Environmental Hearing Board

Adjudications and Opinions

1999

Volume I

COMMONWEALTH OF PENNSYLVANIA

George J. Miller, Chairman

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OF THE

ENVIRONMENTAL HEARING BOARD

1999

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1999.

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.

ADJUDICATIONS

OPINIONS

1999 DECISIONS

SOLID WASTE MANAGEMENT ACT

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HIGHRIDGE WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 98-191-R**
	:	**(Consolidated with 98-192-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLAIRSVILLE MUNICIPAL AUTHORITY and LOWER INDIANA COUNTY MUNICIPAL AUTHORITY, Permittee	:	**Issued: January 5, 1999**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Letters from the Department of Environmental Protection (Department) constitute a final appealable action where they are a culmination of events and confirm the Department's final determination. A third party appellant has standing to pursue an appeal where it successfully argues that the Department's decision may impact its own permit.

BACKGROUND

In August of 1991, the Blairsville Municipal Authority (Blairsville) obtained Water Allocation Permit No. WA-32-142A (permit). In March of 1995, Blairsville obtained an amendment to its permit which authorized Blairsville to sell up to 30,000 gallons per day of water, as a 30-day average, to the Lower Indiana County Municipal Authority (Lower Indiana). At the same time, Lower Indiana obtained a subsidiary permit which authorized Lower Indiana to purchase the water

from Blairsville. In November of 1997, Blairsville filed Water Application No. WA32-142B seeking permission to sell an additional quantity of up to 300,000 gallons per day of water to Lower Indiana. Lower Indiana filed an application at the same time for an amendment to its subsidiary permit to authorize Lower Indiana to purchase an additional quantity of water from Blairsville.

On September 24, 1998, the Highridge Water Authority (Highridge) filed two notices of appeal seeking review of two August 26, 1998 letters (collectively, letter) from the Department of Environmental Protection (Department) addressed to Blairsville and Lower Indiana, respectively. The letter relates to the purchase of the additional quantity of water by Lower Indiana from Blairsville. The appeal at EHB Docket No. 98-192-R was consolidated with the above-captioned appeal. Blairsville filed a motion to intervene which the Board granted in an Order dated November 19, 1998.

Currently before the Board is a motion to dismiss the appeal and supporting brief filed by Blairsville on December 3, 1998. Blairsville claims that the Board lacks jurisdiction to proceed and that Highridge does not have standing to pursue this appeal. On December 14, 1998, Highridge filed a response and brief in opposition to Blairsville's motion. Blairsville filed a reply and Highridge in turn filed a sur-reply. The Department filed a reply memorandum on December 21, 1998 in support of Blairsville's motion to dismiss the appeal.

On December 7, 1998 Highridge filed a petition for supersedeas. A hearing on the petition is scheduled to occur on January 12 and 13, 1999. For the reasons set forth below, the hearing on the petition for supersedeas will be held as scheduled.

DISCUSSION

In deciding the motion to dismiss, the Board must view the facts in the light most favorable

to Highridge, the non-moving party. *See Stoystown Borough Water Authority v. DEP*, 1997 EHB 1089, *Tinicum Township v. DEP*, 1996 EHB 816. Because a jurisdictional question has been presented, we shall first address whether the Department's August 26, 1998 letter constitutes a final appealable action and then address the issue of standing.

A. The Board's Jurisdiction

Both Blairsville and the Department contend that no action was taken by the Department in this case. By way of background, a letter signed by both Blairsville and Lower Indiana and dated August 12, 1998 reads as follows, in relevant part:

> At the meeting on July 21, 1998 . . . attended by officials and staff of both [the Department] and [Blairsville], it was our understanding that, based upon the opinion of [the Department] rendered at that meeting, [the Department] would not require any modifications to the current allocation permits from either . . . [Blairsville] to sell water to [Lower Indiana], or for [Lower Indiana] to buy water from [Blairsville]. . .
>
> Based upon our understanding of [the Department's] position regarding the need for an allocation permit as expressed above, both [Blairsville] and [Lower Indiana] now request to withdrawl [sic] the subject allocation applications.

The Department's August 26, 1998 response, and the basis for Highridge's appeal, reads as follows, in relevant part:

> In response to your letter of August 12, 1998 the Department is returning the [respective applications] . . . filed on November 12, 1997 . . . .
>
> No modification is required to the current water allocation permits for either [Blairsville] to sell water to [Lower Indiana], nor [Lower Indiana] to purchase water from [Blairsville], provided that the amount of water transferred by [Blairsville] to [Lower Indiana] does not exceed the sum of the total amount of groundwater pumped directly to the [Blairsville] filtration plant that day, plus 30,000 gallons of surface water previously approved.[1]

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[1] Only the letter addressed to Blairsville included the following two additional paragraphs:

> Please provide a drawing showing the location of the master meters in your

Highridge contends that the Department's letter of August 26, 1998 constitutes a final determination by the Department and is therefore an appealable action. We agree.

Section 4(a) of the Environmental Hearing Board Act[2] gives the Board jurisdiction over "orders, permits, licenses or decisions of the [D]epartment." The Board's Rules of Practice and Procedure refer to these collectively as "actions" and define them as follows:

> An 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.

25 Pa. Code § 1021.2(a).

There is no *per se* rule that Department letters are not appealable. Rather, the appealability of a particular Department letter is dictated by the language of the letter itself. *Conrail v. DEP*, EHB Docket No. 97-198-MR (Opinion issued May 12, 1998). In fact, where the Department's action in the form of a letter is the culmination of a series of events, that letter may constitute an appealable action. *See Middle Creek Bible Conference, Inc. v. Department of Environmental Resources*, 645 A.2d 295 (Pa. Cmwlth. 1994). We agree with Blairsville that if a letter merely advises the recipient of the Department's interpretation of the law, it is not appealable. *Sandy Creek Forest, Inc. v. Department of Environmental Resources*, 505 A.2d 1091 (Pa. Cmwlth. 1986); *Township of Upper Saucon v. DEP*, EHB Docket No. 98-082-MG (Opinion issued October 26, 1998). However, we are

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> system. As a minimum, the drawing should show the meters on the Trout Run intake, Wells No. 1 and 2, and the finished water meters serving both [Blairsville] and [Lower Indiana].
>
> We wish to remind you of your stated willingness to work with the Pennsylvania Fish and Boat Commission in addressing the conservation release issue with regards to [Blairsville]'s use of Trout Run as a public water supply source.

[2] Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(a).

not faced with that situation here. The Department's letter of August 26, 1998 does not purport to render legal opinions.

In support of its position that the Department's inaction on an application is not appealable, Blairsville relies on *Westvaco Corp. v. DEP*, 1997 EHB 275. In that case, the Board granted the Department's motion to dismiss an appeal seeking review of the withdrawal of an application for a modification to a mine drainage permit. Subsequent to the filing of the application, the permittee decided not to pursue mining activities at the proposed facility and so informed the Department. In response, the Department returned extra copies of the application to the permittee and terminated its review of the application. In that case, the application was returned because the applicant decided not to pursue the mining activities, not because the Department determined that no permit modification was necessary. Here, Blairsville and Lower Indiana are still intending to pursue the action that formed the original basis for their permit modification requests.[3]

Blairsville cites to *R. A. Bender, Inc. v. DEP*, 1996 EHB 1041, in support of its contention that the Department's letter does not have an impact on Highridge's existing rights and duties. In that case, the Board granted a motion to dismiss a third party appeal of an approved Consent Order and Adjudication entered into to settle an appeal of the Department's approval of a county solid waste management plan. The Board held that the action did not impact the appellant's rights and duties and did not result in a change of the *status quo ante*. In the present matter, Highridge contends that its own allocation permit is affected by the Department's action because it is still

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[3] Although the Department has filed a memorandum supporting Blairsville's position, it did not file a separate motion to dismiss. The Department's position that no permit modification was required may indeed be correct. However, we cannot make that determination based upon the record before us. *Cf. Hahn v. DEP*, 1996 EHB 933 (The Department did not abuse its discretion where a mining permit required a correction rather than a revision).

subject to a permit condition regardless of the Department's decision to sanction the sale of water between Blairsville and Lower Indiana. It also argues that the Department's decision is a radical departure from the *status quo ante* in that its determination is arbitrary, capricious and contrary to law. After viewing the facts in the light most favorable to Highridge, we conclude that Highridge may be impacted by the Department's determination. We cannot find as a matter of law that the motion to dismiss should be granted. *Green Thornbury Committee v. DER*, 1995 EHB 294.

According to the joint letter from Blairsville and Lower Indiana, the withdrawal of the applications was requested based on advice previously rendered by the Department. The Department arrived at the conclusion that no permit modification was required, advised the applicants to withdraw the applications, and then ratified a final determination to that effect in the letter of August 26, 1998. The Department's letter explicitly approves of the plan to sell and purchase water without requiring the modification of the existing permits. Moreover, the letter explains that additional submissions and continued promises are required on the part of Blairsville. *See supra note 1.* The Department's letter therefore constitutes a final appealable action.

B. Standing

A party is aggrieved by an action and may appeal if that party has a direct, immediate and substantial interest in the matter, and a causal connection exists between the action complained of and the harm alleged. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (1975); *Belitskus v. DEP*, EHB Docket No. 96-196-MR (Adjudication issued August 20, 1998). Blairsville argues that even if there had been some action over which the Board has jurisdiction, Highridge has no standing to appeal any such action. Blairsville alleges that the Department's letter has not had any effect upon Highridge's rights and duties with respect to its ability to sell water to

Lower Indiana, which are governed by the contract between Highridge and Lower Indiana. In both its response and its notice of appeal, Highridge asserts that it has standing to challenge the Department's action. Highridge argues that it has been irreparably harmed by the Department's decision since subject to its permit, Highridge has a water supply contract with Lower Indiana and must reserve 300,000 gallons of water per day for Lower Indiana which it cannot sell to anyone else. Highridge also asserts that it has standing to bring this appeal because as a holder of a water allocation permit, Highridge has an interest in the Department's decision to act arbitrary, capricious and contrary to law.

Blairsville points to the Board's decision in *Neshaminy Water Resources Authority v. DER*, 1990 EHB 288 in support of its position that Highridge lacks standing to prosecute this appeal. In that case, the Board held that where the actual holder of the permit was already in the case, the nominal former permit holder was dismissed as a result of not identifying or explaining any legal rights or obligations at stake. While we agree that mere existence as a municipal authority is not enough, it is evident after viewing the facts in the light most favorable to Highridge that Highridge's interest in this matter is sufficient to withstand Blairsville's motion to dismiss. Since standing is not a jurisdictional issue, it may be raised at any time during the proceeding. *Oley Township v. DEP*, 1996 EHB 1098. Therefore, the parties will have an opportunity at the hearing on the merits to present further evidence of standing.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HIGHRIDGE WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 98-191-R**
	:	**(Consolidated with 98-192-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLAIRSVILLE MUNICIPAL AUTHORITY and LOWER INDIANA COUNTY MUNICIPAL AUTHORITY, Permittee	:	

ORDER

AND NOW, this 5th day of January, 1999, the motion to dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: January 5, 1999

(See following page for service list)

EHB Docket No. 98-191-R
(Consolidated with 98-192-R)

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

202 ISLAND CAR WASH, L.P., EMCO CAR WASH, L.P. and CAR WASH OPERATING COMPANY, INC.	:	
v.	:	**EHB Docket No. 98-202-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 22, 1999**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis

The Board grants in part and denies in part a motion to dismiss an appeal of a letter issued by the Department to the appellants. Portions of the letter which simply review the progress the appellants have made in complying with an earlier administrative order are not appealable and the objections in the notice of appeal relating to these portions will be dismissed. The motion is denied as to other portions which add new obligations to those imposed by the administrative order. The appeal will also not be dismissed on the grounds that the objections in the notice of appeal are not sufficiently specific only because the Department is well aware of the appellants' objections from the proceedings in an earlier, closely related appeal. However, the appellants must file a more specific notice of appeal.

In addition, this appeal will be consolidated with the earlier appeal of the administrative order.

BACKGROUND

Before the Board is a motion to dismiss filed by the Department of Environmental Protection, which seeks to dismiss the appeal of a letter by 202 Island Car Wash, L.P., EMCO Car Wash, L.P, and Car Wash Operating Company, Inc. (collectively, Appellants).

This appeal is related to another matter currently before the Board at EHB Docket No. 98-023-MG. Some background facts from that appeal are useful to understand the current motion. The subject of that appeal was a February 5, 1998 administrative order issued by the Department because gasoline components were found in drinking water wells located in a neighborhood near the Appellants' retail gasoline station, the discovery that the facility's three regulated underground gasoline storage tanks were not properly registered, and that leak detection was not being conducted as required by the Department's rules and regulations. The order required the Appellants to, among other things, submit specific information concerning the storage tanks, complete a site assessment and the submission of further reports and remedial plans on a time table triggered by the completion of the site assessment. The order also required testing and remediation of specified residential drinking water wells alleged to be contaminated by a gasoline release from the facility. The Appellants appealed this order. The Board recently granted partial summary judgment in favor of the Appellants on certain aspects of the order because particular items had been completed by the Appellants. The Board also struck an automatic civil penalty provision from the February order. *See 202 Island Car Wash, L.P. v. DEP*, EHB Docket No. 98-023-MG (Opinion issued December 18, 1998).[1]

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[1] The Appellants also sought and were partially granted a supersedeas of the order. *See 202 Island Car Wash, L.P. v. DEP*, EHB Docket No. 98-023-MG (Opinion issued May 13, 1998).

During the pendency of that appeal the Department sent a letter dated September 17, 1998, to the Appellants. This letter was in two parts. The first part discussed the ramifications of the results of the sampling of certain residential drinking water wells in mid-June 1998, and detailed further action which the Appellants must undertake. The second part reviewed the requirements of the February administrative order and the Department's evaluation of the Appellants' compliance status concerning those requirements. The Appellants appealed the letter challenging the actions taken pursuant to the first part of the letter and also challenging the Department's evaluation of their compliance status relating to specific provisions of the February order. The Department has moved to dismiss the appeal on the basis that the letter is not an appealable action over which the Board has jurisdiction. The Department also argues that the notice of appeal filed by the Appellants is fatally vague because it does not meet the specificity requirements of the Board's rules.

OPINION

Most letters issued by the Department to regulated parties do not constitute appealable actions of the Department.[2] The appealability of such letters is governed by the language of the letter and whether it requires specific action on the part of the appellant, or whether it merely advises the recipient of the Department's interpretation of the law. *Sandy Creek Forest, Inc. v. Department of Environmental Resources,* 505 A.2d 1091 (Pa. Cmwlth. 1986); *M.W. Farmer Co. v. DER*, 1995 EHB 29; *Medusa Aggregates v. DER*, 1995 EHB 414. Therefore, we must examine the specific language of the Department's letter to the Appellants to determine whether or not it constitutes an appealable action.

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[2] An "action" of the Department is defined as an "order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties liabilities or obligations of a person . . . ." 25 Pa. Code § 1021.2.

We will deal with the second portion of the letter first. Beginning on page 2 the Department reviewed Paragraphs 2, 3, 5 and 6 of the February order and detailed its position concerning the Appellants' failure to comply with these provisions. In their notice of appeal the Appellants object to the contentions concerning Paragraphs 2, 5 and 6.[3] They concede that the portions of the letter which merely advised the Appellants of the Department's views regarding compliance with the February order do not constitute an appealable action. (Appellants' Response ¶ 9)

The Board addressed a similar provision in a notice of violation in *M.W. Farmer Co. v. DER*, 1995 EHB 29, 30, where we held that "[a]n NOV containing a listing of violations, mention of the possibility of future enforcement action, or the procedures necessary to achieve compliance is not an appealable action." Since the provisions of the September letter discussing the February order are so similar we dismiss this objection in the notice of appeal.[4]

The first portion of the Department's letter, on the other hand, requires the Appellants to (1) provide two additional homes with water filtration because of elevated levels of methyl tertiary butyl ether (MTBE), a gasoline component; (2) remediate a tributary to Beaver Run which has allegedly been impacted with gasoline constituents; and (3) sample drinking water wells at 22 additional homes in addition to those listed in the February order.

The Department concedes that these paragraphs impose specific requirements upon the Appellants and are not advisory in nature. (Department Brief at 3) Rather, the Department takes the position that these actions are necessary to effectuate compliance with the February order and should

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[3] Paragraph 2 of the order required the completion of a site characterization; Paragraph 5 required the remediation and monitoring of the drinking water wells at four residences; Paragraph 6 required regular sampling of the drinking water wells at 52 residences.

[4] This objection is Paragraph 6(i) of the notice of appeal.

be considered unappealable because the requirements of the September letter were "contemplated" by the language of the February order. We disagree. As to the first and third requirements relating to the additional drinking water wells, it is enough to create an appealable action that the Department imposed new specific obligations upon the Appellants even though it reserved the right to do so generally in the February order by including language requiring the Appellants to provide potable water to any residences where gasoline constituents exceed a certain level and reserving the right to modify the sampling requirements imposed by the order. (February order ¶¶ 5, 6) It is certainly possible that it was a proper exercise of the Department's authority to require filtration and sampling of some of the drinking water wells but not others, and the Appellants should have the opportunity to raise that challenge. Furthermore, as the Department points out, these new obligations arose from facts which were discovered after the issuance of the February order. Thus, even though related to the previous order, we believe these provisions of the September letter constitute a new action of the Department which is reviewable by the Board.

As to the requirement to remediate the tributary to Beaver Run, this is an entirely new obligation that was not mentioned in or implied by the February order in any way. The Department concedes this point, but argues that the action is required by the corrective action process regulations. While this may be true, that fact does not deprive the Board of jurisdiction to review that determination by the Department.

The Department also argues that these letters are merely interlocutory decisions of the Department as it manages the Appellants' compliance with the February order, citing *Department of Environmental Resources v. New Enterprise Stone & Lime, Inc.*, 359 A.2d 845 (Pa. Cmwlth.

1976)(*en banc*), and *Conrail, Inc. v. DEP*, EHB Docket Nos. 97-198-MR, 97-205-MR (Opinion issued May 12, 1998). These decisions do not support the Department's position.

In *Conrail, Inc. v. DEP*, EHB Docket Nos. 97-198-MR, 97-205-MR (Opinion issued May 12, 1998), the appellants appealed two letters of the Department which identified omissions in plans submitted to the Department for review pursuant to an administrative order and requested the submission of revisions within 20 days. The Board held that these letters did not constitute final actions of the Department because the letters merely gave the appellants advance warning that the plans as submitted will not be approved when the Department does take final action at a specified time in the future unless certain revisions are made to them. In contrast, in this case there is no indication that the Department's additional requirements are not final actions of the Department.

Department of Environmental Resources v. New Enterprise Stone & Lime, Inc., 359 A.2d 845 (Pa. Cmwlth. 1976)(*en banc*), is also not applicable to the case here. There, the appellant appealed the Department's refusal to grant it a second extension of a deadline to comply with certain air pollution requirements. The Commonwealth Court held that this refusal was not a "decision" of the Department as that term is defined by the Board's rules because it did not result in any action being taken against the appellant and therefore did not affect its personal or property rights, privileges, immunities, duties, liabilities, or obligations. *See* 25 Pa. Code § 1021.2; footnote 2, above. Clearly, the Department's decision here to impose further obligations upon the Appellants under the aegis of the February order *is* an action against the Appellants which affects their personal or property rights, privileges, immunities, duties, liabilities, or obligations.

