this letter to guide and inform your analysis of the situation.

April 29, 2005 Letter, ANOA Exhibit M at 2.

Eljen discusses the seriously detrimental and unfair effect of its rejection under ESG and its having to proceed under TVP. Eljen says that the denial of its request to be approved as an alternate technology and dismissal of its appeal will mean that their years of work and the funds

expended on installing and monitoring the In-Drain Systems within Pennsylvania will be for naught. We take Eljen at its word that the consequences of the DEP decision are drastic to it. This fact, however, is exactly why the November 23, 2004 Letter should not reasonably have gone unappealed. That effect or consequence was visited upon Eljen no later than the November 23, 2004 Letter. Whether DEP's action to deny the application under ESG and require Eljen to proceed in the future under TVP was technically erroneous, unreasonable, unfair or otherwise contrary to law was a question squarely open for the opportunity and the obligation to appeal to the Board no later than 30 days after Eljen obtained notice of the November 23, 2004 Letter. That question is not justiciable by the Board now. The dire consequences which Eljen will suffer result from its failure to both exercise its right and perform its obligation to appeal the Department's decision on time, not from our dismissal of an untimely appeal.

Obviously, in light of our discussion thus far, we also conclude that the letter from counsel for the Department to counsel for Eljen dated July 19, 2005 does not present an appealable action with respect to the Department's decision to deny the Eljen application under ESG. That letter simply restates what had already happened months before, i.e., Eljen's application was denied.[6] The letter contains no current decision, it merely refers to the November 23, 2004 Letter and the decision embodied in that letter and provides the Department's interpretation of Eljen's appeal rights, which by July 19, 2005 had expired. The July 19, 2005 Letter presents no decision to appeal nor does it resurrect the decision already made for an opportunity to appeal now.

Thus, we have answered the seminal question Eljen posed in its brief. The final action of

[6] Ironically, under Eljen's proposed "rule" that a letter be appealable or not based on the presence or absence of "Mirandizing" language advising the recipient that the letter embodies a final action which is appealable to the Environmental Hearing Board, the July 19, 2005 Letter would not be appealable since that language is missing.

the Department from which Eljen had the opportunity and the obligation to appeal came no later than the November 23, 2004 Letter. Having failed to file an appeal within the 30 day time period, the Departmental action denying Eljen's application for its In-Drain System for qualification as an alternate system under ESG is final as to Eljen and not subject to appeal now. 35 P.S. § 7514(c); 25 Pa. Code § 1021.52(a). Moreover, of course, the July 19, 2005 Letter is not an appealable action.

Appellant's Request to Allow Appeal *Nunc Pro Tunc*

Much of what we have said already applies as well to the Appellant's request to allow this appeal *nunc pro tunc* which must be denied. Appeal *nunc pro tunc* is allowed in only very limited circumstances, none of which are present here. Our Rules provide that, "[t]he Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*, the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth." 25 Pa Code § 1021.53(f). The Pennsylvania Supreme Court provided guidance on when an appeal *nunc pro tunc* is appropriate in *Bass v. Commonwealth*, 401 A.2d 1133 (Pa. 1979), noting that "the time for taking an appeal cannot be extended as a matter of grace or mere indulgence." *Id.* at 1135. An appeal *nunc pro tunc* is appropriate when "there is fraud or a breakdown in the court's operation [or] there is a non-negligent failure to file a timely appeal which was corrected within a very short time, during which any prejudice to the other side of the controversy would necessarily be minimal." *Id.* at 1135-36. *See also, e.g., Greenridge Reclamation LLC v. DEP*, EHB Docket No. 2005-053-L (Opinion issued April 21, 2005) (and cases cited therein); *Pedler v. DEP*, 2004 EHB 852, 854 (quoting *Bass*); *Dellinger v. DEP*, 2000 EHB 976, 982 (quoting *Bass*).

From our discussion above, it is clear that we do not view Eljen's failure to appeal the November 23, 2004 Letter as non-negligent.

We do not accept Eljen's view that appeal *nunc pro tunc* is appropriate because it was unclear to Eljen when the Department's denial of their request became final and because the Department continued a dialogue with Eljen, action which Eljen views as evidence that the Department did not treat the decision expressed in the November 23, 2004 Letter as final. It is not objectively reasonable to conclude that the November 23, 2004 Letter was unclear that denial of Eljen's application under ESG had taken place. The letter is clear and unequivocal about that. What else is clear is that Eljen considered its application denied under ESG. It characterized the Department's action as a denial and argued that the denial was technically unjustified and unfair. Instead of filing an appeal, it attempted to persuade DEP to reconsider and retract what Eljen itself numerous times called the denial of its application. No appeal *nunc pro tunc* lies under these circumstances.

An appropriate Order consistent with this Opinion follows.