In sum, we conclude that the first part of the Department's September letter, labeled Paragraphs 1, 2 and 3 on pages 1 and 2 creates an appealable action.

The Department next argues that the appeal should be dismissed because the objections in the notice of appeal do not meet the specificity requirements of 25 Pa. Code § 1021.51(e). We disagree that the appeal should be dismissed on this basis.

Rule 51(e) of the Board's rules requires that the *specific* objections in a notice of appeal shall be set forth in separate numbered paragraphs. Objections may be factual or legal. 25 Pa. Code § 1021.51(e). The Appellants do not cite statutory authority or specific factual bases for their objections, but say simply that they believe Paragraphs 1-3 are "without factual or legal support" and are unreasonable. The Appellants also state that the Department has abused its discretion by improperly amending the prior order and has exceeded the scope of its authority.

We agree that these objections are not specific enough to comply with 25 Pa.Code § 1021.51(e). *See Agmar Sewer Company v. DEP*, 1997 EHB 433. However, we do not believe the appropriate sanction is to dismiss the appeal at this time. First, there is a long history of communication between the Department and the Appellants concerning the situation at the gasoline station from the proceedings in the related appeal at Docket No. 98-023-MG. Hence we believe that the Department is well aware of the reasons for the Appellants' objections to the September letter. Second, the Appellants have reserved the right to amend their notice of appeal and have offered to file a more specific notice in their response to the motion to dismiss. Accordingly, rather than dismissing the Appellants' appeal at this time we will order them to file a more specific notice of appeal which provides specific factual and legal bases for their objection to each provision of the September letter under appeal.

Finally, the Department seeks consolidation of this appeal with the appeal of the February order because the two appeals are so closely related. The Appellants oppose consolidation on the

grounds that the first appeal is procedurally more mature than the current appeal in that discovery is closed and all dispositive motions have been filed and decided. We will grant the motion to consolidate the appeals. However, we will consider bifurcating the hearing on the matter so that we may move forward with our consideration of the basic contamination and responsibility issues raised initially in the first appeal, but allow additional, limited discovery on the factual matters raised by the later appeal and deal with them at a later date.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

202 ISLAND CAR WASH, L.P., EMCO CAR WASH, L.P. and CAR WASH OPERATING COMPANY, INC.	:	
v.	:	**EHB Docket No. 98-023-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
202 ISLAND CAR WASH, L.P., EMCO CAR WASH, L.P. and CAR WASH OPERATING COMPANY, INC.	:	
v.	:	**EHB Docket No. 98-202-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 22nd day of January, 1999, upon consideration of the motion to dismiss and motion to consolidate filed by the Department of Environmental Protection in the above-captioned matter, it is hereby ordered that:

1. The motion to dismiss Paragraph 6(i) of the notice appeal is hereby **GRANTED**;

2. The motion to dismiss is **DENIED** in all other respects.

3. 202 Island Car Wash, L.P., EMCO Car Wash, L.P, and Car Wash Operating Company, Inc., the Appellants, shall file a more specific notice of appeal within 10 days of the entry of this order.

4. The motion to consolidate is **GRANTED** and these matters are consolidated at the following docket number and under the following caption:

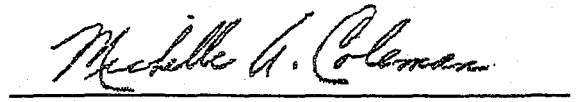
202 Island Car Wash, L.P.,	:	
EMCO Car Wash, L.P. and	:	
Car Wash Operating Company, Inc.	:	**EHB Docket No. 98-023-MG**
	:	**(consolidated with 98-202-MG)**
v.	:	
Commonwealth of Pennsylvania,	:	
Department of Environmental Protection	:	

All future filings shall be made at **EHB Docket No. 98-023-MG**.

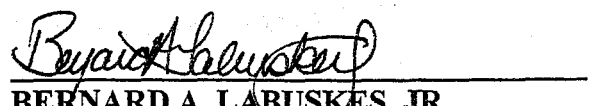
ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: January 22, 1999

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

POTTS CONTRACTING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 97-234-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 29, 1999**

OPINION AND ORDER ON MOTION TO IMPOSE SANCTIONS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board denies the Department of Environmental Protection's (Department) motion to impose sanctions, to dismiss an appeal or preclude testimony of a witness. Although the Board is allowed to impose sanctions for failure to comply with a Board order, we will give the parties another opportunity to resolve the matter since both parties have been unable to successfully schedule the deposition of a witness, but with the stipulation that failure to comply with the order in this opinion will result in the Board taking appropriate action.

OPINION

This matter was initiated by the filing of the October 27, 1997 notice of appeal by Joyce Potts Lengel, Vice President of Potts Contracting Co., Inc. (Potts), of the Department's denial of the renewal of Potts' mining permit, Permit No. 54881303R, for an operation in Tremont Township, Schuylkill County. Ms. Lengel was acting *pro se*. The Department denied the renewal because Potts

failed to provide the requisite information to process the permit application including a copy of the "Official Coal Land Lease of Schuylkill County Commissioners and Tax Claim Bureau of Schuylkill County for Deep Mining," and Potts' legal right to use the haul road associated with its mining operation was in question. By the Board's October 30, 1997 order Potts had to file additional information in order to perfect its appeal. Ms. Lengel filed the requisite information on November 10, 1997.[1]

Currently before the Board is the Department's motion to impose sanctions for failure to comply with the Board's September 23, 1998 order directing Ms. Lengel to attend a deposition. Potts has not filed a response to the motion.

Under Board Rule 1021.72(c) Potts had 15 days, or until November 5, 1998, to file a response. However, to date Potts has not responded to the motion. The Board deems a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion except in the case of motions for summary judgment or partial summary judgment under Board Rule 1021.70(f). 25 Pa. Code § 1021.70(f) Consequently, Potts has admitted to all the facts set forth in the Department's motion by its failing to file a response.

The admitted facts are the following. Potts is a Pennsylvania corporation with a business address of Box 350, R.D. 4, Pine Grove, Pennsylvania 17965 and Joyce Potts Lengel is asserted to be its Vice-President. On October 7, 1997 the Department denied Potts' permit application, No. 54881303R, for the operation of a surface mine in Tremont Township, Schuylkill County. The Department's denial was based on 1) the failure to submit a copy of the "Official Coal Land Lease of Schuylkill County Commissioners and the Tax Claim Bureau of Schuylkill County for Deep

[1] Subsequent to this filing Potts retained counsel in its behalf.

Mining" for the operation and 2) the failure to submit required information regarding Potts' legal right to use the haul road associated with the above referenced operation. Specifically: 1) a copy of a lease from the landowner of record of the haul road; or 2) a description and copy of any other documents upon which Potts bases the right to use this haul road for coal mining activities; or 3) a recorded "Supplemental C" (consent of landowner) form from the landowner of record of the haul road. On October 27, 1997 Ms. Lengel, as Vice-President of Potts, appealed the Department's denial. On November 11, 1997 Potts perfected its appeal by filing a document titled Supplemental Information. Potts did not serve the Department with the supplemental information. The parties agreed to request that the Board reopen the discovery period and allow the Department to file dispositive motions. The Board granted the parties' motion by its May 15, 1998 order. On June 4, 1998 the Department served its first set of discovery requests. On September 16, 1998 the Department filed a motion to compel. On October 6, 1998 Potts responded to the request. Potts responses are not clear. However, the Department was willing to allow Ms. Lengel to clarify any confusion at her deposition scheduled for October 14, 1998. The scheduling of this deposition had the following chain of events: 1) on July 14, 1998 the Department sent a letter to Appellant's counsel which, among other things, sought to schedule a deposition for Ms. Lengel; 2) on August 5, 1998 the Department sent a letter to Appellant's counsel which included a notice of deposition for Ms. Lengel for August 14, 1998 the last day of the discovery period; 3) Ms. Lengel did not attend the deposition scheduled for August 14, 1998; 4) on August 14, 1998, the Department sent a letter to Appellant's counsel seeking, among other things, to again schedule a deposition for Ms. Lengel; 5) on September 16, 1998 the Department filed a motion to compel which, among other things, requested that the Board order Ms. Lengel to attend a deposition; and 6) by a September 21, 1998

letter the parties submitted a joint request for the Board to grant the Department's motion to compel and to enter an order which required in part that Ms. Lengel attend a deposition on October 14, 1998. By order dated September 23, 1998, the Board directed Ms. Lengel to attend a deposition on October 14, 1998. On October 13, 1998 James Munnis, Potts' counsel, contacted Department counsel by telephone and indicated that Ms. Lengel would not attend the deposition scheduled for October 14, 1998, contrary to the agreement between the parties and in violation of the Board's September 23, 1998 order.

On November 10, 1998 the Board issued a rule to show cause why Potts' appeal should not be dismissed as a sanction for failing to comply with a Board order. On November 30, 1998 Potts filed their response to the rule to show cause. In its response Potts alleges: 1) that it was not until the late afternoon of October 12, 1998 that the Department's attorney contacted Potts' counsel requesting that the deposition be changed to the Department's offices since that would be more cost effective for the parties; 2) that Potts' counsel was unable to contact his client until October 13, 1998 regarding the proposed change; 3) that Ms. Lengel was unwilling and unable to change the location at the last moment; and 4) that Potts' counsel advised his client of the need to attend the deposition. On December 10, 1998 the Department filed its reply to Potts' response in which it refuted several facts in the response including: 1) the allegation that the attorneys had a conversation on October 12, 1998 since it was a state holiday and 2) the issue of the location of the deposition which the Department contends took place during a conversation on October 7, 1998. The Department's reply also states that during a conversation between counsel Potts' counsel indicated to Department's counsel that one of the reasons Ms. Lengel did not want to attend the deposition at the Department's office was based on additional expense incurred by Potts to have its attorney travel to the deposition.

The Department contends that dismissal of the appeal is appropriate, or in the alternative, Potts should be precluded from presenting evidence at a hearing because Potts, as the party with the burden of proof and persuasion, will not be able to sustain that burden since Ms. Lengel refused to attend a deposition in a case where she is the person who filed the appeal and supplemental information and she is the only person associated with Potts being proffered as a witness in the pre-hearing memorandum. Furthermore, the Department contends it is unfair to have to defend the appeal without having an opportunity to depose Ms. Lengel since the appeal and supplemental information contain many allegations and assertions about which the Department has no knowledge.

While we agree with the Department that sanctions could be imposed, we do not believe that sanctions are appropriate at this time given the circumstances in this case. Under Board Rule 1021.125, the Board any impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. 25 Pa. Code § 1021.125 This Board has long held that it is authorized to impose sanctions upon a party for failure to abide by a Board order. *Shaulis v. DEP*, (Opinion issued May 15, 1998, Docket No. 96-182-MR); *Al Hamilton Contracting Co. v. DER*, 1994 EHB 1027. However, the Board believes that the Department's recommendations are too harsh. Consequently, the Board orders the parties to reach an agreement on the day, time and location for the deposition of Ms. Lengel as soon as possible but no later than the end of January, 1999. The Board will not hesitate to enforce any future failure by either party to abide by one of its orders including dismissal of the appeal.

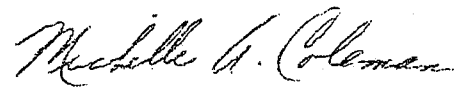
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

POTTS CONTRACTING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 97-234-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 29th day of January, 1999, the Department of Environmental Protection's Motion to Impose Sanctions is denied. A status report on the progress of depositions is required on or before **February 12, 1999.**

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 29, 1999

c: **DEP Bureau of Litigation**
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25th ANNIVERSARY 1972-1997

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HIGHRIDGE WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 98-191-R**
	:	**(Consolidated with 98-192-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLAIRSVILLE MUNICIPAL AUTHORITY and LOWER INDIANA COUNTY MUNICIPAL AUTHORITY, Permittees	:	**Issued: January 29, 1999**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By: Thomas W. Renwand, Administrative Law Judge

Synopsis

A Petition for Supersedeas is denied for failure to demonstrate the likelihood of prevailing on the merits of the underlying appeal. A public water supply agency has standing to appeal the Department's decision not to require permit modifications to two other public water agencies' permits where (1) the Department solicited the public water supply agency's comments; and (2) the public water supply agency suffered monetary loss as a result of the Department's action.

Simply because the Department has followed a certain practice in the past and has a technical guidance document inconsistent with its current action does not mean that the Department is prohibited from changing its policy or that the change is arbitrary, capricious, or contrary to

law. Department technical guidance documents are intended to serve as guidelines but do not carry the weight of a statute or regulation.

I. Discussion

Presently before the Board is the Petition for Supersedeas filed by Appellant Highridge Water Authority (Highridge). The Department of Environmental Protection (Department), Blairsville Municipal Authority (Blairsville), and the Lower Indiana County Municipal Authority (Lower Indiana) oppose the granting of a supersedeas. A hearing on the Petition was held on January 12 and 13, 1999, in Pittsburgh. The record consists of a transcript of 452 pages and 20 exhibits.

A. Background

Highridge, Blairsville and Lower Indiana are all municipal public water supply agencies. They all have permits issued by the Department dealing with water allocation. Highridge has a long history of selling water to Lower Indiana. (N.T.254) Highridge is permitted by the Department to sell Lower Indiana up to 300,000 gallons of water per day. Conversely, Lower Indiana has a subsidiary permit issued by the Department authorizing it to purchase up to 30,000 gallons of water per day from Blairsville, 57,000 gallons of water per day from the Central Indiana Water Authority, and 300,000 gallons of water per day from Highridge. Lower Indiana also has a contract with Highridge establishing how much it will pay Highridge for the purchase of the water. However, the contract does not require any minimum purchases.

In 1998 Lower Indiana negotiated a water purchase contract with Blairsville which allowed it to purchase water at a substantially lower cost than what it was paying to Highridge for water. (N.T.378-380) Consequently, both Blairsville and Lower Indiana filed applications with the

Department requesting approval for Blairsville to sell Lower Indiana up to 350,000 gallons of water per day (later reduced to 300,000 gallons of water per day.) The Department accepted the applications and as part of the review process sent copies of the applications to Highridge. (Joint Stipulation ¶12, 13; N.T.59; App. Ex. 2, 5) The Department also solicited Highridge's comments concerning the applications. (N.T.59-60)

Highridge sent written comments strongly opposing both applications. (N.T. 265-268) The Department sent Blairsville and Lower Indiana deficiency letters setting forth various questions and voicing concerns that the increased sales were not justified pursuant to the provisions of the Act. (N.T. 367-368; App. Ex. 19, 20) On June 3, 1998, the Department sent pre-denial letters to both Lower Indiana and Blairsville. These detailed letters advised the applicants that the Department intended to deny their requests pursuant to the provisions of the Act. Copies of these letters were sent to Highridge. (N.T. 369)

Following the receipt of these pre-denial letters, representatives of Lower Indiana and Blairsville requested a meeting with Department officials. (N.T. 415; App. Ex. 30) Such a meeting is frequently held as part of the application process. At this meeting, the applicants argued that since the Act only applied to "surface waters" and since Blairsville planned on pumping ground water from two wells directly into its water treatment plant and then selling the ground water plus 30,000 gallons of water per day under its current permit the Act did not confer jurisdiction on the Department to regulate the increased sales. The Department agreed with this position and advised the applicants to make certain the amounts pumped from the wells were adequately metered. The Department recommended that the applicants withdraw their applications since the increased sales would be made up of ground water. By separate letter of August 26,

1998 the Department returned the applications to Lower Indiana and Blairsville. (Joint Stipulation ¶ 15; N.T. 26-27; App. Ex. 8, 9)

The Department changed its position radically from almost denying the applications to deciding that applications were not even required and the increased sales of water from Blairsville to Lower Indiana were legally permissible. Highridge, which stands to lose a great deal of business from one of its major customers, appealed the Department's action to the Board and is seeking a supersedeas to return the parties to the *status quo*. Highridge contends that the Department abused its discretion and acted contrary to law in not requiring Lower Indiana and Blairsville to obtain permits for the increased sales of water.

In our opinion and order of January 5, 1999 we denied the joint motion to dismiss filed by Blairsville and Lower Indiana. In that opinion we specifically found that the Department's letters of August 26, 1996 explicitly approving of the plan to sell and purchase water without requiring the modification of the existing permits constituted a final appealable action of the Department. *Highridge Water Authority v. DEP*, EHB Docket No. 98-191-R (Opinion issued January 5, 1999) at p.6

B. <u>The Water Rights Act</u>

This appeal involves an interpretation of the Water Rights Act, 32 P.S. §§ 631, *et seq.* (Water Rights Act or Act). Although the Water Rights Act was enacted in 1939, as the Department pointed out in its opening statement, it has received scant judicial and regulatory attention. (N.T. 15-16) Neither the courts nor this Board have had many opportunities to interpret the provisions of the Act. Moreover, the Environmental Quality Board has not promulgated any regulations to aid the Department in carrying out its duties under the Act.

Prior to the passage of the Act eminent domain was the statutory method which authorized municipalities to obtain water. See *Philadelphia and Reading Railroad Co. v. Pottsville Water Co.*, 38 A. 404 (Pa. 1897). The legislature, in passing the Act, abolished the eminent domain system for individual water allocation and set up state control of the system through the Water and Power Resources Control Board, a predecessor agency to the Department. *Department of Environmental Resources v. Philadelphia Suburban Water Company*, 581 A.2d 984, 986 (Pa. Cmwlth. 1990). The Act was passed to insure an adequate and safe supply of water as Pennsylvania grew into a modern state.

The Act only deals with "surface waters." "Water rights" are defined as "the right to take or divert water from any rivers, streams, natural lakes and ponds, or other surface waters within or partly within and partly without the Commonwealth of Pennsylvania... ." 32 P.S. § 631(e).

C. <u>Standing</u>

Blairsville, Lower Indiana, and the Department argue that Highridge has failed to establish any interest in order to grant it standing to file this appeal of the Department's decision not to require permit modifications. We previously determined that Highridge's interest was sufficient to withstand Blairsville's motion to dismiss and afforded the parties an opportunity to present further evidence of standing at the hearing. *Highridge Water Authority v. DEP*, EHB Docket No. 98-191-R (Opinion issued January 5, 1999).

Highridge has standing to challenge the Department's action only if it is aggrieved by that action. It must have a direct, immediate and substantial interest in the litigation challenging that action. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). An interest is "direct" if the matter complained of caused harm to the party's interest. An

"immediate" interest means one with a sufficiently close causal connection to the challenged action. A "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. *Florence Township v. DEP*, 1996 EHB 282.

We find that the evidence introduced at the hearing established that Highridge has a direct, immediate, and substantial interest in the Department's action of not requiring permit modifications. Highridge thus has standing to pursue its appeal. Our decision is supported not only by the testimony establishing that the impact of the Department's action will have a financial impact on Highridge but the Department itself closely involved Highridge in the application process. When the Department received the applications, it affirmatively contacted Highridge and other "interested" parties to advise them of the applications. (App. Ex. 54,55,58). In fact, the Department even sent copies of the complete applications to Highridge and solicited its comments. Mr. David Plank, Chief of Technical Services Section, Water Supply Management Division of the Pittsburgh office of the Department, acknowledged that Highridge was notified of the filing of the Lower Indiana and Blairsville applications to modify their respective permits because Highridge had an "interest" in determining whether those permit modifications were granted. (N.T. 59-60) Highridge in turn responded to the Department's request and submitted detailed written comments strongly opposing the permit modifications pursuant to the provisions of the Water Rights Act. (App. Ex. 56, 57)

The Department sent copies of the technical deficiency letters to Highridge (App. Ex. 19, 20) as well as the pre-denial letters (App. Ex 6, 7). Following the Department's decision not to require permit modifications, Mr. Plank personally advised Highridge of the decision. Moreover,

Highridge's Executive Director, Mr. George Sulkosky, Jr., testified extensively as to the economic harm that Highridge will suffer as a result of the Department's action. As a water municipal authority who counts Lower Indiana as one of its major customers, Highridge has adequately demonstrated a direct and immediate interest in the Department's action that surpasses that of an ordinary citizen or the public at large and thus has standing to pursue this appeal.

D. Standard for Issuing a Supersedeas

The Board will consider the following factors in granting or denying a supersedeas: (1) likelihood of the petitioner prevailing on the merits; 2) irreparable harm to the petitioner; and (3) likelihood of injury to the public or other parties. 25 Pa. Code § 1021.78(a); *Consolidated Penn Labs v. DEP*, 1997 EHB 908. The Board must balance these factors to determine if a supersedeas should be issued. *Pennsylvania Fish Commission v. DER*, 1989 EHB 619. Highridge is required to make a credible showing on each of the above three factors. Moreover, Highridge must make a strong showing that it is likely to succeed on the merits. *Pennsylvania Mines Corporation v. DEP*, EHB 808,810.

Highridge argues that the Board should issue a supersedeas in this appeal because the Department acted in an arbitrary and capricious manner and contrary to law in: (1) ignoring its own program guidance manual, and (2) ignoring established precedent in not requiring Blairsville and Lower Indiana to obtain permit modifications to increase its sale and purchase of water from 30,000 gallons per day to 300,000 gallons per day, and (3) if a supersedeas is not issued Highridge will lose a substantial amount of business from Lower Indiana which will constitute irreparable harm since it will not be able to recoup this amount from the Department or Lower Indiana if it is successful in its appeal.

The main issue in this appeal is also central to whether Highridge is entitled to a supersedeas; and that is whether commingled surface water and ground water must be regarded as surface water under the Act. Stated in another way, once water pumped from a well mixes with water from a lake, stream, reservoir or other surface water in a water plant is the treated water considered surface water for purposes of regulation by the Department under the Act?

The Department adopted the reasoning advanced by Blairsville and Lower Indiana in deciding that permit modifications were not needed as long as any water sales above the permitted amount of 30,000 gallons per day were from ground water. The Department advised Blairsville and Lower Indiana that as long as the ground water did not mix with the surface water prior to being pumped to the treatment plant then it would not regulate the sale of treated water as long as the increased sales were made up of ground water. Since August 20, 1998, the water that Blairsville has supplied includes surface water Blairsville has withdrawn from Trout Run Reservoir and ground water which it has withdrawn from Well No. 1. The surface water from Trout Run Reservoir and the ground water from Well No. 1 is mixed in the water treatment plant before it is supplied to Lower Indiana. (Joint Stipulation ¶17) For example, if Blairsville pumped 100,000 gallons of ground water a day into the treatment plant it could sell 130,000 gallons of treated water per day to Lower Indiana (100,000 gallons of ground water plus the 30,000 gallons of surface water already approved by the Department under the current permit). The Department approved this arrangement even though once the water is mixed in the water treatment plant there is no way to separate the ground water from the surface water. (N.T. 168)

The testimony revealed that historically water allocation permits were issued from the central office of the Department in Harrisburg. Technical guidance documents were prepared over

the years by individuals based in Harrisburg. In the early 1990's, the Department decided to issue water allocation permits from its six regional offices. Thus the decision making was transferred from Harrisburg to the regions. Highridge called as witnesses the two Department employees with the most experience in this area and who were heavily involved in drafting the program guidance manuals and training the regional staff in the intricacies of water allocation permit regulation. Appellant Exhibit 13 consists of various highly technical Department guidance documents. These documents tend to support Highridge's position that commingled water should be treated as surface water under the Water Rights Act.

Department technical guidance documents are intended to serve as guidelines but do not carry the weight of a statute or regulation. *Bagnato v. DEP*, 1992 EHB 177. By their own terms, they may be disregarded by the Department. They are not binding and are not entitled to "any weight unless ... it is supported by independent evidence." *Manor Mining & Contracting Corp., v. DEP*, 1992 EHB 327.

The current technical guidance manual dealing with subsidiary water allocation permits provides as follows: "If a water supply is obtained from another supplier having both surface and ground water supply, the water will be considered from a surface water source for purposes of the subsidiary allocation." (App. Ex. 13, PDEP 000950) Testimony from several Department witnesses called by Highridge revealed that the Department's action in this case was not in accordance with this guideline or past Department practices.

Highridge, therefore, contends that the actions of officials in the Pittsburgh office in not requiring permit modifications were arbitrary and capricious in not following past Department practices or the technical guidance manual. We disagree. Just because the Department has

followed a certain practice in the past and has a technical guidance document inconsistent with its current action does not mean that the Department is prohibited from changing its policy. A supersedeas is an extraordinary remedy and Highridge must convince us that it is likely to prevail at the hearing on the merits. After carefully weighing the evidence adduced at the hearing, we can not say Highridge is likely to be successful at the hearing on the merits of its appeal. There is no indication that simply because Department officials in Pittsburgh came to a different result than what was arrived at in previous instances by the Department proves that its decision here is arbitrary and capricious or contrary to law. Indeed, there were sound policy arguments advanced by the Department at the hearing supporting its decision. Therefore, we can not find that Highridge has made a strong showing that the Department abused its discretion or acted contrary to law.

Highridge also has not satisfied the remaining two prongs of the test. Although it presented evidence that Lower Indiana is a major customer and that it was suffering financial harm caused by the new arrangement between Blairsville and Lower Indiana sanctioned by the Department's action, no evidence was presented which indicated that this financial harm was substantial enough to rise to the level of irreparable harm. Highridge presented evidence and testimony about some of the losses it is suffering and will suffer. However, it did not present any testimony that would allow this Board to judge the impact of these losses on its bottom line in order to determine if these amounts were significant enough to constitute irreparable harm. *See*

Pennsylvania Mines Corp. v. DEP, 1996 EHB 808, 810.[1] Accordingly, we find that Highridge has not satisfied this part of the test.

The third-prong requires that the public or other parties not suffer any harm or any harm suffered is acceptable under the circumstances. It does not seem that any parties or the public will suffer any *environmental* harm no matter how we rule on the petition for supersedeas. Instead, what we are looking at here is monetary harm. If we do not issue a supersedeas Highridge will surely suffer some monetary loss. However, as outlined earlier, we have not been presented with any hard evidence that this loss is substantial. Moreover, if we issued a supersedeas it seems certain that Blairsville and Lower Indiana would suffer economic harm. Once again, the evidence established that Highridge has not met its burden of proof concerning this part of the test.

Highridge argues that it is required to reserve 300,000 gallons of water per day for sale to Lower Indiana. However, Highridge is not harmed by this requirement because the testimony indicated that it has far more water capacity than it is currently selling. Stated another way, the reservation of this amount does not prevent it from selling all the water it can to other customers. More importantly, if Blairsville is unable to fully supply Lower Indiana then the latter can make up the shortfall by purchasing water from Highridge in fact, Lower Indiana has continued to purchase water from Highridge, albeit in far lesser amounts than it previously purchased.

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[1] The Board's cases in this area that hold that significant economic loss may constitute irreparable harm all involve costs incurred in complying with a Department order or orders. Those cases involve the expenditure of money. In this case, the Department is not ordering Highridge to comply with any order or expend any funds. These are funds that Highridge will lose because of the loss of business from Lower Indiana. Although these are losses, nevertheless the fact that the Department is not ordering Highridge to expend any funds makes us hesitate to find that Highridge has suffered irreparable harm as a result of any action by the Department.

Highridge also argues that Paragraph 8 of the Blairsville water allocation permit requires the Department to permit any increased sales of water to Lower Indiana. We find that this paragraph only applies to sales of *surface water* in excess of the currently permitted amount of 30,000 gallons per day.

Highridge argues that its construction of its infrastructure and capital investments assumed that Lower Indiana would continue as a major customer. Highridge further contends that it would have not built such capacity in its system if it knew that Lower Indiana would purchase the bulk of its water from Blairsville. This may all be true. However, this information is irrelevant to the issues before this Board.

Since Highridge has not satisfied any of the requirements that would allow us to grant the relief it is requesting we have no choice but to deny the petition for supersedeas.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

HIGHRIDGE WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 98-191-R**
	:	**(Consolidated with 98-192-R)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and BLAIRSVILLE	:	
MUNICIPAL AUTHORITY and LOWER	:	
INDIANA COUNTY MUNICIPAL	:	
AUTHORITY, Permittees	:	

ORDER

AND NOW, this 29th day of January, 1999, the Petition for Supersedeas filed by Highridge Water Authority is **denied.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: January 29, 1999

EHB Docket No. 98-191-R
(Consolidated with 98-192-R)

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DAVISON SAND & GRAVEL COMPANY	:	
	:	
v.	:	**EHB Docket No. 96-090-R**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 3, 1999**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where a permittee has entered into a contractual agreement with the Department of Environmental Protection to conduct mussel surveys prior to dredging, it may not subsequently challenge the Department's authority to impose such a condition in the permittee's dredging permit. However, the permittee is not precluded from challenging the Department's implementation of that authority where the Department has added requirements for conducting the mussel survey which were not part of the original agreement.

OPINION

This matter involves multiple appeals filed by Davison Sand & Gravel Company (Davison), challenging a requirement contained in amendments and extensions to various Water Obstruction and Encroachment Permits (permits) issued by the Department of Environmental Protection (Department). The permits authorize Davison to conduct dredging operations along the Allegheny

River. The appeals have been consolidated at EHB Docket No. 96-090-R.

On June 3, 1988, the Department and Davison entered into an agreement (the June 1988 Agreement) which was an addendum to an earlier Sand and Gravel Agreement entered into by the parties. The June 1988 Agreement contained a number of provisions including the following:

> Prior to dredging Licensee shall undertake or cause to be undertaken by a reputable environmental consultant, at Licensee's expense, a survey to determine if mussels are present in the area it proposes to dredge. The data collected shall be provided to Department, Pennsylvania Fish Commission, U.S. Army Corps of Engineers and the U.S. Department of the Interior, Fish and Wildlife Service for review and comment before dredging is initiated. If significant mussel resources exist in the proposed dredging area, dredging shall be prohibited.

(Exhibit C to Department's Motion, para. 2.26) Davison did not appeal the addendum. (Exhibit D to Department's Motion)

Beginning on March 21, 1996, the Department extended the expiration date of Davison's dredging permits. The Department's letter stated that in order for the permits to be further extended, Davison was required to submit a mussel survey for any areas proposed to be dredged. The letter also contained guidelines and a protocol for conducting the mussel surveys. (Exhibit E to Department's Motion) The Department's letters requiring the mussel surveys are the subject of these consolidated appeals.

In its notice of appeal, Davison has challenged the Department's authority to require the mussel surveys as a condition of extending the dredging permits. The Department asserts that Davison is precluded from challenging this issue by the doctrine of administrative finality since the mussel survey condition appeared in earlier permits and in the June 1988 Agreement, but was never

challenged by Davison. In response, Davison asserts that it is not precluded by the doctrine of administrative finality since the mussel survey condition has not been in continuous effect and since the Department did not begin to officially require mussel surveys until it issued the letters which are the subject of this appeal.

Related Appeals

The Department asserts that this matter has already been decided by the Board in similar appeals brought by other dredging companies challenging the same mussel survey condition. In *Glacial Sand & Gravel Co. v. DEP*, 1997 EHB 756; *Tri-State River Products, Inc. v. DEP*, 1997 EHB 1061; and *Tri-State River Products, Inc. v. DEP*, 1997 EHB 1072, the Board granted summary judgment to the Department on the issue of whether appeals of the mussel survey condition, which had continuously appeared in the dredging companies' permits, were precluded under the doctrine of administrative finality.

However, the facts surrounding our decision in *Glacial* and *Tri-State* are distinguishable from those of the present appeal. In both *Glacial* and *Tri-State*, the appellants did not respond to the Department's motion for summary judgment. This is critical since, pursuant to Pa. R.C.P. 1035(d), summary judgment may be entered against a party who fails to respond to a motion for summary judgment. Indeed, in *Glacial*, we noted that the appellant had not contested the facts set forth in the Department's motion. *Glacial*, 1997 EHB at 759.

Our decisions in *Glacial* and *Tri-State* were based in large part on the averment in the Department's motion that the mussel survey condition had been in continuous effect. Since the appellants did not contest this fact, we had no basis for holding otherwise. In the present appeal, Davison has contested this fact, and has presented evidence that the mussel survey condition, while

present in earlier versions of the permit, was not enforced until the action now under appeal.

Because the issues which have been raised by Davison in its response to the Department's motion and in its cross-motion for summary judgment were not before the Board in *Glacial* and *Tri-State*, those decisions are not controlling here.

Department's Authority to Require Mussel Surveys

We now turn to the issue of whether Davison may challenge the Department's authority to require mussel surveys as a condition of renewing Davison's permits. As noted, the Department contends that Davison is barred by the doctrine of administrative finality from challenging this issue since the mussel survey condition appeared in earlier permits.

We find that Davison is precluded from challenging the Department's authority to require mussel surveys, not on the basis of administrative finality, but because Davison freely entered into a contract with the Department agreeing to provide mussel surveys prior to dredging. Though the parties did not focus on this issue, we are required to recognize contracts entered into by parties and to evaluate them for the purpose of determining issues of compliance and permitting. *See, e.g., Pond Reclamation Co. v. DEP*, 1997 EHB 468, 474 and *Coolspring Stone Supply, Inc. v. DEP*, EHB Docket No. 96-171-R (Opinion issued March 25, 1998), at 4. The June 1988 Agreement is signed by representatives of both the Department and Davison and clearly states that Davison agrees to undertake mussel surveys prior to dredging. Even if the Department chose not to require the mussel surveys until March 1996, there is no indication that the contract had expired or was no longer in effect at that time.

However, while we hold that Davison is precluded from challenging the Department's *authority* to require the mussel surveys, Davison is not precluded from challenging the Department's

implementation of that authority since new requirements are being imposed on Davison which were not agreed to by the parties in the June 1988 Agreement. Whereas the June 1988 Agreement gives the Department the authority to require mussel surveys from Davison, the agreement does not specify the timing or manner of implementing this requirement. The specifications for conducting the mussel surveys were not set forth by the Department until its renewal letters which are the subject of this appeal. Those letters not only reiterated the requirement that Davison conduct mussel surveys prior to dredging, but also set forth the "Minimum Requirements for an Acceptable Mussel Survey" (protocol). The protocol for conducting the surveys was not contained in the June 1988 Agreement between the Department and Davison or in earlier versions of the permit. Nor could it have been contemplated by the parties at the time they entered into the agreement as it did not come into existence until August 1995. (Exhibit C to Davison's Response and Cross-Motion)[1] The Department's decision to impose these new requirements at this time is an action which is subject to challenge by Davison.[2]

Nor is Davison's appeal of the implementation of the mussel surveys barred by the doctrine of administrative finality since that doctrine only bars litigation of issues which could have been raised in an appeal of a prior Department action. *Department of Environmental Resources v. Wheeling - Pittsburgh Coal Corp.,* 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd,* 375 A.2d 320 (Pa.

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[1] The protocol was issued by the U.S. Fish and Wildlife Service on August 18, 1995.

[2] *See, e.g., Standard Line & Refractories Co. v. Department of Environmental Resources*, 279 A.2d 383, 386 (Pa. Cmwlth. 1971): "[S]ince the appellant did not appeal from the original abatement order, appellant cannot now question that order. . .However, if the appellee now desires to question compliance, a new issue has been raised which can only be determined through a legal procedure via a hearing on that issue, either before the appellee's adjudicatory functionary or the courts."

1977); *Reading Anthracite Co. v. DEP,* EHB Docket No. 95-196-C (Opinion issued March 12, 1998), at p. 5. Because the specific requirements for conducting the mussel surveys were not adopted until the time of the Department's letters which are the subject of this appeal, they could not have been challenged in a prior action.

In conclusion, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVISON SAND & GRAVEL COMPANY	:	
	:	
v.	:	**EHB Docket No. 96-090-R**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 3rd day of February, 1999, Davison Sand & Gravel Company's Motion for Partial Summary Judgment is **denied**. The Department of Environmental Protection's Motion for Partial Summary Judgment is **granted in part**, as set forth in this Opinion.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 96-090-R (Consolidated)

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **February 3, 1999**

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

For the Commonwealth, DEP:
Charney Regenstein, Esq.
Southwest Region

For Appellant:
Ronald S. Cusano, Esq.
Schnader, Harrison, Segal & Lewis, LLP

mw

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ENVIRONMENTAL HEARING BOARD
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HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

KOCHER COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 84-236-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**ISSUED: February 9, 1999**

OPINION AND ORDER
ON RULE TO SHOW CAUSE

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

This appeal was filed fifteen years ago. A review of the docket and the file reveals that there has been no substantive activity before the Board in this matter since September 1988. For the past eleven years, the parties have simply filed status reports and requests for extensions. Those filings have referenced related litigation and ongoing settlement discussions.

On July 1, 1998, this Board ordered the parties to file a status report on or before December 31, 1998. No status report was filed. A review of the docket revealed that this was not the first time that such a deadline had been missed. On January 20, 1999, the Board issued a Rule To Show Cause to Kocher to explain why the appeal should not be dismissed for lack of prosecution. We specifically directed Kocher to "explain what purpose is being served by keeping this appeal open." The Rule was returnable, in writing, to the offices of the Board on February 8, 1999.

Kocher responded to the Rule on February 8, 1999. Kocher's response continues to reference "extensive and complex negotiations" and asks that the appeal remain open. Kocher notes that "comprehensive resolution of this matter may still be years away." Kocher points out that a stay has been requested in related litigation before the Commonwealth Court. It is not clear whether the stay has been granted. Kocher states

that counsel for DEP "agrees with Kocher's response to the Rule to the extent that it characterizes this matter as being of extreme complexity and importance." Kocher requests a conference with the Board "to discuss the case and possible resolutions of the litigation."

Kocher's representation of DEP's position is curiously qualified. It appears by negative implication that DEP does not agree that this appeal should remain open.