COMMONWEALTH OF PENNSYVANIA
ENVIRONMENTAL HEARING BOARD

ELJEN CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2005-257-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

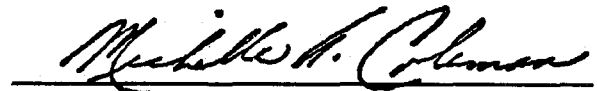
AND NOW, this 2nd day of December 2005, the Department's Motion to Dismiss is **GRANTED** and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: December 2, 2005

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MON VIEW MINING CORP.	:	
	:	
v.	:	**EHB Docket No. 2005-112-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 2, 2005**

OPINION AND ORDER ON APPELLANT'S FAILURE TO PERFECT APPEAL

By: Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Pennsylvania Environmental Hearing Board, pursuant to 25 Pa. Code Section 1021.161, dismisses an Appeal as a sanction following the Appellant's failure to perfect its Appeal pursuant to two Board Orders.

Discussion

On May 31, 2005 Appellant, Mon View Mining Corp. (Mon View), filed its Notice of Appeal. On June 15, 2005 the Board issued an Order directing Mon View to perfect its Appeal pursuant to 25 Pa. Code Section 1021.51 by filing with the Board on or before July 5, 2005 the following information: a copy of the Department action being appealed and proof of service that the proper officials at the Pennsylvania Department of Environmental Protection were served with the Notice of Appeal. When the Appellant ignored the Board's first Order, the Board issued a second order, dated July 7, 2005, again ordering Mon View to supply the same basic

information. The Board's Order directed that the information should be filed with the Board on or before July 22, 2005. The Order also warned Mon View that "failure to supply the missing information as ordered **will** result in dismissal of the appeal..." (emphasis in original) Appellant has not complied with either of our Orders.

It is axiomatic that the Board may impose sanctions upon a party for ignoring Board Orders. *Yourshaw v. DEP*, 1998 EHB 1063.

> The Board may impose sanctions upon a party for failure to abide by a Board Order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including these permitted under Pa. R.C.P. 4019 (relating to sanctions regarding discovery matters).

25 Pa. Code Section 1021.161.

Here, the Appellant could have perfected its Appeal by simply mailing the Board a copy of the Department action being appealed and providing proof of service that the appropriate Department officials were served with the Notice of Appeal. This is simply what is required to be filed pursuant to 25 Pa. Code Section 1021.51.

A party is only required to follow a few simple steps to perfect its appeal. These steps are necessary to insure that the due process rights of the Department are protected. Since Mon View has failed to perfect its Appeal and ignored two Board Orders directing it to do so, its Appeal is dismissed as a sanction pursuant to 25 Pa. Code Section 1021.161. Therefore, we will enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MON VIEW MINING CORP.	:	
	:	
	:	
v.	:	**EHB Docket No. 2005-112-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

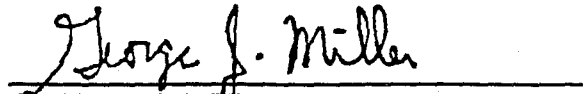
ORDER

AND NOW, this 2nd day of December, 2005, following the Appellant's failure to perfect its Appeal as required by 25 Pa. Code Section 1021.51 and two Board Orders directing it to do so, it is ordered as follows:

1) Appellant's appeal is ***dismissed*** as a sanction pursuant to 25 Pa. Code Section 1021.161.

ENVIRONMENTAL HEARING BOARD

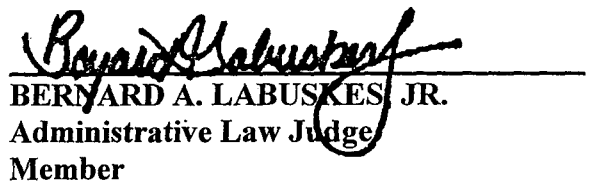
MICHAEL L. KRANCER
Administrative Law Judge
Chairman



GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **December 2, 2005**

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

For the Commonwealth, DEP:
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Southwest Regional Counsel

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med

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SHENANGO INCORPORATED	:	
	:	
v.	:	**EHB Docket No. 2002-259-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 2, 2005**

OPINION AND ORDER ON PREHEARING MOTIONS

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

Synopsis:

The Board denies a request to postpone a hearing on the merits due to the sudden incapacity of a Department employee.

OPINION

Shenango Incorporated filed this appeal from the Department of Environmental Protection's issuance to Shenango of NPDES Permit No. PA0002437. The appeal was filed on October 21, **2002.** The Board has granted numerous requests for continuances over the years.

On September 15, 2003, we scheduled the matter for a hearing. In December 2003, just before the first prehearing memorandum was due, the parties moved for another continuance. The basis for the repeated continuances was that Shenango has submitted a variance request related to its permit limits. Apparently, if that request were to be granted, the appeal would be moot. After a conference call with the parties, we postponed the hearing pending action on the

variance request or April 15, 2004, whichever occurred first. The variance was not acted upon and several more continuances followed.

While the parties were apparently willing to allow the appeal to remain dormant indefinitely, the Board was not. *See* EHB Internal Operating Procedures, Section 102(d) (available on EHB's website) ("It is the intent of the Board to resolve all Appeals as expeditiously as possible. In any event, the Board will strive to resolve all Appeals within two years of filing."). The Board adopted IOP 102(d) because litigants before this Board historically suffered from a tremendous backlog. Although we can happily say that those days are over, we must remain vigilant in ensuring that they never return. On June 30, 2005, we rejected the latest of the parties' requests for a continuance, and we scheduled a hearing on the merits to begin on December 6, 2005.