While the Board strongly encourages settlement discussions, it can only be expected to a accommodate such discussions for a reasonable period of time. The Board also understands the need to accommodate parties who are involved in related litigation that is pending before other tribunals. Again, however, there is a limit to the extent of the Board's reasonable accommodation.

The Board in this appeal has been more than accommodating. After fifteen years, eleven of which have resulted in no substantive activity, unless this Board is presented with clear and compelling reasons to tolerate further inactivity, this matter needs either to move forward or come to an end. Further references to ongoing settlement discussions and related litigation will not by themselves explain why this fifteen-year-old case should continue to be permitted to remain open, yet dormant. The parties need to explain very carefully why there are no practical alternatives to allowing this appeal to remain dormant.

Kocher's response to the Rule to Show Cause is inadequate to justify further inactivity. Before proceeding further, however, we will grant Kocher's request for a conference with the Board. In preparing for that conference, the parties are advised that the Board is unlikely to await a comprehensive resolution that "may still be years away."

Accordingly, we enter the following:

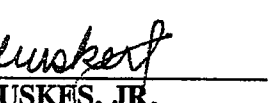
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KOCHER COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 84-236-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 9th day of February, 1999, pursuant to 25 Pa. Code § 1021.83, a prehearing conference is scheduled for **February 24, 1999** at 10:00 a.m. at the offices of the Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400 Market Street, Harrisburg, Pennsylvania.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: February 9, 1999

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

For the Commonwealth, DEP:
Martin H. Sokolow, Jr., Esquire
Acting Chief Counsel

For Appellant:
Charles E. Gutshall, Jr., Esquire
RHOADS & SINON
Harrisburg, PA

BAL/bap

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

THOMAS F. WAGNER,	:	
THOMAS F. WAGNER, INC. d/b/a	:	
BLUE BELL GULF and	:	
BLUE BELL GULF	:	**EHB Docket No. 98-184-MG**
	:	**(consolidated with 98-133-MG,**
v.	:	**98-164-MG, 98-213-MG and**
	:	**99-016-MG)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: February 11, 1999**
PROTECTION	:	

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By George J. Miller, Administrative Law Judge

Synopsis:

An order of the Department suspending the Appellant's permits for operation of underground tanks at his gasoline station and requiring him to empty the tanks and cease operation because he is financially unable to complete a remediation of a release of gasoline is superseded on proof of irreparable harm, the absence of harm to the public and the likelihood that issuance of the order will be found to be an abuse of discretion and unnecessary to aid in the enforcement of the Storage Tank Act. While the Appellant has made no offer to repay the Commonwealth for its expenses in completing the remediation, the Department's other powers under this Act are adequate to protect its interest in recovering its costs from the Appellant to the full extent of his very limited financial capability.

BACKGROUND

These appeals arise from a series of orders issued by the Department in response to a release of gasoline sometime prior to July 2, 1998, from Blue Bell Gulf, an automobile service station owned and operated by Thomas F. Wagner (Appellant). This facility is located in Blue Bell, Whitpain Township, Montgomery County. The Department's orders were issued pursuant to the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101 - 6021.2104 (Storage Tank Act).

The Department's first order of July 2, 1998 directed, among other things, the cessation of all operations, the emptying of the tanks and the performance of remedial action beginning with the preparation of a site characterization plan and a later remedial action plan as required by the Department's regulations. It also required the Appellant to execute the remedial action to be approved by the Department. This order looked forward to a reopening of the facility upon the approval of a leak detection protocol, an operations inspection and the correction of any operational violations detected in this inspection. This initial order was thereafter amended on August 18, 1998, to impose more detailed requirements for reopening the facility which included a demonstration that the tanks are tight and that the facility is able to conduct leak detection in accordance with regulatory requirements. The appeals from these orders are docketed at EHB Docket Nos. 98-133-MG and 98-164-MG.

Thereafter, the Appellant satisfied the Department that he could meet all of the conditions for reopening, including the requirement that there was no ongoing release from the facility. The Department nevertheless declined to permit the facility to be reopened because of the Department's

concerns that the Appellant is financially unable to perform the required remediation resulting from the prior leak at the gasoline station facilities. At that time, the Appellant was performing the required remediation studies through an environmental consulting firm using the funds provided by insurance coverage provided by the Underground Storage Tank Indemnification Fund.

By opinion and order dated October 9, 1998, the Board superseded the Department's refusal to permit the Appellant to operate the facility based primarily on evidence that the required remediation studies were proceeding and that the tanks were tight so there was no ongoing release. The Board's opinion stated that the Appellant must understand that he remains financially responsible for carrying out the remediation in accordance with the Department's outstanding orders. *Wagner v. DEP*, Docket No. 98-184-MG (Opinion issued October 9, 1998)

The appeal which is the subject of this opinion and order was originally taken on February 1, 1999 (Docket No. 99-016-MG) from an order of the Department dated January 19, 1999. The Department's order claims that the release was of a significant quantity, believed to be in excess of 10,000 gallons of gasoline, which contaminated the groundwater in the vicinity of the facility and has contaminated both drinking water wells and surface waters. The order asserts that vapors from the release forced the evacuation of two homes and have infiltrated at least one commercial building in the vicinity of the facility. The Department's January, 1999 order also recites that near the end of December, 1998 the development by the Appellant's consultant of a site characterization study ceased because of the exhaustion of insurance funds, and that the Appellant has ceased all remedial activity. As a result, the Department has authorized Foster Wheeler Environmental Corporation to take overall remediation, including site characterization and remedial action using Commonwealth funds. The order suspends the operating permits for the tanks at Blue Bell Gulf, requires Mr.

Wagner to immediately cease operation of all regulated storage tanks and remove all product from the tanks within 48 hours. A petition for both a temporary and a permanent supersedeas was filed with this appeal.

The appeal and the petitions for supersedeas claim that the issuance of the 1999 order suspending the permits and directing the cessation of the facility's operation is an abuse of discretion. Among other things, the Appellant claims that the issuance of this order is not necessary to aid in the enforcement of the Storage Tank Act because the Appellant has cooperated with the Department in effecting the remediation to date. The Appellant states that requiring him to cease operations will not adversely affect the public now that the Department has taken over the remediation. He further argues that the Department forfeited its right to enter an order suspending the permits and requiring the Appellant to cease operations once it decided to take over the remediation.

The Board denied the petition for a temporary supersedeas by order dated February 4, 1999, and held a hearing on the petition for a supersedeas on Monday, February 8, 1999. The factual record consists of a stipulation of facts marked Board Exhibit 1, the affidavits submitted with the petition for supersedeas and the brief testimony of Thomas Wagner.

DISCUSSION

Section 1302(a) of the Storage Tank Act, 35 P.S. § 6021.1302(a), authorizes the Department, in the case of a release from a storage tank, to order the owner or operator to take corrective action in a manner satisfactory to the Department. It also authorizes the Department to order the owner or operator to allow access to the land by the Department or a third party to take such action. Section 1302(b) authorizes the Department to recover its expenses in connection with any such corrective

action in the same manner as civil penalties are collected under section 1307(b). 35 P.S. § 6021.1302(b). Section 1307(b) of the Act authorizes the Department to assess the amount of its expenses in connection with the remedial activity. This amount must be paid to the Department in advance, or a bond in the amount due must be posted as a condition of contesting the assessment by an appeal. If no appeal is taken or successfully pursued, the amount due, plus interest and costs, shall constitute a judgment in favor of the Commonwealth which may be entered and indexed against the real estate of the owner or operator. 35 P.S. § 6021.1307(b)

In addition to these powers, section 1309 of the Storage Tank Act, which is the basis for the issuance of the Department's order, provides in relevant part as follows:

> The Department may issue such orders *as are necessary to aid in the enforcement of the provisions of this act.* Such orders shall include, but shall not be limited to, orders modifying, suspending or revoking permits or certifications, orders requiring persons to cease unlawful activities or cease operation of an establishment which, in the course of its operation, is in violation of any provision of this act, rule or regulation promulgated hereunder, permit, order to take corrective action or to abate a public nuisance, or an order requiring the testing, sampling or monitoring of any tank. Such an order may be issued if the department finds that any condition existing in or on the facility or operation involved is causing or is creating a danger of pollution of the waters of the Commonwealth, including any public or private water supply, surface water or groundwater or if it finds that the permittee or any person is in violation of any provision of this act, or of any rule, regulation or order of the Environmental Hearing Board or regulation, order, permit or certification of the department....

35 P.S. § 6021.1309 (emphasis added)

The Evidence

The evidence indicates that the Appellant has complied with all of the Department's regulations and orders short of committing his own funds to complete the required remedial activities. Mr. Wagner's affidavit states that he first discovered an indication of a possible release

on May 8, 1998. He promptly stopped operating the likely sources of this release and arranged for additional investigations. On the following day, when those investigations confirmed a release from one of the underground tank systems, he immediately notified the Department and the Township Fire Marshal of the release by telephone.

He states that the release was caused by the improper installation of a product line and the secondary containment system. According to the Appellant, these facilities were installed improperly by a certified contractor. Repairs were made in May, 1998. In compliance with the Department's July 1998 order, leak detection systems were upgraded and funds from the Underground Storage Tank Indemnity Fund were used to implement the required remedial work. The stipulation of counsel indicates that this work included the installation of soil vapor extraction systems at the facility and at two residences. This work also included free product recovery from installed wells, temporary relocation of residents, the installation of carbon filtration systems in private water well systems and installation of public water supply lines to residential properties. In December, 1998, the Appellant agreed to the Department's request for access to the facility by the Department and its contractor, Foster Wheeler, for purposes of completing the remedial activities based on the Department's statements that it would complete the remediation and that his funds from the Underground Storage Tank Indemnification Fund were nearly exhausted.

The evidence also indicates that the Appellant has no significant funds to commit to the continuing remedial activities. The stipulation of counsel states that the Department's estimate of the cost of these continuing activities is in excess of one million dollars. The Appellant's current net worth is a negative $121,818, excluding the value of the facility's real estate and his liability for legal fees. The value of the real estate is presently unknown as a consequence of the contamination

presently on the property. He is indebted to a bank on a mortgage loan in the approximate amount of $440,000. The lien of the mortgage and security agreement extends to his home as well as the facility's real estate and equipment. The Appellant is also indebted to an affiliate of Gulf Oil in the amount of $139,000 which holds a subordinate security interest on the facility's real estate, the appellant's home and certain fixtures, machinery and equipment. The Appellant's affidavit states that he has been unable to pay his mortgage for over five months. He is required to make child support payments of $216 every two weeks. He can pay his bills only if he is able to operate the facility. He states that he has no investments, retirement accounts savings or other income that he can use to pay his debts. The stipulation of counsel also states that his adjusted gross annual income in 1996 and 1997, as reported on his U.S. Individual Income Tax Returns for those years, was less than $25,000 per year.

Requirements for a Supersedeas

The Board may issue a supersedeas under its rules of procedure at 25 Pa. Code §1021.78 by considering whether there will be irreparable harm to the petitioner, the likelihood of injury to the public or other parties and the likelihood of the petitioner prevailing on the merits. A supersedeas will not issue if 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 have no difficulty in reaching the conclusion that the Department's order will subject the Appellant to irreparable harm. In addition to his limited financial circumstances, the Appellant testified at the hearing that he is significantly disabled as a result of a hit-and-run motorcycle accident in 1976 which resulted in a crushed leg, a dislocated hip and injuries to his head and gall bladder. He has had six operations on his knees and is now a diabetic. These conditions limit his

ability to perform other work such as automobile repairs or state inspections. He testified that the Department's order will deprive him of ability to pay his bills. If the order is superseded, he testified that his gasoline sales would permit him to meet his child support payments and pay his current bills.

We see no injury to the public under the circumstances of this case if the Appellant is able to continue the operation of his facility while the Department's contractor completes the remediation. There is no ongoing release from the tanks and the Department has been satisfied that the Appellant's leak detection system is adequate. Those residents who have been affected by the release will not be harmed by the continuance of the facility's operation while the remediation proceeds. For the same reasons, no pollution or injury to the public health, safety or welfare is threatened by permitting the Appellant to operate the facility.

We also conclude that the Appellant has demonstrated a likelihood of success on the merits of his claim that the issuance of the Department's order depriving him of the opportunity to operate the facility was, under all the circumstances, an abuse of discretion or is contrary to law. We believe that the introductory sentence of section 1309 of the Storage Tank Act qualifies the Department's power to issue such an order to circumstances in which the issuance of the order is somehow necessary to aid in the enforcement of the Act. This introductory sentence states, "The department may issue such orders as are necessary to aid in the enforcement provisions of this act." 35 P.S. § 6021.1309.

We do not see how ordering the Appellant to cease operations can aid in the enforcement of the Storage Tank Act. The evidence demonstrates that the Appellant is incapable of providing any significant monetary amount toward the completion of the remedial action at least until some reasonable value can be placed on the facility's real estate. It is unlikely that such an appraisal can

be made until after the major part of the remedial action is completed. The Department has an adequate remedy to recover its response costs under sections 1302(b) and 1307(b) of the Storage Tank Act. Requiring the Appellant to cease operations will do nothing to aid in that effort. As indicated above, the Department can assess the amount of its response costs and recover them in the same way it collects a penalty through, if necessary, the entry of a judgment and executing on the judgment through a sale of the real estate. Indeed, requiring the Appellant to cease operations may mean that fewer assets will be available to satisfy any such judgment.

The Department does not claim that requiring the Appellant to cease operations is necessary to aid in the enforcement of the Act. The Department's primary position is that it is unseemly for the Appellant to be free to profit from the operation of the facility while the Department spends the Commonwealth's money to complete the remediation. The contamination was caused by the Appellant's facility, but the Appellant has made no offer to the Department to meet his obligation to repay all or any portion of those funds.

The Department also argues that section 1309 of the Storage Tank Act authorizes it to suspend permits and order the cessation of the operation of facilities whenever it finds that the person is in violation of any order of the Department. The Department points out that the Appellant is in violation of the Department's order to conduct the site characterization and remedial action studies and to effect a remediation of the site. According to the Department the introductory sentence of section 1309 means only that the Department can issue such orders and does not in any way restrict the circumstances under which such an order may be entered.

We disagree. We believe the drafters of the Storage Tank Act intended that effect be given to the language "necessary to aid" in the enforcement of the Act. The Department's interpretation

would simply read this language out of Section 1309.

The Department also argues under its "permit by rule" regulations at 25 Pa. Code § 245.212(b), applicable to underground manufactured storage tank systems storing petroleum, also authorizes suspension of the tank permits. That regulation provides:

> The owner/operator of a storage tank system who causes or allows violations of the act, regulations thereunder, an order of the Department, or a condition of a permit issued under the act is subject to administrative or other actions including suspension, modification or revocation of the permit.

While this language certainly gives a pointed warning, it does not clearly authorize suspending permits under any and all circumstances.

Regardless of how section 1309 is to be interpreted, we think that requiring an owner/operator who has cooperated with the Department in all respects other than being unable to provide the money necessary to complete his compliance with the Department's order is likely to be found to be an abuse of discretion. In addition to the evidence described above, the affidavit of the Appellant's counsel, Scott Schwarz, describes the steps he and the Appellant have taken to require other parties responsible for the release to provide additional funds to finance the remediation through litigation. One adverse effect of the Department's order may be to limit the effectiveness of their efforts by depriving the Appellant of income from operation of the facility which might otherwise be used in this litigation.

Both the Commonwealth Court and this Board have held that the Department's power to direct cessation of a permitted activity is not unlimited. In *Department of Environmental Resources v. Mill Services, Inc.*, 347 A.2d 503 (Pa. Cmwlth. 1975), the Department revoked a permit under a

similar statutory provision of the Clean Streams Law[1] based on an isolated discharge to a stream which was not intentional. The Court held that the Department's revocation of the permit was an excessive penalty and an abuse of discretion. Similarly, in *Keystone Cement Company v. DER*, 1992 EHB 590, the Board found that an indefinite suspension of air quality plan approvals and hazardous waste storage permits was excessive under the circumstances and superseded the Department's order. In that case the permittee had burned waste solvents in violation of permit conditions. However, the permittee acted promptly to put proper controls in place to assure that violations would not occur in the future.

By contrast, the Board has upheld the Department's order suspending storage tank permits and directing the cessation of operations where the appellants were in violation of the Department's order to engage in corrective and remedial action, including the development of an adequate site characterization study. In that case it appeared necessary to issue such an order to provide the appellants with an economic incentive to comply with the Department's order. *202 Island Car Wash v. DEP,* EHB Docket No. 99-008-MG (Opinion issued February 4, 1999) In this case, however, the Appellant cannot finance the required remedial work under his present financial circumstances so that the issuance of the Department's order is not necessary to induce compliance.

For these reasons we believe that an indefinite suspension of the Appellant's permits and the direction to cease operations is excessive under the circumstances. The Department's interest in recovering its response costs from the Appellant or other responsible parties is adequately protected by its other powers under the Storage Tank Act.

Accordingly, we issue the following:

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[1] Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §§ 691.1 – 691.1001.

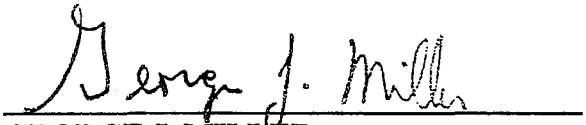
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMAS F. WAGNER,	:	
THOMAS F. WAGNER, INC. d/b/a	:	
BLUE BELL GULF and	:	
BLUE BELL GULF	:	**EHB Docket No. 98-184-MG**
	:	**(consolidated with 98-133-MG,**
v.	:	**98-164-MG, 98-213-MG and**
	:	**99-016-MG)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 11th day of February, 1999, IT IS HEREBY ORDERED that the Department's order of January 19, 1999 suspending the Appellant's permits for his underground tanks, requiring Appellant to cease operation of the tanks and to surrender the facility registration certificate to the Department is hereby superseded.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Docket No. 98-184-MG (consolidated with 98-133-MG, 98-164-MG, 98-213-MG and 99-016-MG)

DATED: **February 11, 1999**

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

For the Commonwealth, DEP:
Wm. Stanley Sneath, Esquire
Southeast Region

For Appellant:
Scott J. Schwarz, Esquire
MATTIONI, MATTIONI & MATTIONI
Philadelphia, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ROBERT K. GOETZ, JR. d/b/a GOETZ DEMOLITION	:	
v.	:	**EHB Docket No. 97-226-C (Consolidated with 97-147-C, 97-223-C, 97-224-C, and 97-225-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** February 12, 1999

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants the Department of Environmental Protection's motion to dismiss an appeal of a civil penalty assessment for a noncoal mining operation when the appellant fails to pay the civil penalty or post an appeal bond as required by a earlier Board order.

OPINION

This matter initiated with Robert K. Goetz's, d/b/a Goetz Demolition, (Appellant) notice of appeal of the Department of Environmental Protection's (Department) September 18, 1997 assessment of civil penalty, EHB Docket No. 97-223-C[1]. The basis of the civil penalty assessment

[1] The Board consolidated this matter with EHB Docket Nos. 97-147-C, 97-224-C and 97-225-C at EHB Docket No. 97-226-C.

was two Department compliance orders which were issued to Appellant. The first order, No. 97-5-025-N, was dated June 12, 1997 and cited Appellant for mining without a license and without a permit and for denying Department personnel access to inspect the site. The Department issued the second order, No. 97-5-032-N, on July 11, 1997 and cited Appellant for failure to comply with the June 12 order.

On September 18, 1997 the Department issued an Assessment of Civil Penalty in the amount of $56,000 to Appellant for the violations cited in the June 12, 1997 and July 11, 1997 Compliance Orders.

On October 21, 1997 Appellant appealed the civil penalty, but failed to prepay or post an appeal bond to perfect his appeal as required by the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, No. 219, *as amended*, 52 P.S. §§ 3301-3326 and its accompanying regulations. At the same time Appellant filed a petition in forma pauperis in which he claimed he was financially unable to either prepay the civil penalty or to post an appeal bond in the amount of the civil penalty.

On January 21, 1998 and April 21, 1998 the Board held a hearing on Appellant's ability to prepay the civil penalty. The Department moved for compulsory nonsuit at the close of Appellant's case-in-chief. On September 10, 1998 the Board issued an opinion and order in which it held that Appellant failed to prove that he could not prepay the penalty because he introduced virtually no evidence concerning his personal worth regarding payment of a civil penalty which was assessed against him personally. The Board required Appellant to prepay the civil penalty within 30 days (October 13, 1998) or suffer dismissal of his appeal.

On October 7, 1998 Appellant filed a petition for review of the Board's September order in

Commonwealth Court. By order dated February 1, 1999 Commonwealth Court dismissed the appeal as interlocutory and premature.

Presently before the Board is the Department's November 10, 1998 motion to dismiss. The Department contends the appeal should be dismissed because Appellant failed to comply with the Board's September order which required Appellant to prepay the civil penalty by October 13, 1998.

To date Appellant has not filed a response.

Discussion

We must assess a motion to dismiss in the light most favorable to the non-moving party. *Smedley v. DEP*, EHB Docket No. 97-253-C (Opinion issued November 20, 1998). The Board treats motions to dismiss the same way it treats motions for judgment on the pleadings: we will dismiss the appeal only where there are no material factual disputes and the law is clear that the moving party is entitled to a judgment as matter of law. *Smedley v. DEP*, EHB Docket No. 97-253-C (Opinion issued November 20, 1998).

Facts

Under Board Rule 1021.70(f) the Board will deem a party's failure to respond to a motion to be an admission of all properly pleaded facts contained in the motion, except in the case of motions for summary judgment or partial summary judgment. 25 Pa. Code § 1021.70(f) Facts set forth in the Department's motion are deemed admitted by Appellant because he failed to file a response in which he specifically denied the Department's averments. Consequently, there are no disputes of material fact.

The admitted facts are the same as set forth in the procedural section of this opinion and will

not be repeated.

Dismissal

Since there is no dispute regarding the facts, we must determine whether the Department is entitled to judgment as a matter of law. Under Board Rule 1021.125, "[T]he 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 the dismissal of an appeal or an adjudication against the offending party, ..."[2] 25 Pa. Code § 1021.125

The Department is entitled to judgment as a matter of law. Appellant failed to abide by the Board's September 10 order which required him to pay the civil penalty or post an appeal bond by October 13, 1998. As of November 10, 1998 Appellant had not paid the civil penalty or posted an appeal bond. (Certification by William T. Phillipy, IV Secretary to the Environmental Hearing Board) By not prepaying the penalty or posting the bond, Goetz has failed to comply not only with the Board's order but also with the requirements of the Noncoal Surface Mining Conservation and Reclamation Act. Consequently, the Board will dismiss his appeal.

Accordingly, we enter the following order.

---

[2] The Department incorrectly cites Board Rule 1021.73 to support its request for dismissal. Board Rule 1021.73 covers dispositive motions and not dismissal as a sanction for failure to abide by a Board order. The Department should have cited Board Rule 1021.125.

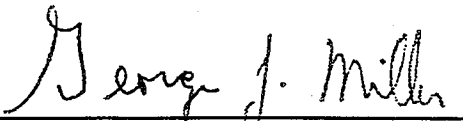
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT K. GOETZ, JR.	:	
d/b/aGOETZ DEMOLITION	:	
	:	
v.	:	**EHB Docket No. 97-226-C**
	:	**(Consolidated with 97-147-C,**
COMMONWEALTH OF PENNSYLVANIA,	:	**97-223-C, 97-224-C, 97-225-C)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

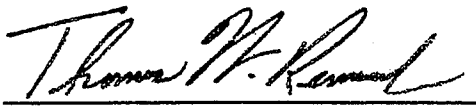
ORDER

AND NOW, this 12th day of February, 1999 the Department of Environmental Protection's motion to dismiss is granted and the appeal docketed at EHB Docket No. 97-223-C is dismissed.

ENVIRONMENTAL HEARING BOARD

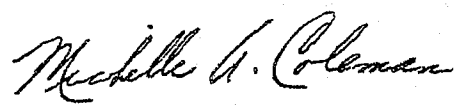


GEORGE J. MILLER
Administrative Law Judge
Chairman



THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 97-226-C
(Consolidated with 97-147-C,
97-223-C, 97-224-C, and 97-225-C)



MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: February 12, 1999

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

For the Commonwealth, DEP:
Dennis A. Whitaker, Esquire
Charles B. Haws, Esquire
Mary Martha Truschel, Esquire
Southcentral Regional Counsel

For Appellant:
Daniel F. Wolfson, Esquire
York, PA

bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

GREGORY & CAROLINE BENTLEY	:	
	:	
v.	:	**EHB Docket No. 98-058-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DONALD AND JOAN SILKNITTER, Permittee	:	**Issued:** February 12, 1999

OPINION AND ORDER ON
MOTION TO AMEND A NOTICE OF APPEAL

By George J. Miller, Administrative Law Judge

Synopsis:

Before the Board is a motion by the appellants to amend their notice of appeal. The Board denies the motion because the appellants have not identified the specific legal issues they wish to raise as required by the Board's rules, nor have they shown that the other parties in this matter will not be prejudiced by the addition of a proposed amendment so late in the discovery process.

OPINION

Gregory and Caroline Bentley (Appellants) seek to amend their notice of appeal filed on March 30, 1998. Their appeal seeks to challenge the Department of Environmental Protection's issuance of a Limited Power Permit for a minor water power project to Donald H. and Joan L. Silknitter (collectively, Permittee).

This permit was issued pursuant to the Department's authority under the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. § 693.1-693.27, and the Limited Power Act, Act of June 14, 1923, P.L. 704, *as amended*, 32 P.S. § 591-625. It authorizes the Permittee to operate and maintain an existing dam and hydroelectric generating plant on Buck Run in West Marlborough Township, Chester County. (Notice of Appeal, Exhibit A).

In their notice of appeal, the Appellants listed 9 objections to the Department's issuance of the permit. In their motion to amend they seek to withdraw several claims and to amend what they consider a typographical error to Paragraph 5, which reads as follows:

> The Department violated the Dam Safety and Encroachment Act, 32 P.S. §591 et seq. including, but not limited to 32 P.S. §§693.2, 693.8 and 693.9.

The Appellants argue that they intended to include a full citation to the Dam Safety and Encroachments Act and the name of the Limited Power Act, but due to a word processing error these two items were deleted when the appeal was filed. No other objection notes an objection or a specific reference to the Limited Power Act.

By order dated January 29, 1999, the Board directed the Appellants to file a "statement of precisely what claims it would make under the Limited Power Act." The

Appellants responded to the Board's order by letter dated February 5, 1999:

> The Bentleys contend that the Department violated both the Dam Safety and Encroachment [sic] Act and the Limited Power Act by issuing a permit for the use and maintenance of a millrace that the Permittee neither owns nor controls.
>
> The Limited Power Act is referenced in the Bentleys' Notice of Appeal. Therefore, this claim is not an expansion of the claims raised in the Bentley's original Notice of Appeal.

The Department objects to the addition of a claim under the Limited Power Act at this late date. It contends that it will be prejudiced in its case preparation because such an addition will expand the scope of the litigation in this matter.[1] Specifically, the Department contends that there is nothing in the notice of appeal which would put it on notice that the Appellants intended to raise a claim under the Limited Power Act and that it was reasonable for the Department to presume that the citation to the Dam Safety and Encroachments Act had merely been misnumbered.

We must deny the Appellants motion to include a claim under the Limited Power Act at this late date in the proceedings. First, although it is a reasonable explanation that the failure to name the Limited Power Act was merely a typographical error, it is equally reasonable for the opposing parties to assume that the error was simply an incorrect citation to the Dam Safety and Encroachments Act. Therefore the Appellants are required to sustain a burden of demonstrating that an amendment to their notice of appeal is justified under the circumstances. We hold that it is not.

Our review is governed by Board Rule 53, which provides that an appeal may be

---

[1] The Permittee has joined the Department's response.

amended with leave of the Board where (1) it is based on specific facts that were discovered during discovery of a hostile witness or Department employee, or (2) is based upon facts that were discovered during preparation of the appellant's case that could not have previously been discovered, or (3) includes legal issues "identified in the motion, the addition of which will cause no prejudice to any other party or intervenor." 25 Pa. Code § 1021.53(b). Raising a general objection under a statute which does not specify what aspect or section of the statute the Appellants believe has been violated, is insufficient to demonstrate that the other parties will not be prejudiced by the amendment. Although discovery has been briefly extended so that certain depositions can be completed, at this point in the litigation the Appellants should be able to specifically state what their objection under the Limited Power Act is other then a general allegation that the Department violated the Act by issuing the permit. In fact, Rule 51(e) requires that an appellant set forth *specific* objections to the Department's action in its notice of appeal. 25 Pa. Code § 1021.51(e). Since the Appellants seem to be unwilling to state the specific objection that they would raise under the Limited Power Act, we are constrained to deny their motion to amend their appeal.

We therefore enter the following:

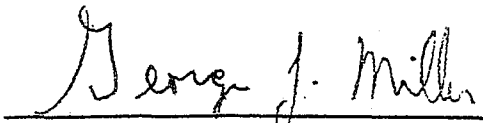
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREGORY & CAROLINE BENTLEY	:	
	:	
v.	:	**EHB Docket No. 98-058-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DONALD AND JOAN SILKNITTER	:	

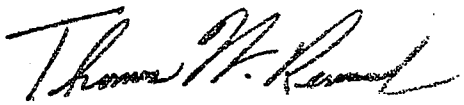
ORDER

AND NOW, this 12th day of February, 1999, it is hereby ordered that the motion of Gregory and Caroline Bentley to amend their notice of appeal in the above-captioned matter is hereby **DENIED.**

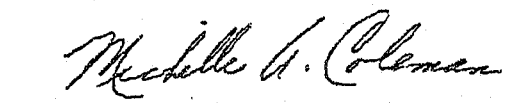
ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: February 12, 1999

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

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Southeast Regional Counsel

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Philadelphia, PA

For Permittees:
John Myers, Esquire
MONTEVERDE, McALEE, FITZPATRICK,
TANKER & HURD
Philadelphia, PA

ml/bl

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GREGORY & CAROLINE BENTLEY	:	
v.	:	**EHB Docket No. 98-058-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DONALD AND JOAN SILKNITTER	:	**Issued: February 23, 1999**

OPINION AND ORDER ON MOTION TO COMPEL

By George J. Miller, Administrative Law Judge

Synopsis:

Before the Board is a motion to compel filed by the Department of Environmental Protection seeking to compel answers to interrogatories and production of documents and sanctions. As the appellants have waived their right to object to the interrogatories they must produce more specific responses. However, at this time the Board declines to impose sanctions.

OPINION

On July 9, 1998, the Department served seventeen interrogatories upon Gregory and Caroline Bentley (Appellants) and associated requests for production of documents. At the time the parties were attempting to settle the appeal, and the Appellants did not answer the interrogatories within the thirty day period required by the Pennsylvania Rules of Civil Procedure. Pa. R.C.P. No. 4006(a)(2). Thereafter, the Appellants and the Department agreed

that the Appellants could answer the interrogatories on an extended schedule, but the Department reserved its right to argue that any objection to the interrogatories by the Appellants was waived. The answers to the Department's interrogatories were served on or about January 11, 1999. The Department argues that the Appellants have waived their objections to the interrogatories and now seeks more specific responses to some of those interrogatories.

Although some of the courts of common pleas have come to different conclusions, the Board has held that a party's failure to object to interrogatories within thirty days of service ordinarily results in a waiver of those objections. *Clever v. DEP*, EHB Docket No. 98-086-MG (Opinion issued July 29, 1998); *Weiss v. DEP*, 1996 EHB 246; *Johnston v. DER*, 1986 EHB 1106.[1] Therefore, we agree with the Department that the Appellants' objections have been waived because they failed to answer its interrogatories within the required time period. However, the Appellants have provided answers to the interrogatories in addition to their objections, which requires us to examine the answers to rule on their adequacy.[2]

Interrogatory No. 6 seeks information concerning all properties within a 2 mile radius of the proposed project including production of a "schematic chart" of the Appellants' holdings and insurance policies related to those parcels. Information concerning properties downstream have been provided. Additionally, the Appellants have agreed to supplement their answer to include upstream properties (Appellants' Memorandum of Law at 5, n. 2) and have provided insurance

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[1] These decisions are consistent with *Nissley v. The Pennsylvania Railroad Co.*, 259 A.2d 451 (Pa. 1969).

[2] The Board will also take into consideration information provided by the Appellants and the Department during a conference call concerning discovery that had taken place between the

policies which cover many if not all of the upstream properties. "Schematic" information was evidently provided in deposition. Accordingly, we find that this interrogatory has been adequately answered.

Interrogatory No. 7 seeks the location of where the Appellants reside and work and asks that the information be provided on a chart or plan. The Appellants provided addresses which were qualified by "from time to time." If the Appellants reside and work at other addresses, those addresses must be provided to the Department. However, as there is no chart or plan currently in existence it is not necessary for the Appellants to create one.

Interrogatory No. 8 asks if the Appellants are aware of any web sites relating to the appeal. The Appellants have answered "none" and this is adequate.

Interrogatory No. 9 seeks the legal bases for objections in its notice of appeal. The Appellants have provided a very broadly phrased answer that generally refers to some of the Department's regulations. We find this answer too general and direct the Appellants to provide a more specific description of the bases of objection in the notice of appeal as requested by the interrogatory.

Interrogatory No. 10 seeks a "yes" or "no" answer to a specific question concerning the site of the dam and the millrace. We find the Appellants' answer to this interrogatory vague and direct them to answer "yes" or "no" as requested by the Department and to include the explanation to their answer.

---

time the Department's motion was filed and the Appellants' response to the motion was received.

Interrogatory No. 11(b) asks the Appellants to identify parties with "a direct interest in the facilities subject to the Permit." The answer provided was that "Appellant maintains a direct interest based on its ownership of property immediately downstream . . . ." The Department objects because only Caroline Bentley and not Gregory Bentley is the title owner of the downstream property. Although the Appellants could have been more precise about their answer, it is clear that the Department has the information it was seeking from the interrogatory and no further answer is necessary.

Interrogatory No. 13 seeks specific information concerning the Appellants' allegation in Paragraph 8(c) of their notice of appeal concerning adverse consequences to downstream portions of Buck Run. As with Interrogatory No. 9 the Appellants provided a rather vague answer. Therefore they are directed to state *specifically* their use of the land in proximity to the proposed project, what specific restrictions will be imposed by the project, and how those restrictions are related to the permit issued by the Department.

Interrogatory Nos. 14, 15 and 16 related to claims in Paragraphs 8(d) through 8(f) of the notice of appeal. The Appellants have represented to the Board that they intend to withdraw these objections and that they intend to file a stipulation which so provides. Therefore, at this time the Department's objections relating to these interrogatories are moot.

The Department also argues that the Appellants have not complied with its request for production of documents because Caroline Bentley did not review the documents submitted by her husband Gregory Bentley. In her deposition she stated that she did not have custody of any documents relating to the appeal in her custody. Although it would have been prudent of her to have reviewed the documents submitted by Gregory, we find the request for production of

documents has been adequately complied with and will not compel further production of documents.

In sum, we will partially grant the Department's motion to compel more specific answers to its interrogatories as outlined above. However, we believe that it is inappropriate to impose any sanctions at this time. We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

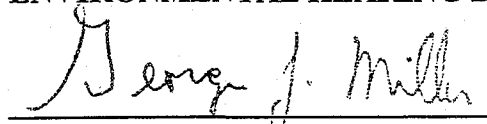
GREGORY & CAROLINE BENTLEY	:	
	:	
v.	:	**EHB Docket No. 98-058-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DONALD AND JOAN SILKNITTER	:	

ORDER

AND NOW, this 23rd day of February, 1999, upon consideration of the motion to compel of the Department of Environmental Protection in the above-captioned matter it is hereby ordered as follows:

1. The Department's motion to compel answers to Interrogatory Nos. 6, 8, 11(b), and 14-16, is hereby **DENIED**.
2. The Department's motion to compel answers to Interrogatory Nos. 7, 9, 10, and 13 is hereby **GRANTED** consistent with the foregoing opinion. Appellants Gregory and Caroline Bentley shall answer these interrogatories within 10 days of entry of this order.
3. The Department's motion to compel production of documents is **DENIED**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: February 23, 1999

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

For the Commonwealth, DEP:
Kenneth Gelburd, Esquire
Southeast Region

For Appellant:
Christopher W. Boyle, Esquire
DRINKER BIDDLE & REATH, LLP
Philadelphia, PA

For Permittee:
John M. Myers, Esquire
MONTEVERDE McALEE FITZPATRICK TANKER & HURD
Philadelphia, PA

ml/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BUDDIES NURSERY, INC. & DONALD L. PEIFER	:	
v.	:	**EHB Docket No. 98-165-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** February 26, 1999

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants a motion to dismiss the appeal of an individual Appellant on the ground that he was deceased at the time the appeal was filed.

OPINION

This matter involves an appeal from a Department of Environmental Protection (Department) Administrative Order (Order) issued August 3, 1998 to Donald L. Peifer t/d/b/a/ the Buddies Nursery, Inc. (collectively, Appellants), among others. The Order directed Donald L. Peifer to immediately cease accepting the solid waste at the site identified in the Order, to commence within 45 days the removal and proper disposal of the waste illegally stored and disposed at the site, and imposed other related requirements.

A Notice of Appeal was filed with the Board on September 1, 1998 on behalf of Donald L. Peifer, among others. However, Donald L. Peifer died on August 25, 1998, seven days prior to the

filing of the Notice of Appeal.1 The Department filed a motion to dismiss the appeal and supporting memorandum asserting that Pennsylvania law dictates that a dead person cannot be a party to an action such as the present appeal and any such proceeding is void. The Appellants failed to file a response.