Shenango filed its prehearing memorandum on November 1, 2005. Although Shenango now claims that Kareen Milcic, a Department employee, may possess critical factual information, it did not list Milcic as a fact witness in its prehearing memorandum. It is not entirely clear why Shenango did not initially list Milcic as a fact witness in its prehearing memorandum. Shenango states in its recent filings that it agreed to postpone Milcic's deposition based upon the Department's oral representation that Milcic would serve as the Department's expert witness, but if Shenango also believed that Milcic would be required to provide testimony as a fact witness, it would have been advisable to list her as such in the prehearing memorandum. Shenango's failure to list Milcic in its initial prehearing memorandum is not necessarily significant in and of itself, but it does cast some doubt on Shenango's current assertion that Milcic may possess *indispensable* factual information. Shenango does not allege that Milcic acquired important factual information after Shenango filed its prehearing memorandum.

Shenango did not supplement its prehearing memorandum to add Milcic as a fact witness until November 23, which is about the same time as it became clear that Milcic would be incapacitated.

But we get ahead of ourselves. Returning to the case chronology, the discovery period in the matter closed back in 2003. Nevertheless, without the Board's knowledge or consent, the parties apparently agreed to conduct depositions of each other's witnesses.

On November 2, 2005, the Department filed a motion to compel. Shenango responded with a motion for a protective order. Shenango claimed that the Department was asking irrelevant and embarrassing questions at the depositions. The Department's motion was filed because Shenango abruptly terminated and walked out of a deposition because it believed that the Department's questions were irrelevant. Shenango in its motion asked us to issue an order prohibiting the Department from inquiring any further into irrelevant or embarrassing matters. In a November 2 Order, we took the matter under advisement and scheduled a conference call. In our Order, we stated: "It should be noted that, according to the Board's file, the discovery period in this appeal expired on March 24, 2003."

Neither party reacted to our prompt regarding the unapproved discovery at the ensuing conference call. The discussion centered entirely on the relevance, and therefore, discoverability, of certain matters. We ruled that the matters were at least reasonably calculated to lead to the discovery of relevant information. We were not asked to and did not address the timeliness of the discovery. There was no question or thought of postponing the hearing. The Board's independent interest in moving its docket along was not implicated one way or the other.

The latest skirmish in this appeal involves the aforesaid Ms. Milcic. The Department has represented that Milcic has become seriously ill and is unable to testify at either a deposition or a

hearing. The Department has provided a doctor's prescription in support of that representation. Shenango has stated that it does not contest the Department's representation of Milcic's incapacity. There is no reason to believe that Milcic's unexpected incapacity could reasonably have been anticipated.

The Department's revelation has resulted in several filings with the Board, including Shenango's motion to compel, the Department's motion in limine and motion to quash subpoena, and the responses to those documents. All of the filings amount to the same thing: Shenango is essentially asking that discovery (which officially closed in 2003) be reopened so that it may depose Milcic. Incidentally, this would mean that the hearing scheduled to begin two business days from today would need to be postponed. Interestingly, Shenango did not specifically ask for a postponement of the hearing in its motion to compel, but it acknowledged during a conference call that we conducted yesterday to address the matter that a postponement would be the inevitable result of its motion if granted. We are not suggesting that styling the motion as a motion to compel was disingenuous; we do believe, however, that Shenango could have been more forthcoming about the need for a postponement rather than leaving it to necessary implication.

The Department in response minimizes Milcic's role, and disputes the need to depose Milcic or call her as a witness. Interestingly, the Department does not specifically complain that the hearing would need to be postponed if Shenango's motion is granted.

The Board is extremely reluctant to further postpone a hearing in a case as old as this case is. The parties have been on notice for months that the Board would not entertain any further delay. There is no indication if or when Milcic's condition might resolve, and the Department has indicated that the incapacity might be protracted.

Even when discovery is conducted in an orderly and timely fashion in accordance with the Board's rules and orders--something that did not occur here--it is never perfect. Parties who conduct late discovery pursuant to side agreements among themselves without Board approval--and, in fact, in violation of the Board's deadlines--generally do so at their own risk. *See Philadelphia Suburban Water Co. v. DER*, 1988 EHB 735, 736 (Board refuses to reopen discovery requested at late date in already protracted case). *See generally*, Board Pre-Hearing Order No. 1, ¶ 3 (discovery period only extended "for good cause upon written motion"); *Concerned Citizens v. DER*, 1990 EHB 69 (discovery period only to be extended with Board approval). [1]

Further, if Milcic's factual knowledge was truly unique and of great consequence, it is questionable whether Shenango was reasonable in waiting until the last days before a hearing that was scheduled back in June to seek a deposition. Shenango states that it is "outrageous" for us to suggest that it was risky to wait until the last minute. It explains that it noticed Milcic's deposition in early October but postponed the actual deposition based upon representations by the Department that the Department intended to use Milcic as an expert witness. Regardless of what oral representations the Department may have made pursuant to the parties' extra-judicial arrangement, [2] we stand by our conclusion that Shenango's decision, even if justified in its own

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[1] We reject the suggestion by Shenango that our ruling today is inconsistent with our ruling several weeks ago regarding Shenango's motion for a protective order. That motion sought to limit the Department's right to ask a Shenango employee certain questions based solely on relevancy grounds. As explained in a conference call with the parties, we denied the motion because the information sought was calculated to lead to the discovery of relevant information. *See* Pa.R.C.P. 4003.1(b). Shenango did *not* object to the discovery as untimely, and by ruling in favor of the Department, we were simply addressing the discoverability argument. We did not and do not now endorse the parties' decision to conduct late discovery without Board approval. We most certainly did not suggest that the parties' informal arrangement or the direct or indirect consequences thereof would be grounds for further continuances in this stale appeal.