The Board's rules dictate that a party's failure to respond to a motion is deemed to be an admission of all properly-pleaded facts contained in the motion. 25 Pa. Code § 1021.70(f). In addition, we agree with the Department that a deceased person has no capacity to participate in legal proceedings. The Pennsylvania Supreme Court explained as follows:

> It is fundamental that an action at law requires a person or entity which has the right to bring the action, and a person or entity against which the action can be maintained. By its very terms, an action at law implies the existence of legal parties; they may be natural or artificial persons, but they must be entities which the law recognizes as competent. A dead man cannot be a party to an action, and any such attempted proceeding is completely void and of no effect.

Thompson v. Peck, 181 A. 597, 598 (Pa. 1935) (citations omitted). *See also Valentin v. Cartegena*, 544 A.2d 1028 (Pa. Super. 1988)(affirming the trial court's holding that a lawsuit brought after the defendant's death was a nullity), *Longo v. Estep*, 432 A.2d 1029 (Pa. Super. 1981)(agreeing with the trial court that an action brought against a defendant who dies prior to the time the complaint was filed is void).

Since Donald L. Peifer lacked the capacity to participate in such a proceeding due to his death seven days prior to the filing of the appeal on his behalf, the Department's motion to dismiss is granted. Accordingly, we enter the following:

---

1 The Department included a true and correct copy of the Petition for Grant of Letters and Grant of Letters from the Office of Register of Wills of Berks County in its motion. (Department's Motion, Exhibit B)

COMMONWEALTH OF PENNSYLVANIA

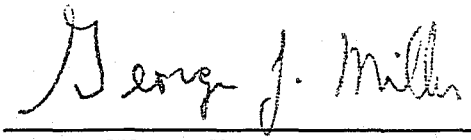
ENVIRONMENTAL HEARING BOARD

BUDDIES NURSERY, INC. & DONALD L. PEIFER	:	
v.	:	EHB Docket No. 98-165-MG
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

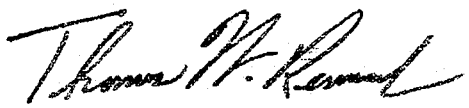
ORDER

AND NOW, this 26th day of February, 1999, the Department's motion to dismiss the appeal of Donald L. Peifer is **GRANTED** and his appeal alone is dismissed.

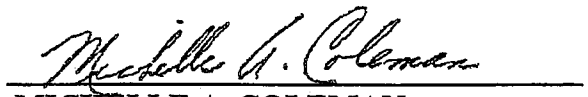
ENVIRONMENTAL HEARING BOARD



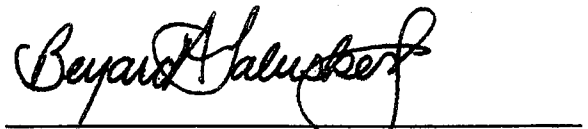
GEORGE J. MILLER
Administrative Law Judge
Chairman



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: February 26, 1999

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

For the Commonwealth, DEP:
Dennis A. Whitaker, Esquire
Southcentral Regional Counsel

For Appellants:
Mark F. Quinn, Jr., Esquire
Oley, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HESTON S. SWARTLEY TRANSPORTATION COMPANY, INC.	:	
v.	:	**EHB Docket No. 99-017-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** March 15, 1999

OPINION AND ORDER ON INABILITY TO PREPAY PENALTY

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

Synopsis:

Where the appellant has failed to demonstrate that it is financially unable to prepay a civil penalty or post an appeal bond, its appeal will be dismissed unless it prepays or posts a bond by April 15, 1999.

OPINION

Heston S. Swartley Transportation Company, Inc. ("Swartley") appeals from the Department of Environmental Protection's (the "Department's") assessment of a $325,265 civil penalty against it pursuant to Section 9.1 of the Air Pollution Control Act (the "Act"), 35 P.S. § 4009.1. Swartley averred in its notice of appeal that it is financially unable to prepay the penalty or post an appeal bond as is normally required by the Act. In such cases, the relevant portion of the Act provides as follows:

> 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 inability to pay.

35 P.S. § 4009.1

We held the evidentiary hearing contemplated by the Act on February 25, 1999. In reviewing the evidence, we are guided by the Board's decision in *Goetz v. DEP*, EHB Docket No. 97-226-C (Opinion issued September 10, 1998), where we held that the Board must have hard evidence before it can determine that an appellant is unable to prepay a penalty. Slip op. at p.14 In *Goetz* we listed the types of relevant evidence that the Board will ordinarily consider. *Id.,* p.14 n.9. That evidence includes recent financial statements and income tax returns, among other things. The Act clearly places the burden of proving (i.e. "demonstrating") an inability to pay on the appellant. 35 P.S. § 4009.1. *See also* 25 Pa. Code § 1021.101; *Goetz* at p.11.

Swartley produced the following documents at the hearing in this appeal:

1. A comparative statement of income and accumulated deficit for 1996 and 1997;
2. The first page of Swartley's U.S. Income Tax Form 1120S for 1996;
3. The first page of Swartley's U.S. Income Tax Form 1120S for 1997; and
4. A partial in-house statement of income for 1998, supported by an affidavit.

Swartley's secretary/treasurer, Heston S. Swartley, Jr., also testified briefly about Swartley's banking relationship, line of credit, efforts to obtain surety bonds in the past, cash-flow difficulties, access to collateral, and, to a very limited extent, the fifteen gasoline stations currently held by the company. Swartley's evidence indicates that the company has suffered losses since 1996. The Department presented the expert testimony of its financial investigator, James C. Bixby, CPA. Mr. Bixby testified that Swartley had not produced enough information to support a conclusion one way or the other regarding its ability to prepay or post a bond.

We find that Swartley has failed to demonstrate that it is financially unable to prepay the penalty or post an appeal bond. Swartley failed to produce any complete financial statements or complete income tax returns. It provided virtually no explanation concerning the incomplete statements and returns that it did produce. Among other unexplained deficiencies, there were no notes and disclosures accompanying the financial statements and no schedules attached to the tax forms.

Furthermore, as with the appellant in *Goetz*, Swartley failed to introduce any evidence concerning the value of assets that it has at its disposal. For example, and perhaps most troubling, Swartley produced no balance sheets. Although this information is obviously critical in assessing a party's ability to pay, none of it was produced. Still further, there was insufficient evidence to support a finding that Swartley has exhausted all reasonably available opportunities to obtain credit, even if we were to assume that it had insufficient assets at its disposal to satisfy the prepayment requirement. Finally, Mr. Swartley testified that the company, a closely-held corporation, has

repeatedly relied upon the personal assets of one of its principals in the past, but other than testimony that those assets are now in an estate because of the recent death of that principal, there was no evidence concerning the scope and availability of those assets. In short, we conclude that there is simply not enough evidence here to show that Swartley is unable to prepay the penalty or post a bond.

Having failed to make the requisite demonstration of financial inability as required by the Act, Swartley has 30 days in which to prepay its civil penalty or post an appeal bond, or an order will be issued dismissing its appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HESTON S. SWARTLEY TRANSPORTATION COMPANY, INC.	:	
v.	:	**EHB Docket No. 99-017-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of March, 1999, IT IS ORDERED that Appellant shall prepay the civil penalty that is the subject of this appeal or post an appeal bond in accordance with Section 9.1 of the Air Pollution Control Act, 35 P.S. § 4009.1, by **April 15, 1999** or its appeal will be dismissed.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: March 15, 1999

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

GLOBAL ECO-LOGICAL SERVICES, INC.	:	
	:	
v.	:	**EHB Docket No. 99-055-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 18, 1999**

OPINION AND ORDER ON PETITION FOR TEMPORARY SUPERSEDEAS

By Bernard A. Labuskes, Jr.

Synopsis:

A petition for temporary supersedeas is denied pursuant to the criteria is set forth in the Board's rules.

OPINION

The Department of Environmental Protection ("DEP") issued an order and civil penalty assessment to Atlantic Coast Demolition & Recycling, Inc. ("Atlantic") on March 3, 1999. The order revokes Atlantic's permit for a construction and demolition waste processing and transfer facility in Philadelphia. Global Eco-Logical Services, Inc. ("GES") filed a notice of appeal and a petition for a temporary and permanent supersedeas on March 16, 1999. The precise relationship between GES and Atlantic and GES's standing to pursue this matter are issues that will require

further explanation.

Although GES's notice of appeal does not indicate when Atlantic received the order, DEP's counsel represented without contradiction at a conference call between the Board and the parties earlier today that the order was hand delivered on the date of issuance, March 3.

In ruling upon the petition for a temporary supersedeas, we are guided by the criteria set forth in the Board's Rules at 25 Pa. Code § 1021.79. The Board is required to consider the harm that will occur to the petitioner and the public until the Board can hold a hearing on the petition for supersedeas. 25 Pa. Code § 1021.79(e); *A & M Composting v. DEP*, 1997 EHB 965. *See also, Ponderosa Fibres of Pennsylvania Partnership v. DEP*, EHB Docket No. 98-178-C (September 16, 1998). Based upon these regulatory criteria, GES's petition for a temporary supersedeas is denied for the time being, subject to reconsideration during or following the evidentiary hearing on GES's petition.

First, we have scheduled a hearing on the petition for supersedeas for March 23, three business days from today. We are hesitant to grant the extraordinary remedy of a temporary supersedeas when an evidentiary hearing will be held in such short order.

Second, we are puzzled by the fact that GES waited almost two weeks after receiving the order before filing its petition. We are not convinced that three more business days will make a substantial enough difference to justify superseding DEP's order without the taking of any evidence.

Even putting aside GES's initial delay in filing, we do not have enough information to conclude with confidence that GES will suffer irreparable injury by waiting three days. The exhibits attached to GES's petition show that the facility has been shut down for extended periods over the

last few years. (Exhibit I.) The facility has apparently been closed during recent periods of transition in ownership. The facts regarding the actual level of activity at the facility as of the March 3 order are quite sketchy at this point. The affidavit of GES's Chairman of the Board states that waste coming into the facility is necessary as feedstock at the company's other sites. It has been represented without contradiction, however, that about 3,000 tons of material are on site and presumably available for that purpose.

Finally, there is simply not enough at this very preliminary juncture to conclude with any degree of comfort that there is a tolerable risk of injury to the public over the next few days. We are particularly looking forward to evidence regarding DEP's claim that the site may pose a risk in the event of a flood, as well as its intimations that the facility may not be adequately bonded and insured to allow for additional accumulations of waste.

This ruling is very limited. It does not contain binding findings of fact, and it does not foreclose GES from renewing its petition following the evidentiary hearing on March 23.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GLOBAL ECO-LOGICAL SERVICES, INC.	:	
	:	
v.	:	**EHB Docket No. 99-055-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 18th day of March, 1999, Global Eco-Logical Services Inc.'s ("GES's") petition for a temporary supersedeas is DENIED.

EVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: March 18, 1999

c: **via FAX & 1st Class Mail**

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WESTINGHOUSE ELECTRIC CORPORATION	:
	:
v.	: **EHB Docket No. 88-319-CP-MG**
	:
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	: **Issued: March 26, 1999**
	:

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

On remand from the Commonwealth Court, the Board assesses a civil penalty of $3,296,515 against a defendant under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law). The Board assesses a $1,600,000 penalty for the defendant's failure to notify the Department for years after more than a thousand releases of hazardous substances to the soil surrounding defendant's plant, in violation of 25 Pa. Code § 101.2(a). The Board also assesses a $1,600,000 penalty for defendant's failure to take prompt remedial action to remove the contamination from the soil and otherwise protect waters of the Commonwealth, in violation of 25 Pa. Code § 101.2(b) and § 101.3(a). These penalties are reasonable and appropriate given the serious violations the Department proved. The Board will not recalculate the penalty for violations of sections 301, 307, and 401 of the Clean Streams Law, 35 P.S. §§ 691.301, 691.307, and 691.401, where the Commonwealth Court did not direct us to recalculate that penalty, and the penalty previously assessed for these violations is reasonable.

INTRODUCTION

This adjudication concerns a complaint for civil penalties the Department of Environmental Protection (Department) filed against Westinghouse Electric Corporation (Westinghouse) on August 16, 1988, for alleged violations involving an elevator manufacturing plant (plant) Westinghouse owned and operated in Cumberland Township, Adams County.[1] The complaint asserted that Westinghouse allowed degreasers containing trichloroethylene (Tri) and 1,1,1-trichloroethane (Ta) to escape from the plant and enter groundwater and surface water in violation of sections 301, 307, and 401 of the Clean Streams Law; that Westinghouse failed to alert the Department and downstream water users to the water pollution, in violation of 25 Pa. Code § 101.2(a); and that Westinghouse failed to implement remedial measures necessary to prevent the chemicals from reaching waters of the Commonwealth or causing injury to property and downstream users, in violation of 25 Pa. Code §§ 101.2(b) and 101.3(a).

On November 5, 1996, after a hearing on the merits, we issued an extensive adjudication assessing a $5,451,283 penalty against Westinghouse. *See Westinghouse Electric Corporation v. DEP,* 1996 EHB 1144. Subsequently, Westinghouse appealed the Board's decision to Commonwealth Court, which affirmed our adjudication in part and remanded it in part. The Court held that we erred in our computation of the civil penalty, and it remanded the matter to the Board "for a calculation of the appropriate penalty to be imposed." *Westinghouse Electric Corporation v. Department of Environmental Protection*, 705 A.2d 1349, 1357 (Pa. Cmwlth. 1998).

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[1] The history of the proceedings in this appeal is set forth in detail in *Westinghouse Electric Corporation v. DEP,* 1996 EHB 1144, 1147-49.

After the Supreme Court denied a Westinghouse petition for review, on October 7, 1998, we ordered the parties to file memoranda of law regarding our recalculation of the penalty. In addition, in response to a Westinghouse petition for oral argument, the entire Board heard oral argument on February 23, 1999. The parties focused principally on the amount of the penalty for Westinghouse's violations of 25 Pa. Code § 101.2(a) and the amount of the penalty for its violations of 25 Pa. Code §§101.2(b) and 101.3(a). Before we turn to the parties' specific arguments, some context is necessary.

Westinghouse constructed the plant in 1968 and was the sole owner and operator until 1989, when it sold the plant. *Westinghouse*, 1996 EHB 1144, 1151 F.F. 3 and 4. From 1969 to 1984, the plant used degreaser containing Tri and Ta for a number of purposes. 1996 EHB at 1151 F.F. 5; 1172 F.F. 186-187. The degreaser escaped from the plant by various avenues, contaminating the soil, groundwater, and surface waters.[2] Samples of surface waters near the plant, taken in 1983, and late 1988 or early 1989, contained Tri and Ta. 1996 EHB at 1154 F.F. 31-32. A January 1989 sample taken from a storm sewer at the plant contained Ta. 1996 EHB at 1154 F.F. 33. Samples from residential wells in the area revealed widespread contamination by Ta and Tri and the presence of certain byproducts and degradation products of Tri—PCE, 1,1-DCE, and 1,2-DCA—found in Tri degreaser. 1996 EHB at 1172-73 F.F. 175-176, 188-189; 1270-1273.

Both Ta and Tri are hazardous substances, as are the Tri byproducts and degradation

[2] The means by which the degreasers entered the soil, surface waters, and groundwater are set forth more fully in the adjudication. *See Westinghouse,* 1996 EHB at 1153-1159 F.F. 19-34, 37-84; 1160-1163 F.F. 88-123; 1229-38; 1245-1252.

products found in the wells.[3] Without active remediation, Tri and Ta can persist in groundwater for thousands of years. *Westinghouse,* 1996 EHB at 1174 F.F. 201. Even with remediation, restoring the aquifer would require at least 20 years. 1996 EHB at 1174 F.F. 202. The damage to the aquifer from degreaser contamination is extraordinarily severe. 1996 EHB at 1174 F.F. 206.

In our adjudication, we assessed a total civil penalty of $5,451,283:

> (1) $61,500 for allowing the discharge of an industrial waste and polluting substance into waters of the Commonwealth, in violation of sections 301, 307, and 401 of the Clean Streams Law;
>
> (2) $2,677,384 for failing to notify the Department that polluting substances had been placed in a location where they could enter waters of the Commonwealth, in violation of 25 Pa. Code § 101.2(a);
>
> (3) $2,677,384 for failing to promptly take remedial action and protect downstream users and waters of the Commonwealth after polluting substances were placed in a location where they could enter waters of the Commonwealth, in violation of 25 Pa. Code § 101.2(b), and for failing to take necessary measures to prevent polluting substances from entering waters of the Commonwealth, in violation of 25 Pa. Code § 101.3(a); and
>
> (4) $35,015 to reimburse the Department for the cost of investigating the violations.

For purposes of calculating the penalty for the 25 Pa. Code § 101.2(a) violations in our adjudication, we held that the $2,677,384 penalty the Department requested would not have been unreasonably high even if we considered only one class of the 25 Pa. Code § 101.2(a) violations the

---

[3] Exposure to Ta can cause liver and kidney damage, memory defects, cardiac arrythmia, and other symptoms. *Westinghouse*, 1996 EHB at 1152 F.F. 9; 1228. Tri is 20 times more toxic but causes the same symptoms. 1996 EHB at 1152 F.F. 9-10; 1228. In addition, Tri is a probable human carcinogen. 1996 EHB at 1152 F.F. 11, 1228. Exposure to the byproducts and degradation products of Tri found in the wells produces symptoms similar to Tri or Ta exposure. 1996 EHB at 1173. In addition, PCE is a proven human carcinogen; 1,2-DCA is a probable human carcinogen; and 1,1-DCE is a potential human carcinogen. 1996 EHB at 1173 F.F. 192-194.

Department proved: the leaks from the large hoppers in the railroad dock area of the plant. *Westinghouse,* 1996 EHB at 1283-1286. We noted that this penalty amounted to $2.60 per day for each violation involving Tri and $0.13 for each violation involving Ta. 1996 EHB at 1285.

Our approach for calculating the penalty for the 25 Pa. Code § 101.2(a) violations differed slightly. The Department requested a $5,989,000 penalty for those violations. However, the Board considered that penalty unreasonably high. We noted that violations of section 101.2(b) were no more serious than those of the section 101.2(a) violations because the regulations were "separate but coordinate elements of the same regulatory scheme," and that there was no basis for the Department requesting more for the section 101.2(b) and section 101.3(a) violations than for the section 101.2(a) violations. *Westinghouse*, 1996 EHB at 1288. Therefore, when evaluating the penalty for the section 101.2(b) and section 101.3(a) violations, we used the same figure that the Department requested for the section 101.2(a) violations—$2,677,384—as the basis for our calculations. 1996 EHB at 1288. We held that a $2,677,384 penalty was appropriate for the section 101.2(b) and section 101.3(a) violations for the same reasons we held the figure reasonable with respect to the section 101.2(a) violations. 1996 EHB at 1288.

Westinghouse appealed our adjudication to the Commonwealth Court, arguing that we improperly applied the statute of limitations, that there was inadequate evidence for the Board to conclude that Westinghouse was responsible for groundwater contamination, and that we erred in calculating the penalties for the 25 Pa. Code § 101.2(a) violations and the 25 Pa. Code § 101.2(b) and § 101.3(a) violations. The Court held that we committed harmless error regarding one aspect of the statute of limitations but otherwise affirmed that we applied the limitations period correctly. *Westinghouse,* 705 A.2d 1349, 1354-55 (Pa. Cmwlth. 1998). The Court also affirmed our

determinations that the releases from Westinghouse's plant caused groundwater contamination and that Westinghouse failed to prove that other sources caused the contamination. 705 A.2d at 1355-56.