[2] *See* Pa.R.C.P. 4002 (authorizing discovery agreements) *Note* ("see Rule 201 for advisability of a writing") and *Explanatory Comment* ("Counsel will be well advised to confirm such [discovery]

mind, was risky in light of the Board's well advertised position that the hearing would not be postponed.

Although given the opportunity to do so on the conference call, Shenango was not able to convincingly explain exactly how it would be "severely prejudiced" if it cannot depose Milcic. We understand that Milcic is clearly a person who has been actively involved in post-appeal discussions between the Department and Shenango and who possesses what would have been discoverable information under normal circumstances. However, we were not told that other witnesses deferred questions in their depositions to Milcic. There is no other indication apparent to us that Milcic is the only person who has any particular information. As far as we know, the Department has made all of its other employees available to testify.[3] Admittedly, it can be difficult to show how a lack of information is prejudicial if one does not have the information. But it is also frequently obvious that a certain person is an indispensable witness. It does not appear that Milcic is such a person. This appeal, as well as negotiations regarding the appeal and ongoing permitting issues have been going on between Shenango and the Department for years. We are somewhat skeptical that there are any true surprises left out there.

It gives us some pause that we appear to be the only entity that appears to be genuinely interested in moving this litigation forward. To be blunt, however, we see no evidence that this appeal is any further along than it was three years ago. We see no evidence of progress. In fact, the parties' relationship seems, if anything, to have deteriorated.

This appeal, and in particular the problem currently before us, illustrates one of the reasons why the Board occasionally steps in to move a case along. Aside from the fact that it is

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agreements in writing to avoid misunderstandings."); Pa.R.C.P. 201 (agreements of attorneys relating to the business of the court shall be in writing).

[3] We have no sense that the Department is hiding anything or deliberately trying to withhold evidence. Again, Milcic's health issue is not disputed.

rarely in the public interest to leave Departmental actions in limbo for years, the longer a case drags out, the greater the likelihood that witnesses will forget things, or worse, become unavailable. We encourage full and complete discovery and settlements without unnecessary litigation expense, but at some point, the need to move cases trumps those considerations. *Kocher Coal Co. v. DEP*, 1999 EHB 49, 50. We have clearly passed that point here.

After (and only after) it became clear during the conference call that the Board was unlikely to postpone the hearing indefinitely pending Milcic's hopeful but uncertain recovery, Shenango offered to pursue alternative discovery to get at the information that Milcic would have revealed. For example, it indicated that it could depose a Departmental designee witness. This proposal actually supports our belief that Milcic is not truly indispensable as a witness. Shenango will be entitled to inquire broadly of other Departmental personnel at the hearing itself. It also reinforces our concern that all discovery--not just Milcic's deposition--was not completed in a timely fashion. In any event, it does not solve the problem of avoiding a postponement. All of the considerations that apply to Shenango's asserted need to depose Milcic apply with equal or greater force to its alternative proposal.

At one point on the conference call Shenango suggested that a delay of only one month or so might be necessary. As previously stated, however, there is no indication of Milcic's short term recovery (although we certainly hope that it occurs). Furthermore, at another point in the call, Shenango stated that Milcic's testimony might require re-examination of other witnesses. This illustrates that absolutely perfect discovery is about as attainable as the pot of gold at the end of a rainbow. At some point you simply need to go to a hearing. If we postpone because of Milcic's situation, we fully suspect that something else will come up so long as the variance request is pending.

In summary, we have a very old, stalled case in which no substantive progress is evident or credibly promised.[4] The hearing was scheduled months ago. The parties are conducting unauthorized discovery. The motions have been filed only a few days before the hearing. The witness who is incapacitated does not appear to be indispensable. We are highly skeptical that further discovery at this late date will reveal previously unknown information. Shenango has access at the hearing and may examine broadly any other Department employee with pertinent knowledge.

In light of the foregoing, Shenango's request to reopen discovery and postpone the hearing is denied. We will move forward with the hearing as scheduled. We acknowledge, however, that the hearing itself may shed further light on the extent to which Milcic can provide pertinent, otherwise unavailable information. For example, other witnesses may testify that she has sole access to crucial information or may defer matters to her as the person with the only first-hand knowledge on critical points. If that turns out to be the case, we would be willing to entertain a well grounded, good faith request at the conclusion of the hearing to leave the record open to receive testimony from Milcic if her prognosis improves in a reasonable period of time, particularly if it would not result in a significant delay in the post-hearing briefing schedule.

Accordingly, we enter the order that follows.

[4] To hear Shenango tell it, there is a state of complete confusion within the regulatory agencies on how to address the pending variance requests. We have not heard the Department's version, but actions--or in this case, the lack of actions--speak louder than words.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SHENANGO INCORPORATED	:	
	:	
v.	:	**EHB Docket No. 2002-259-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 2nd day of December, 2005, it is hereby ordered that Shenango's motion to compel is denied. The Department's motion to quash subpoena is granted. The Department's motion in limine is granted. This Order does not preclude Shenango from renewing its request to call Ms. Milcic as a witness before post-hearing briefs are due if events at the hearing support its request and/or Ms. Milcic's health improves sufficiently.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: December 2, 2005

c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT- WDYT, LLC, Permittee	:	**Issued: December 14, 2005**

OPINION AND ORDER ON MOTION FOR AN EXPEDITED PROTECTIVE ORDER

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Pennsylvania Environmental Hearing Board grants a Protective Order barring the deposition of an attorney employed by one of the Appellants on the basis of the attorney-client privilege and attorney work product. Furthermore, facts known and opinions held by experts are only discoverable pursuant to Rule 4003.5 of the Pennsylvania Rules of Civil Procedure. All of the parties in this matter have until February 13, 2006 to respond to expert discovery.

Discussion

Presently before the Pennsylvania Environmental is the Appellants' Motion for an Expedited Protective Order Barring the Deposition of Attorney Mark Wenzler. Attorney Wenzler's deposition has been noticed by counsel for Permittee Wellington Development. The deposition is scheduled at the Washington, D.C. office of Permittee's counsel for this Friday, December 16, 2005.

Appellant filed its Motion for an Expedited Protective Order on Friday, December 9, 2005. Permittee and the Department filed comprehensive responses opposing the motion on Tuesday, December 13, 2005.[1] The Board heard lengthy argument from counsel yesterday afternoon.[2]

Mark Wenzler is an attorney employed by Appellant National Parks Conservation Association. He has filed an affidavit in support of the motion for a protective order in which he states that "with respect to clean air litigation matters, I function as in-house counsel by providing legal advice and counsel to National Parks Conservation Association's staff and Board of Directors." Affidavit of Attorney Mark Wenzler, paragraph 4, dated December 8, 2005. Attorney Wenzler's affidavit goes on to state that he works closely with trial counsel in all aspects of the litigation "including legal research, development of legal strategy, and production of legal analysis."

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[1] Counsel are requested, when citing Pennsylvania Environmental Hearing Board cases, to use the official citation rather than the Lexis citation. Counsel are also requested to limit their use of acronyms.

[2] Because of the urgency to issue this Opinion and Order quickly as counsel would have to leave for Washington shortly and a major snowstorm is threatened we have not written as extensively

We agree with Appellants that Attorney Wenzler should not be deposed. Our holding is buttressed by case law, statute, and the Pennsylvania Rules of Civil Procedure.

> In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon trial by the client.

42 Pa. C.S. Section 5928.

In addition, Rule 4003.3 of the Pennsylvania Rules of Civil Procedure protects an attorney's work product from disclosure to opposing counsel. *See* also *Slater v. Rimar, Inc.*, 338 A.2d 584, 589 (Pa. 1975); *Defense Logistics Agency v. DEP*, 2000 EHB 1218, 1219-20. The attorney-client privilege and attorney work product doctrine apply to both outside counsel and counsel employed directly by corporations and governmental agencies. *Sedat, Inc. v. Department of Environmental Protection*, 641 A.2d 1243 (Pa. Cmwlth. 1994); *Morris Township Property Owners v. DEP*, 2004 EHB 68. We believe that Appellants have shown that the attorney-client privilege and attorney work product doctrine are applicable here to prohibit the deposition of Attorney Wenzler.

Discovery before the Board is governed by both the Pennsylvania Rules of Civil Procedure and the Board's Rules of Practice and Procedure. Appellants also contend that the Permittee is seeking expert discovery prematurely. Although Appellants do not

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as we would have liked on this very important and interesting issue.

clearly set forth their argument in this regard their position has merit. The Board's Rules and Pre-hearing Order No. 1 do not require parties to answer expert interrogatories and/or produce expert reports until after the initial discovery period is concluded.[3] When we extended discovery and other pre-hearing deadlines in this matter we set the expert discovery deadlines just before the conclusion of non-expert discovery in February 2006.

Trying to obtain technical expert information from non-expert witnesses is bound to be difficult and frustrating under the current matrix of the applicable Rules. This is illustrated by the Permittee in its Response to Appellants' Motion for a Protective Order. Permittee takes one of the fact witnesses of Appellant to task for not being able to answer the following deposition question.

> Q. Can you tell us why a stack test for particulate matter would not provide – I'm quoting from the answer here – an adequate demonstration of verification of compliance of the Wellington facility with the particulate matter standards that the Department has imposed in its permit?
>
> A. I don't have the technical expertise to answer that, but I relied on our counsel who prepared those answers.

This is exactly the type of question that requires expert knowledge to answer. Indeed, it is not the type of question that a non-expert witness would even be competent to answer.