Nevertheless, the Court sustained Westinghouse's challenge to our calculation of the penalties for the 25 Pa. Code § 101.2(a) violations and the 25 Pa. Code § 101.2(b) and § 101.3(a) violations. The Court wrote:

> The Board determined that only two instances of actual entry into groundwater had been proven, yet it based the degree-of-harm portion of its penalty analysis on the assumption that all of the contamination of wells in the area was caused by the illegal discharges at the plant. In the Court's view this was error.
>
> Had the Board found that the hundreds of illegal discharges that took place actually caused contamination of waters in violation of provisions of The Clean Streams Law, then the effect on numerous nearby wells would be part of the measure of injury. Because the Board declined to make such findings, it could not then consider such effects in its calculation of the proper penalty for violations of 25 Pa. Code § 101.2(a). This is not to suggest that the hundreds of proven violations of section 101.2(a) and 101.2(b) for not providing notice and not taking corrective measures are not subject to penalties—they certainly are. However, it will be necessary to remand this matter to the Board for another computation of penalties.

705 A.2d at 1356.

In its memoranda and oral argument, Westinghouse argues that:

(1) we should recalculate the penalties for everything except the Department's costs, not simply recalculate the penalties for the 25 Pa. Code § 101.2(a) violations and the 25 Pa. Code § 101.2(b) and § 101.3(a) violations;

(2) the merger doctrine precludes us from assessing separate penalties for conduct which violates two or more of the following: section 301, 307, or 401 of the Clean Streams Law, or 25 Pa. Code § 101.3(a);

(3) the Board impermissibly assumed that Westinghouse was the source of all the groundwater contamination when it calculated the penalty for the violations of sections 301, 307, and 401 of the Clean Streams Law;

(4) multi-million dollar penalties are inappropriate because its violations were not wilful and its conduct was standard practice in the industry; and

(5) we should reduce the total civil penalty to $197,130.20—more than 27 times smaller than the penalty assessed in our adjudication—distributed as follows:

(a) $8,167.20 for violations of sections 301, 307, and 401 of the Clean Streams Law and 25 Pa. Code § 101.3(a);

(b) $153,948 for violations of 25 Pa. Code §§ 101.2(a) and 101.2(b); and,

(c) $35,015 for costs the Department incurred in investigating the violations.

The Department contends that we should assess the same penalty assessed in the adjudication. In support of its position, the Department argues that:

(1) the Commonwealth Court based its decision on a mistaken reading of the Board's adjudication because:

(a) the Board did not consider the degree of harm to the groundwater when calculating the penalties for the 25 Pa. Code § 101.2(a) violations and the 25 Pa. Code § 101.2(b) and § 101.3(a) violations; and,

(b) the evidence adduced at hearing shows that Westinghouse was, in fact, the source of the groundwater contamination around the plant.

(2) the merger doctrine does not apply.

The Department also argues that Commonwealth Court's remand opinion only directs that we recalculate the penalty for the 25 Pa. Code § 101.2(a) violations—not the penalties for all the violations, as Westinghouse requests.

I. Should we recalculate any of the penalties?

We reject the Department's argument that we should not recalculate Westinghouse's penalty because the Commonwealth Court misconstrued certain aspects of our adjudication. Even assuming that such discrepancies exist in the Court's opinion, they would be irrelevant here. If the Department

was aggrieved by the Court's decision, it should have done what Westinghouse did: request reconsideration or file a petition for review with the Supreme Court. Having failed to do so, the Department may not challenge the Commonwealth Court's decision here.[4] The Court noted in its opinion that it would uphold our determination "so long as the penalties 'reasonably fit' the violations. . . ." *Westinghouse*, 705 A.2d 1349, at 1356 (citing *Wilbar Realty Co., Inc. v. Department of Environmental Resources,* 663 A.2d 857 (Pa. Cmwlth. 1995), *appeal denied,* 674 A.2d 1079 (Pa. 1996)). Since the Court remanded the matter back to us for recalculation, the Court necessarily concluded that our penalty did not reasonably fit the violations proved.[5] Therefore, we must reduce the penalty accordingly.

II. Which penalties should we recalculate?

Westinghouse and the Department disagree on which components of the penalty the Commonwealth Court has directed us to recalculate. Westinghouse contends that we must recalculate all the penalties we assessed, except the penalty imposed to reimburse the Department for costs it incurred in investigating the penalties. The Department argues that the express language of the Court's opinion limits the recalculation to the penalty for the 25 Pa. Code § 101.2(a) violations.

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[4] Under the law of the case doctrine, "[t]he board has the duty to strictly comply with the appellate court's mandate and proceed in a manner consistent with the views expressed in that court's opinion, and has no power to modify, alter, amend, set aside, or in any measure disturb or depart from the judgment of the reviewing court as to any matter decided on appeal." *Pequea Township v. Herr,* 716 A.2d 678, 685 (Pa. Cmwlth. 1998).

[5] For instance, in the case the Commonwealth Court cites, *Wilbar Realty Co., Inc. v. Department of Environmental Resources,* 663 A.2d 857 (Pa. Cmwlth. 1995), *appeal denied,* 674 A.2d 1079 (Pa. 1996), the Court rejected our method of deriving a civil penalty, but nevertheless affirmed the penalty we imposed, explaining that the penalty "reasonably fit" the violations proved. *(continued on next page)*

A. The penalties for the violations of 25 Pa. Code § 101.2(a) and for the violations of 25 Pa. Code § 101.2(b) and § 101.3(a)

The Department is correct when it argues that the express language in the Commonwealth Court's opinion refers only to recalculation of the penalty for the section 101.2(a) violations. However, a close reading of the Court's opinion clearly shows that the Court intends that we recalculate the penalty for the 25 Pa. Code § 101.2(b) and § 101.3(a) violations as well. As noted above, our adjudication justified both penalties using the same methodology. Although the Court analyzed Westinghouse's challenges to both penalties together, in section IV of its opinion, the Court expressly ruled only on the propriety of the penalties imposed for the section 101.2(a) violations. *Westinghouse,* 705 A.2d 1349, 1356-1357. However, when the Court's language is read in context, there can be no doubt that the Court means for us to recalculate the penalty for the section 101.2(b) and section 101.3(a) violations, as well. The Court wrote:

> Had the Board found that the hundreds of illegal discharges that took place actually caused contamination of waters in violation of provisions of The Clean Streams Law, then the effect on numerous nearby wells would be part of the measure of injury. Because the Board declined to make such findings, it could not then consider such effects in its calculation of the proper penalty for *violations of 25 Pa. Code § 101.2(a).* This is not to suggest that the hundreds of proven violations *of Section 101.2(a) and 101.2(b)* for not providing notice and not taking corrective measures are not subject to penalties—they certainly are. However, it will be necessary to remand this matter to the Board for another computation of penalties.

705 A.2d at 1356 (emphasis added).

Therefore, we will recalculate the penalty assessed for the violations of sections 101.2(b) and 101.3(a) in addition to that assessed for the violations of section 101.2(a).

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663 A.2d at 861.

B. The penalty for the violations of sections 301, 307, and 401 of the Clean Streams Law

Westinghouse argues that, in addition to recalculating the penalties for the violations of 25 Pa. Code §§ 101.2(a), 101.2(b), and 101.3(a), we must also recalculate the penalties assessed for the violations of sections 301, 307, and 401 of the Clean Streams Law. According to Westinghouse, we must recalculate those penalties because the violations on which they are based merge with the violations of 25 Pa. Code § 101.3(a), and we assumed that Westinghouse was the source of all the groundwater contamination when we assessed the penalties for the violations of sections 301, 307, and 401 of the Clean Streams Law involving the groundwater.

The Department argues that we should not disturb the penalties for sections 301, 307 and 401 of the Clean Streams Law. According to the Department, (1) the underlying violations do not merge, (2) we did not assume that Westinghouse was the source of all the groundwater contamination when we assessed the penalties, and (3) the Commonwealth Court's decision remanding the proceedings back to us did not direct the Board to recalculate the penalties for the violations of sections 301, 307, or 401 of the Clean Streams Law, and (4) disturbing those penalties when the Commonwealth Court did not address them in its decision would violate the law of the case doctrine.

We will not consider Westinghouse's merger argument. Since the Commonwealth Court did not address the merger issue in its decision remanding the case back to us, we could conceivably consider the issue without violating the law of the case doctrine.[6] However, while we have the

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[6] Referring to the constraints that the law of the case doctrine imposes on the Board on remand, the Court recently explained:

The board has the duty to strictly comply with the appellate court's mandate. . . .
(continued on next page)

discretion to consider the issue, we will not do so here. Although Westinghouse could have raised the merger argument in its answer, pre-hearing memorandum, or post-hearing memoranda, Westinghouse failed to raise the issue at any time prior to filing its memoranda on the recalculation of the penalties. In an action as protracted and complex as this one, the Board is reluctant to address arguments on remand which go beyond the scope of the remand order—particularly where the party making the argument could have raised the issue previously but failed to do so. Furthermore, addressing the merger issue at this point in the proceedings would undermine many of the same interests that the law of the case doctrine promotes: "judicial economy, uniformity of decision making, protect[ing] the settled expectations of the parties, maintain[ing] the consistency of litigation and . . . end[ing] the case." *Pequea Township v. Herr,* 716 A.2d 678, 685 (Pa. Cmwlth. 1998).[7]

Nor will we reduce the penalties we imposed for the violations of section 301, 307, and 401 of the Clean Streams Law involving the groundwater based on Westinghouse's argument that those

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> However, the board is permitted to interpret the appellate court's mandate in such a manner, not inconsistent therewith, as will promote the ends of justice. Thus the board may consider and decide any matters left open by the appellate court and is free to make any order or direction in further progress of the case which is not inconsistent with the appellate decision.
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> *Pequea Township v. Herr,* 716 A.2d 678, 685 (Pa. Cmwlth. 1998) (citations omitted).

[7] Even assuming the Board were inclined to consider Westinghouse's merger argument, the argument is based on a false premise. Westinghouse argues, "If two or more violations may be proven with the same facts, the violations should be merged into one violation for civil penalty assessment purposes." (Westinghouse memorandum of law, pp. 8-9.) However, the Supreme Court has expressly rejected this view of the merger doctrine. In *Commonwealth v. Anderson*, 650 A.2d 20 (Pa. 1994), the Court wrote, "We now hold that in all criminal cases, the same facts may support multiple convictions and separate sentences for each conviction except in cases where the offenses are greater and lesser included offenses." 650 A.2d at 22. The fact that the Supreme Court construed the doctrine this narrowly in a criminal case is significant. The doctrine arose in criminal law and *(continued on next page)*

penalties were tainted because we concluded in the adjudication that Westinghouse was the source of all the groundwater contamination. Our decision to assess the maximum penalty of $10,000 for the six violations involving discharges of degreaser to the groundwater did not turn on whether Westinghouse was the sole source of the groundwater contamination. The penalty we imposed is reasonable even if others contributed to the contamination.

As we noted in our adjudication, the Board—not the Department—assesses civil penalties under the Clean Streams Law. 1996 EHB at 1284 n. 49. Section 605(a) of the Clean Streams Law, 35 P.S. § 691.605(a), provides that "a penalty may be assessed whether or not the violation was wilful"; that the penalty "shall not exceed ten thousand dollars ($10,000) per day for each violation"; and that, when determining the amount of the penalty, the Board "shall consider the wilfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors." The deterrent effect of the penalty is one of the "other relevant factors" the Board may consider under section 605. *See, e.g., E.M.S. Resources Group, Inc. v. DEP*, 1995 EHB 834, 840.[8]

We found in our adjudication that Westinghouse allowed degreaser to escape from large hoppers in the plant to the soil outside the railroad dock area several times a week between 1973 and 1978. *Westinghouse*, 1996 EHB at 1155-59 F.F. 44-82; 1232-1238; 1246. We also found that a release of degreaser into the soil outside the railroad dock area would result in contamination entering the groundwater. 1996 EHB at 1159 F.F. 83. However, since the number of separate

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is accorded more weight in criminal proceedings than in civil actions.

[8] Similarly, the Commonwealth Court has expressly referred to the deterrent effect of civil penalties assessed under the Clean Streams Law. *See Commonwealth v. CSX Transportation*, 708
(continued on next page)

violations of sections 301, 307, and 401 of the Clean Streams Law turns on the number of separate discharges to *waters of the Commonwealth*—not releases to the soil—we also had to determine whether separate releases to the soil would necessarily result in separate discharges to the groundwater or whether, instead, the contamination would accumulate in the soil and enter the groundwater less frequently. 1996 EHB at 1237-1238. The Department failed to prove that separate releases to the soil would result in separate discharges to the groundwater. Indeed, it only proved that contamination in the soil migrated into the groundwater at least twice. 1996 EHB at 1237-38. Since the number of violations of sections 301, 307, and 401 turns on the number of separate discharges to the groundwater, the Department only proved that Westinghouse engaged in two violations each of sections 301, 307, and 401 of the Clean Streams Law.

The maximum penalty is appropriate for these violations given (1) the hazardous nature of degreaser containing Tri or Ta, (2) the hundreds of proven releases to the soil, and the fact that some contamination from each release eventually entered the groundwater, (3) the decades that Tri or Ta remains in groundwater, even with active remediation, and (4) the fact that Westinghouse is at least partially responsible for the widespread contamination present in residential wells in the area, and thus at least partially responsible for local residents being exposed to Ta, Tri, and other dangerous compounds present in the degreaser.

III. Recalculation of the penalty for the section 101.2(a) violations and the penalty for the section 101.2(b) and section 101.3(a) violations

The special water pollution regulations, at 25 Pa. Code Chapter 101, are among the oldest and most important environmental regulations in Pennsylvania law. The General Assembly created

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A.2d 138, 142 (Pa. Cmwlth. 1998).

the Department of Environmental Resources (DER)—the precursor to the Department of Environmental Protection[9]—by consolidating a number of smaller state agencies in 1971. Administrative Code §1901-A, 71 P.S. §§ 510-1-510-108. Soon afterwards, DER proceeded to adopt many of the pre-existing regulations that these smaller agencies had administered. Among these regulations were the special water pollution regulations, now at Chapter 101, which became effective as DER regulations on September 11, 1971. 1 Pa. Bull. 1804-05. DER did not make any substantive changes to the special water pollution regulations when adopting them, and the relevant provisions here—25 Pa. Code §§ 101.2(a), 101.2(b), and 101.3(a)—have not been amended since then. Sections 101.2(a), 101.2(b), and 101.3(a) all relate to the discharge, or potential discharge, of polluting substances into waters of the Commonwealth.

A. Violations the Department proved

1. The section 101.2(a) violations

Section 101.2(a) is a notice requirement. It provides that, where a substance causing pollution enters a water of the Commonwealth, or is placed in a position where it "might" enter a water of the Commonwealth, the person in charge of that substance must "forthwith notify the Department by telephone of the location and nature of the discharge and, if reasonably possible to do so, to notify downstream users of the waters." 25 Pa. Code § 101.2(a).[10]

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[9] Effective July 1, 1995, DER was split into the Department of Environmental Protection and the Department of Conservation and Natural Resources. Act of June 28, 1995, P.L. 89, No. 18.

[10] Section 101.2(a) provides in full:

> If, because of an accident or other activity or incident, a toxic or taste and odor-producing substance or another substance, which would endanger downstream users of the waters of this Commonwealth, would otherwise result in pollution or create

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In our adjudication, we found that Westinghouse violated section 101.2(a) hundreds of times with respect to four different types of releases of degreaser to the groundwater. Westinghouse *never* notified the Department of any of the releases, as required by section 101.2(a). *Westinghouse*, 1996 EHB at 1159 F.F. 86; 1207-1208. Therefore, for purposes of determining how many days the violations of section 101.2(a) lasted, we shall make the same assumption that we did in our adjudication: that Westinghouse's duty to notify ended when the Department and downstream users first received notice of the danger from other sources, on August 15, 1983. 1996 EHB at 1285, 1288. Furthermore, since the Department has the burden of proof, Ta is less toxic than Tri, and it is unclear from the record when in 1975 Westinghouse switched from using Tri to Ta, we shall also assume—as we did in our adjudication—that all the releases that occurred in 1975 involved Ta. 1996 EHB at 1285.[11]

We find that the period of violations of the regulation began on September 11, 1971, and that the releases involved in those violations made them very serious violations.

> a danger of pollution of the waters, or would damage property, is discharged into these waters—including sewers, drains, ditches or other channels of conveyance into the waters—or is so placed that it might discharge, flow, be washed or fall into them, it shall be the responsibility of the person or municipality at the time in charge of the substance or owning or in possession of the premises, facility, vehicle or vessel from or on which the substance is discharged or placed to forthwith notify the Department by telephone of the location and nature of the danger and, if reasonably possible to do so, to notify known downstream users of the waters.

[11] In our adjudication, we stated that the plant switched from a Tri-based degreaser to a Ta-based degreaser sometime in 1975. *Westinghouse*, 1996 EHB at 1191, 1284. However, we inadvertently failed to cite support for this conclusion or include it among our findings of fact. Lest there be any confusion on the matter, we expressly make this finding now. Support for it can be *(continued on next page)*

a. Drums leaking in the old drum storage area

The earliest release that the Department proved violated section 101.2(a) occurred in the old drum storage area during the week of September 11, 1971. We found in our adjudication that Westinghouse allowed drums in the old drum storage area to release degreaser containing Tri and Ta into the soil at least once a week between 1971 and 1978. 1996 EHB at 1247. Since the Department did not adopt section 101.2(a) until September 11, 1971, and the Department never argued that it had the power to assess penalties for releases that occurred before it adopted the regulation, we shall not consider the releases that occurred before September 11, 1971.

b. Leaking from the large scrap hoppers in the railroad dock area

The next releases that the Department proved occurred outside the railroad dock. We found in our adjudication that Westinghouse allowed Tri and Ta degreaser to escape from the hoppers to the ground outside the railroad dock several times a week between 1973 and 1978. 1996 EHB at 1246. We construed testimony that the releases occurred "several times a week" to mean that there was a release approximately once every three days. 1996 EHB at 1284-85.

c. The dumping of the 275-gallon tank

The next release that the Department proved occurred behind the plant. In our adjudication, we found that a Westinghouse employee dumped approximately 50 gallons of fluid from a large tank into the soil behind the Westinghouse plant. *Westinghouse*, 1996 EHB at 1162-63, 1251-52. Most of the liquid was Tri, and the release occurred in the early 1970s. 1996 EHB at 1251-52. Since it is unclear precisely when the spill took place, the Department bears the burden of proof, and

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found in the record at N.T. 390, 3301.