[3] Under the Board's proposed new Rules this will no longer be the case. Expert discovery will proceed concurrently with "nonexpert" discovery.

Rule 4003.5 of the Pennsylvania Rules of Civil Procedure governs the discovery of expert testimony. Rule 4003.5 not only applies to the discovery of the opinions held by the expert but also the "facts known" by the expert. The Rule provides in relevant part:

> (a) Discovery of **facts known and opinions held by an expert**, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:
> (1) A party may through interrogatories require...
> (b) the other party to have each expert so identified **state the substance of the facts and opinions to which the expert is expected to testify** and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert. (Emphasis added)

A review of Rule 4003.5 reveals that the discovery of both facts known and opinions held by an expert is limited. The Rule refutes Permittee's argument that it is entitled to the facts supporting the Appellants' expert testimony outside the ambit of this Rule. Appellants, just like the Permittee and the Department, have until February 13, 2006 to set forth the facts known and opinions held by their experts. Depositions of experts are not even permitted unless "upon cause shown" it is ordered by the Board or agreed to by the parties. Pa. R.C.P. 4003.5(a)(2).

Our Order of November 15, 2005 requires all parties to file answers to expert interrogatories or serve their expert reports on or before Monday, February 13, 2006. Moreover, they can serve discovery through Friday, February 17, 2006. Finally, all parties may file supplemental expert reports or answers to expert interrogatories in rebuttal or response to any other expert reports on or before Wednesday, March 1, 2006.

If counsel comply with these deadlines then all parties should have a clear and comprehensive understanding of their opponent's case by March 1, 2006. This is long before the hearing on the merits which is scheduled to begin on June 6, 2006. We will issue an appropriate Order.[4]

[4] Based on representations of counsel for Appellants during the argument on the Motion, we understand that Attorney Wenzler will not be testifying as an expert in this matter. Therefore, our Order will include a paragraph barring him from testifying in the case since we have barred Permittee and the Department from deposing him. Of course, depositions of experts can only be taken by agreement of counsel or unless permitted by the Board.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT- WDYT, LLC, Permittee	:	

ORDER

AND NOW, this 14th day of December, 2005, after review of the Appellants' Motion for an Expedited Protective Order Barring the Deposition of Attorney Mark Wenzler, the Department's and Permittee's Responses, and oral argument, it is ordered as follows:

1) Pursuant to Pennsylvania Rule of Civil Procedure 4012, Appellants' Motion for a Protective Order is ***granted***.
2) Permittee and the Department are ***prohibited*** from taking the deposition of Attorney Mark Wenzler.
3) Attorney Mark Wenzler is ***prohibited*** from testifying at the hearing of this matter.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: **December 14. 2005**

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HARTSTOWN OIL and GAS EXPLORATION COMPANY	:	
v.	:	**EHB Docket No. 2005-268-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 14, 2005**

OPINION AND ORDER ON DEPARTMENT'S MOTION TO DISQUALIFY COUNSEL

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Pennsylvania Environmental Hearing Board denies the Department's Motion to Disqualify Counsel. The Board finds that the prejudice to Appellant in having to incur "tremendous expense" to hire new counsel far outweighs the prejudice, if any, to the Department.

Discussion

This is an appeal from a bond forfeiture. Appellant, Hartstown Oil and Gas Exploration Company, Inc. ("Hartstown Oil & Gas") contends it is a narrow and discrete case. The Department acknowledges that the case "is fairly straightforward." Department's Response to Appellant's Motion for Continuance, page 4, paragraph 16, filed on December 12, 2005.

Presently before the Pennsylvania Environmental Hearing Board is the Pennsylvania Department of Environmental Protection's Motion to Disqualify Counsel. The Department's

Motion to Disqualify is based primarily on Rules 1.7 and 3.7 of the Pennsylvania Rules of Professional Conduct. The Department argues that counsel for the Appellant should be disqualified from representing Hartstown Oil & Gas because Attorney Michael Halliday, its lawyer, is also its president, sole officer, and only shareholder. The Department contends that he will be an important witness for the Appellant regarding the issues in the Appeal. Hartstown Oil & Gas argues that there is no prejudice to the Department if Attorney Halliday represents it. It expects him to be deposed and testify as any witness would in such a case. More importantly, Hartstown Oil & Gas contends that it would suffer "tremendous expense" if it is required to obtain new counsel.

Rule 1.7 of the Pennsylvania Rules of Professional Conduct

The Department contends that there is a conflict of interest between Hartstown Oil and Gas and its counsel based on Rule 1.7 of the Pennsylvania Rules of Professional Conduct. Rule 1.7 regards conflicts of interest and provides as follows:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by, the lawyer's own interests, unless:
>
> 1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> 2) the client consents after full disclosure and consultation.

As the Department points out, resolving this question is primarily the responsibility of the lawyer undertaking the representation. It is correct. However, the Department directs our attention to the explanatory note to Rule 1.7 which states that "where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question." Hartstown Oil & Gas counters that there is no conflict between it

and its attorney. Moreover, it contends that such representation will not threaten the fair or efficient administration of justice.

We are mindful that the Rules of Professional Conduct are designed to provide guidance to attorneys and a structure for regulating conduct through disciplinary agencies. As pointed out in the preamble to the Rules of Professional Conduct, the Rules are not designed as a basis for civil liability. The preamble also notes that "the purpose of the Rules can be subverted when they are invoked by opposing counsel as procedural weapons."

We see no conflict of interest pursuant to these facts between the interests of Attorney Halliday and Hartstown Oil & Gas. Attorney Halliday is the sole shareholder, president, and only officer of the corporation. Therefore, we would be hard pressed to find a case where the interests of attorney and client are not more aligned. The Department has not produced any facts such as to "clearly call in question the fair or efficient administration of justice."

Rule 3.7 of the Rules of Professional Conduct

According to the Department and not disputed by Appellant, Attorney Halliday was involved in every material aspect of the underlying events regarding this Appeal. Consequently, the Department also relies on Rule 3.7 of the Rules of Professional Conduct to argue that Attorney Halliday should be disqualified from representing Hartstown Oil & Gas at trial. This Rule concerns whether trial counsel may testify at trial. The Rule provides that a lawyer shall not act as an advocate at trial in which the lawyer is likely to be a necessary witness except where the testimony relates to an uncontested issue or the nature and value of legal services rendered in the case or if disqualification would work substantial hardship on the client. The Department specifically directs our attention to the note to this Rule which explains the potential prejudice to the opposing party based on the fact that "it may not be clear whether a statement by

an advocate-witness should be taken as proof or as an analysis of the proof."

Appellant contends in its response that Attorney Halliday expects to be deposed as a necessary witness in the case and "is accepting and expects that responsibility." Moreover, Appellant contends that requiring it to obtain independent legal counsel "will only add tremendous expense to Appellant."

We first note that Rule 3.7 of the Professional Rules of Conduct applies to the trial of a case. Therefore, since the parties are presently in discovery with no trial even scheduled it could be argued that it is premature to apply this Rule at the present time. Nevertheless, rather than delay our decision to a day that may never come if the parties resolve this Appeal prior to a hearing, which is what occurs in most of these bond forfeiture appeals, we will decide the issue now.

As set forth in the Board's prior decisions of *DEP v. Angino*, 2003 EHB 434; *DEP v. Whitemarsh Disposal Corporation*, 1999 EHB 588; and *Greenview Development v. DEP*, 2000 EHB 448, the Board must perform a balancing test in resolving this issue. What must be decided is whether any alleged prejudice to the Department outweighs Harstown Oil & Gas's interest in being represented by the lawyer of its choosing. This analysis is very fact based. In *Angino*, Judge Coleman partially disqualified counsel from representing all the Appellants, while in *Whitemarsh* and *Greenview Development,* Judge Labuskes permitted counsel to continue representing their respective clients.

The Department's primary basis for prejudice stems from the fact that Attorney Halliday will be the major witness for Hartstown Oil & Gas while at the same time representing it at the hearing. One of the main purposes, if not the essential purpose, underlying Rule 3.7 of the Rules of Professional Conduct is to assure the orderly conduct of the hearing. It "is the protection of

the legal process itself...The Rule preserves the distinction between advocacy and evidence, and maintains the integrity of the advocate's role as an independent and objective proponent of rational argument." *Golumb & Honik, P.C. v. Ajaj*, 51 Pa. D. & C.4th 320, 325 (2001). However, as acknowledged by Judge Coleman in *Angino*, "the complications arising from a lawyer-witness in the jury trial context are not presented here." *Angino*, 2003 EHB at 440. The issues in this case, as acknowledged by the Department, are "fairly straightforward." In addition, Attorney Halliday acknowledges that he expects to be deposed as a fact witness. Therefore, we are not faced with drafting a procedure to obtain his testimony through the prism of the attorney-client relationship.

Moreover, we are confident that any so-called confusion at trial can be substantially lessened by procedures that we may employ. The Board enjoys considerable flexibility in conducting our hearings and can certainly address with counsel innovative ways in proceeding with Attorney Halliday's testimony. For example, we might order Attorney Halliday to present his direct testimony in written form and then present himself at hearing for cross-examination. *See* 25 Pa. Code Section 1021.124. In any event, we are confident that any potentially confusing aspects of Attorney Halliday's duel role as both advocate and witness in this proceeding can be addressed by the Board in a fair way to both Hartstown Oil & Gas and the Department.

We are also persuaded by Hartstown Oil & Gas's claim of substantial hardship in that it will incur "tremendous expense" if it has to retain new counsel. We share Judge Lalbuskes' concern as enunciated in *Whitemarsh* as we are also "loathe to interfere with a party's choice of counsel" especially in the absence of any real prejudice to the Department. *Whitemarsh*, 1999 EHB at 590.

In summary, the prejudice to Hartstown Oil & Gas in incurring "tremendous expense" to

retain new outside counsel to represent it outweighs any harm to the Department. The complications arising from a lawyer-witness in a jury trial are simply not present here. We believe the issues in this Appeal, as currently set forth, are relatively straightforward and discrete and we see no confusion or potentially detrimental impact on the conduct of the hearing. We see little if any prejudice to the Department especially in light of the Board's unique abilities to structure a hearing fair to both parties. We will therefore issue an Order denying the Department's Motion to Disqualify Counsel.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

HARTSTOWN OIL and GAS EXPLORATION COMPANY	:	
v.	:	**EHB Docket No. 2005-268-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of December, 2005, following review of the Pennsylvania Department of Environmental Protection's Motion to Disqualify Counsel, Memorandum Of Law, and Appellant's Answer and Response, it is ordered as follows:

1) The Department's Motion to Disqualify Counsel is *denied.*

2) *All discovery* in this matter shall be served on or before **Friday, March 17, 2006.**

3) The party with the burden of proof shall serve its answers to all expert interrogatories or serve its expert reports on or before **Wednesday, May 3, 2006.** The opposing party shall serve its answers to all expert interrogatories or its expert reports on or before **Tuesday, June 6, 2006.**

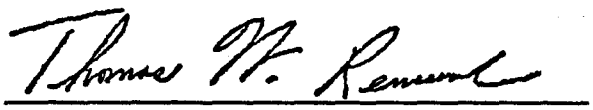
4) *All dispositive motions* shall be filed on or before **Tuesday, June 20, 2006.**

5) On or before **Wednesday, February 8, 2006,** the parties shall meet and discuss the settlement of some or all of the issues raised in this appeal.

6) The parties shall file *joint status reports* with the Board on or before **Monday,**

February 27, 2006 and on or before **Thursday, June 22, 2006.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: December 14, 2005

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MAPLE CREEK MINING, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-038-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 22, 2005**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Department's motion to dismiss, treated as a motion for summary judgment, is granted. Although the Department's letter to an applicant for permit renewal appears to indicate that the renewal application will be denied if the bond requested by the Department is not submitted, a further review of the permitting process reveals that the bond calculation is not final at this stage and may still be revised. Therefore, we find that the Department's letter to the permit applicant was not an appealable action.

OPINION

This matter involves a renewal application for a coal refuse disposal permit for the Ginger Hill II coal refuse disposal facility, which is operated by Maple Creek Mining, Inc. (Maple Creek). The background of this matter is as follows. On or about May 16, 2001, Maple Creek submitted an application to renew its coal refuse disposal permit for the Ginger Hill II facility.

By letter dated October 13, 2004, the Department of Environmental Protection (Department) requested additional information which Maple Creek submitted on January 17, 2005. The additional information submitted by Maple Creek calculated the reclamation liability at the Ginger Hill site to be $7,666,900. The Department requested a bond in that amount and stated in its letter that if Maple Creek did not submit the bond by February 22, 2005, its permit renewal application would be denied.

Maple Creek appealed, and the Department has moved to dismiss the appeal on the basis that its bond request letter was not a final action and, therefore, not appealable to the Board. According to the affidavit of Jay Winter, the lead reviewer for the permit renewal application, the bond request is simply one step in the permit review process. If the applicant fails to submit the bond as requested, the next step is for the Department to issue a "Notice of Intent to Deny" letter which states that the Department intends to deny the permit if the applicant fails to submit the bond and provides the applicant with an opportunity to meet and discuss the application and bond with representatives of the Department. Only after the Notice of Intent to Deny is sent and the applicant has had an opportunity to meet with Department personnel does the Department make what it considers to be its final decision on the application. If the Department's decision is to deny the permit, the Department then sends another letter stating that the Department has completed its review of the application and has denied the permit. (Affidavit of Jay Winter, Department's Motion to Dismiss) It is this letter that the Department considers to be a final, appealable action.

This matter is identical to *Mon Valley Transportation Center, Inc. v. DEP*, EHB Docket No. 2005-049-R, in which we issued a ruling in August.[1] That case involved nearly identical

[1] *Mon Valley Transportation Center, Inc. v. DEP*, EHB Docket No. 2005-049-R (Opinion and

facts and the same attorneys as those in the present matter.

As we noted in *Mon Valley,* whenever a Notice of Intent to Deny letter is issued by the Department, an applicant has the opportunity to request an informal conference with Department representatives where it can dispute the bond amount. If the Department agrees with the applicant's position, it will then request the applicant to submit a revised bond calculation worksheet reflecting the changes agreed to by the Department. If the Department does not agree to change the bond amount and the applicant does not submit the bond in the amount originally determined by the Department, the Department will then issue a permit denial letter which is a final action. *Mon Valley, supra* at 3.

The Board will dismiss an appeal where there are clearly no material factual disputes and the moving party is entitled to judgment as a matter of law. *Cooley v. DEP*, 2004 EHB 554, 558. The motion must be reviewed in the light most favorable to the non-moving party. *Id.*

The bond request letter that is the subject of this appeal is not a final action. There are additional steps in the permitting process during which the bond calculation may yet be revised. Because the bond calculation for Maple Creek's permit application is not final at this stage and may be revised at an informal conference requested by Maple Creek, we find that the matter is not yet final or appealable. *Mon Valley, supra.*

Order on Motion to Dismiss issued August 12, 2005).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAPLE CREEK MINING, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-038-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 22nd day of December 2005, the Department of Environmental Protection's motion is **granted** and the appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATE: December 22, 2005

c: **DEP Bureau of Litigation:**
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