Westinghouse switched to Ta degreaser in 1975, we shall assume for purposes of assessing the penalty that the release took place on the last day of 1974.

d. *Leaking hose from the delivery truck*

When assessing the penalty, we will not consider any releases which may have resulted from a leaking hose on the delivery truck. In our adjudication, we found that, between 1981 and 1984, one cup of Ta spilled in the courtyard area each time Westinghouse had the solvent storage tank filled. *Westinghouse*, 1996 EHB at 1247-1248. We also found that, after 1984, there were sometimes smaller leaks of Ta when the tank was filled and that Ta contamination existed in the soil nearby. 1996 EHB at 1248. Because it was unclear whether the area where the spills occurred was paved, we concluded that the Department proved only one violation of section 101.2(a). 1996 EHB at 1248, 1256. However, it is unclear whether the release occurred before August 15, 1983—the date we are assuming Westinghouse's duty to provide notice ended.[12] Therefore, we will not consider this violation for purposes of assessing the section 101.2(a) penalties.

2. The section 101.2(b) violations

Section 101.2(b) provides that, where a substance which would cause pollution enters a water of the Commonwealth, or is placed in a position where it might enter a water of the Commonwealth, the person in charge of the substance must "immediately take or cause to be taken necessary steps to prevent injury to property and downstream users of the waters and to protect the waters from

[12] The sample which indicated that Ta was present in the soil was not taken until December 7, 1988. *Westinghouse*, 1996 EHB at 1256, and Ex. D-81, Table 4-2, note d. Since Ta continued to be delivered to the solvent storage tank through 1984 and afterwards, the contamination arising from the filling solvent storage tank could have occurred after August 15, 1983, or even after the Department filed its complaint for civil penalties, on August 16, 1988.

pollution or the danger of pollution."[13] We noted in our adjudication that "[w]here a person has a duty to provide notice under section 101.2(a), he also has a duty under section 101.2(b) to immediately take steps to protect the water, property, and downstream users from the danger of pollution. Therefore, Westinghouse violated section 101.2(b) with respect to any of the section 101.2(a) violations for which it failed to take immediate action to protect the water, property, and downstream users." 1996 EHB at 1254.

Westinghouse's section 101.2(b) violations continued to run until at least December 13, 1983. As we explained in our adjudication, "The first time Westinghouse attempted to clean up or contain the pollutants in the soil was on December 13, 1983. At that time, without receiving prior authorization from the Department, Westinghouse started excavating soil from two areas at the plant."[14] *Westinghouse*, 1996 EHB at 1254 (citations omitted). Westinghouse discontinued the excavations when the Department ordered it to desist. 1996 EHB at 1254. Otherwise, Westinghouse failed to take any other action to protect downstream users or waters of the Commonwealth until April 26, 1984. 1996 EHB at 1255.[15]

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[13] Section 101.2(b) provides in full:

> In addition to the notices set forth in subsection (a) [25 Pa. Code § 101.2(a)], the person or municipality shall immediately take or cause to be taken necessary steps to prevent injury to property and downstream users of the waters and to protect the waters from pollution or a danger of pollution and, in addition thereto, within 15 days from the incident, shall remove from the ground and from the affected waters of this Commonwealth to the extent required by the Department the residual substances contained thereon or therein.

[14] Although Westinghouse removed the soil and had it shipped to a hazardous waste landfill because it assumed that the soil was contaminated, Westinghouse failed to have the soil tested. *Westinghouse*, 1996 EHB at 1254.

[15] As in the case of the section 101.2(a) violations, we will not consider the section 101.2(b)

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In our prior adjudication, we expressed grave reservations about Westinghouse's decision to remove the soil from the plant site without testing or prior authorization from the Department. *Westinghouse,* 1996 EHB at 1279-80. However, for purposes of assessing the penalty for Westinghouse's failure to remediate, we will assume Westinghouse's duty ended on August 15, 1983.

3. The section 101.3(a) violations

Section 101.3(a), provides that persons involved in the storage, use, or disposal of "polluting substances" must take "necessary measures" to prevent the substances from reaching waters of the Commonwealth. 25 Pa. Code § 101.3(a).[16] Unlike sections 101.2(a) and 101.2(b), which can be triggered when a polluting substance is placed in a position where it *might* enter a water of the Commonwealth, a violation of section 101.3(a) requires an actual discharge. *Westinghouse,* 1996 EHB at 1201-04.

We found in our adjudication that Westinghouse engaged in at least three violations of section 101.3(a): one violation involving the discharge of Tri and Ta degreaser to a storm sewer,[17]

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violation involving the leak from refilling the solvent tank since it is unclear whether that violation occurred before December 13, 1983, or even before the Department filed its complaint, on August 16, 1988.

[16] Section 101.3(a) provides in full:

> (a) Persons and municipalities engaged in an activity which includes the impoundment, production, processing, transportation, storage, use, application or disposal of polluting substances shall take necessary measures to prevent the substances from directly or indirectly reaching waters of this Commonwealth, through accident, carelessness, maliciousness, hazards of weather or from another cause.

[17] As we noted in our adjudication, we could not conclude that Tri and Ta present in the storm sewer resulted from separate discharges. The contaminants appear to have entered the storm

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and two violations involving the discharge of Tri or Ta degreaser into the groundwater.[18] 1996 EHB at 1242. Since violations of section 101.3(a) are triggered by the discharge of the degreasers into waters of the Commonwealth, and the Department failed to elicit any evidence showing that any of the three proven discharges lasted more than one day, we shall assume that each of the three proven violations lasted only one day.

B. The appropriate penalty for the violations

The regulatory violations that the Department proved are extremely serious. Sections 101.2(a), 101.2(b) and 101.3(a) are the keystone of the Department's program to protect surface waters and groundwater from the intrusion of toxic or hazardous materials, like Tri and Ta. The Department cannot possibly inspect every facility every day to determine whether hazardous substances may have been released and, if so, whether the release might threaten waters of the Commonwealth. Similarly, the Department cannot possibly maintain remediation staff and equipment capable of responding at a moment's notice to every facility that could potentially have a release that could threaten those waters. If the owners of the facilities fail to notify the Department of releases and fail to take immediate action to protect the waters of the Commonwealth and those who use them, the waters may become contaminated and—as happened here—those using the waters

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sewer on waste removed from the painting grates, and the Department failed to adduce any evidence showing that the grates were cleaned between the last time the plant used Tri and the first time it used Ta. *Westinghouse*, 1996 EHB at 1232.

[18] At least one of the discharges involved Tri and at least one of the discharges involved Ta, since both were present in the groundwater. However, it is unclear whether *both* Tri and Ta entered the groundwater on either occasion. The only evidence elicited on the issue indicated that contamination from the degreasers migrated from the soil to the groundwater on at least two separate occasions. *Westinghouse*, 1996 EHB at 1237-38. Whether one discharge involved just Tri and the other involved just Ta, or instead, either or both of the discharges involved both types of degreaser, *(continued on next page)*

may discover only afterwards that they have been using contaminated water. While the Department ordinarily has a variety of enforcement tools at its disposal, it has little means of protecting other water users if it is unaware that a release of a hazardous substance has occurred. Furthermore, it is frequently impossible to restore an affected aquifer completely once it has been contaminated. And even where possible, restoration can take years.

We are also particularly conscious of the need to assess a penalty that will provide industrial managers with a credible deterrent to failing to comply with the notice and remediation requirements. Since the notice and remedy requirements are the keystone of the Department's regulatory program, we cannot lightly countenance violations of these regulations—particularly repeated, consistent, and protracted violations involving hazardous substances, such as the violations of section 101.2(a) and section 101.2(b) here. Our penalty must not only be commensurate with the hazardous nature of the substances released, it must convince members of the industrial community that they cannot simply ignore the regulations or write off the resulting penalties as "the cost of doing business."

In light of these factors, we will assess a penalty of $1,600,000 for the violations of section 101.2(a). This penalty is large enough to deter other potential violators. Most importantly, the size is the result of Westinghouse's multitudinous and protracted violations. The penalty breaks down to slightly in excess of $350 a day from September 11, 1971 to August 15, 1983, when Westinghouse's duty to notify ended, a total of 4,356 days.

In our adjudication, we imposed an identical penalty for the section 101.2(b) and section

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is unclear from the record.

101.3(a) violations and the section 101.2(a) violations. *Westinghouse*, 1996 EHB 1286-88. We explained that "[w]here a person has a duty to provide notice under section 101.2(a), he also has a duty under section 101.2(b) to immediately take steps to protect the water, property, and downstream users from the danger of pollution," 1996 EHB at 1253-54. We also noted that Westinghouse failed to take any remedial action prior to December 13, 1983, 1996 EHB at 1163 F.F. 124; 1254, and that "[t]he section 101.2(b) violations took place at the same time as the section 101.2(a) violations and are no more or no less serious." 1996 EHB at 1288. We will impose an identical penalty for the violations of section 101.2(b) and section 101.3(a) of the Department's regulations for the same reasons. Under the circumstances, the $1,600,000 penalty is reasonable and appropriate given the section 101.2(b) and 101.3(a) violations the Department proved.

Westinghouse's argument that a multi-million dollar penalty is unreasonable because its conduct was neither egregious nor wilful, and because it acted in accordance with standard industry practice, does not affect our conclusion that the penalties are reasonable and appropriate for the violations. Westinghouse contends, "Punitive sanctions like penalties are meant primarily to deter wilful or egregious conduct." (Westinghouse reply memorandum, p. 17.) However, section 605(a) of the Clean Streams Law, 35 P.S. § 691.605(a), clearly authorizes penalties in the case of negligent violations. After stating that the Board has the power to impose civil penalties, it provides, "Such a penalty may be assessed whether or not the violation was wilful." In any event, we do not consider a penalty of about $350 per day particularly "punitive." As previously noted, the penalty is so large primarily because the violations of the regulations went on so long.

In support of its argument that industry discharges of Tri and Ta to the soil were accepted practice in the industry, Westinghouse points to an August 17, 1973, material safety data sheet for

Tri.[19] (Westinghouse's reply memorandum, p. 17.) The data sheet advises the following in the event of a spill:

> Use proper protective equipment. *Small spills:* Mop up, wipe up or soak up immediately. Remove to out of doors. *Large spills:* Evacuate area. Contain liquid; transfer to closed metal containers. Keep out of water supply. Send solvent to a reclaimer. In some cases it can be transported to an area where it can be placed on the ground and allowed to evaporate safely. Refer to Chemical Safety Data Sheet SD-14. . . .
>
> Joint Ex.-1 (Hess deposition), Ex. 4

But Westinghouse failed to show that it acted consistent with the data sheet. There is no evidence in the record showing that Westinghouse mopped up, wiped up, or soaked up the releases to the soil immediately. There is no evidence that Westinghouse contained the degreaser or took measures to keep the releases out of the water supply. And there is no evidence showing that Westinghouse ascertained that the degreaser would evaporate safely from those areas where it was released or that it referred to Chemical Safety Data Sheet SD-14.

Furthermore, even assuming Westinghouse were acting consistent with standard industry practice at the time, that would be inadequate where the Department's regulations imposed a higher standard. The regulations at 25 Pa. Code §§ 101.2(a) and 101.2(b) required that Westinghouse notify the Department and take remedial action if it placed a polluting substance where it might contaminate the groundwater. The substances Westinghouse released were not only polluting; they were toxic—and in some cases carcinogenic as well. Furthermore, as we explained in the

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[19] In addition, Westinghouse's reply memorandum quotes a 1996 text on the history of groundwater contamination involving chlorinated solvents. However, neither the text nor the quotation are part of the official record in this case. Therefore, we cannot consider the quotation. *Soja v. Pennsylvania State Police*, 455 A.2d 613 (Pa. 1982).

adjudication, Westinghouse knew or should have known of much of the potential danger. The toxic effects of Tri have been well known for over 40 years and Westinghouse should have known of Ta's toxic properties since at least 1979,[20] when the plant received a material data sheet listing them. *Westinghouse,* 1996 EHB at 1174 F.F. 207-209; 1275. All of these regulatory violations posed a threat to the groundwater. Many of them contaminated the soils, which in turn resulted in serious groundwater contamination.

Accordingly, we enter the following order:

[20] The fact that Ta's toxic properties were not widely known until 1979 cannot excuse Westinghouse's failure to comply with sections 101.2(a) or 101.2(b) before that date. A substance need not be toxic for persons to have a duty to report and remediate under those regulations. The substance need only be of a type that would cause pollution or the danger of pollution. Westinghouse should have known of Ta's propensity to cause pollution from the time the plant switched degreasers.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WESTINGHOUSE ELECTRIC CORPORATION	:	
	:	
v.	:	**EHB Docket No. 88-319-CP-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of March, 1999, it is ordered that civil penalties are assessed against Westinghouse in the total amount of $3,296,515:

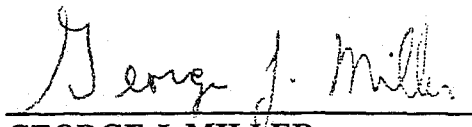
a. $61,500 for the violations of sections 301, 307, and 401 of the Clean Streams Law;

b. $ 1,600,000 for the violations of 25 Pa. Code §101.2(a);

c. $ 1,600,000 for the violations of 25 Pa. Code §§ 101.2(b) and 101.3(a); and,

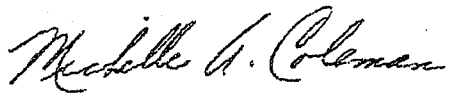
d. $35,015 for the costs the Department incurred in investigating those violations.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: March 26, 1999

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

RAYMOND PROFFITT FOUNDATION	:	
	:	
v.	:	**EHB Docket No. 98-020-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and VESTA MINING COMPANY, Permittee	:	**Issued: March 26, 1999**

OPINION AND ORDER ON APPLICATION FOR AWARD OF COSTS, ATTORNEY'S FEES AND EXPERT FEES

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The appellant's application for award of costs and attorney's fees in its appeal of a coal mining activity permit is denied because it does not meet the criteria required for an award of costs and fees, as set forth in *Big B Mining Co. v. Department of Environmental Resources*. Where the appeal was dismissed for mootness prior to any decision on the merits, and the appellant was also facing possible dismissal of its appeal due to lack of standing, we cannot find that the appellant is a "prevailing party" or that it achieved "success on the merits." Nor do we find that the appellant made a "substantial contribution to a full and final determination of the issues" since there is no indication that the permit was withdrawn due to the efforts of the appellant.

Although we find that the appellant is not entitled to an award of costs and fees, we do not agree with the argument advanced by the Department of Environmental Protection and the permittee

that the appellant has failed to "incur" fees, as required by the attorney's fees provisions under which this petition was filed. The appellant's agreement to pay its counsel any fees which "may be awarded in [this] appeal" does not act to prevent the appellant from incurring legal fees.

OPINION

This matter involves an appeal filed by the Raymond Proffitt Foundation from the Department of Environmental Protection's (Department) issuance of a bituminous coal mining activity permit to Vesta Mining Company (Vesta Mining). The permit authorized, among other things, the operation of a preparation plant and coal refuse disposal area and the disposal of 21.6 million tons of coal refuse within 100 feet of an unnamed tributary.

Vesta Mining moved to dismiss the appeal for lack of standing, on the basis that the Raymond Proffitt Foundation had no members who would be affected by the permit issuance on the date the appeal was filed. On June 30, 1998, the Board issued an Opinion and Order which denied the motion without prejudice because there were issues of fact in dispute. Thereafter, on August 26 and 27, 1998, a hearing was held before Administrative Law Judge Thomas W. Renwand on the issue of standing. Vesta Mining and the Raymond Proffitt Foundation submitted briefs on the issue of standing on October 21, 1998 and November 6, 1998. By letter filed with the Board on October 28, 1999, the Department joined in Vesta Mining's brief. In addition, the Raymond Proffitt Foundation filed with the Board a motion for summary judgment.

Prior to the Board making a final ruling on the issue of standing or on the Raymond Proffitt Foundation's motion for summary judgment, events occurred which rendered a decision on either matter moot. The property covered by the Vesta Mining permit was purchased by another mining company, Laurel Run Mining Company, which elected not to undertake the activities covered by the

permit. By letter dated November 10, 1998, Vesta Mining formally withdrew the permit. Pursuant to Vesta Mining's request, the Department cancelled the permit on November 25, 1998.

On the morning of November 16, 1998, the parties requested a telephone conference with Judge Renwand.[1] During the telephone conference, all of the parties agreed that they did not believe a decision should be rendered on either of the two pending motions.

On December 10, 1998, the Department and Vesta Mining filed a joint motion to dismiss the appeal as moot, on the basis of the permit cancellation. The Raymond Proffitt Foundation indicated that it did not oppose the motion. By Order of December 15, 1998, the Board granted the joint motion to dismiss for mootness and dismissed the appeal.

Subsequently, on January 12, 1999, the Raymond Proffitt Foundation filed an application to recover costs and fees in this matter pursuant to Section 4(b) of the Surface Mining Conservation and Reclamation Act (Surface Mining Act), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.1 - 1396.31; Section 307(b) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 - 691.1001; and Section 5(i) of the Coal Refuse Disposal Control Act (Coal Refuse Disposal Act), Act of September 24, 1968, P.L. 1040, *as amended*, 52 P.S. § 30.51 - 30.66. On January 14, 1999, the Raymond Proffitt Foundation supplemented its application to include Section 5(g) of the Bituminous Mine Subsidence and Land Conservation Act (Mine Subsidence Act), Act of April 27, 1966, P.L. 31, *as amended*, 52 P.S. §1406.1 - 1406.21. Vesta Mining and the Department filed responses opposing the application. In addition, each party has extensively briefed

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[1] According to Vesta Mining, the telephone conference was initiated with Judge Renwand at the request of counsel for the Raymond Proffitt Foundation, who suggested that the Board be notified of the status of the permit so that time would not be spent considering and deciding the two motions pending before the Board. (Vesta Response, para. 30)

the issues surrounding the application for costs and fees.

Attorney's Fees Provisions

The general rule in the American legal system is that each side is responsible for the payment of its own costs and attorney's fees absent bad faith or vexatious behavior. *McDevitt v. Terminal Warehouse Co.*, 499 A.2d 374, 376 (Pa. Super. 1985). This rule has been modified by certain statutes at the state and federal level, which direct the award of costs and attorney's fees to the prevailing party. Pennsylvania's Surface Mining Act, Clean Streams Law, Coal Refuse Disposal Act, and Mine Subsidence Act are four such statutes. Each vests the Board with discretion to award costs and attorney's fees to the prevailing party in actions brought under certain sections of the acts.

Section 4(b) of the Surface Mining Act reads in relevant part as follows: "The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to [Section 4 of the Act]." 52 P.S. § 1396.4(b). Section 5(i) of the Coal Refuse Disposal Act, 52 P.S. § 30.55(i); Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b); and Section 5(g) of the Mine Subsidence Act, 52 P.S. § 1406.5(g), contain similar language.

However, it is not sufficient that the outcome of an appeal be in one party's favor to entitle it to an award of costs and attorney's fees. An applicant for costs and attorney's fees must satisfy certain criteria before it is entitled to such an award. The Commonwealth Court has found the award of costs and attorney's fees to be appropriate under Section 4(b) of the Surface Mining Act, where the following criteria have been met:

1) a final order must have been issued;

2) the applicant for the fees and expenses must be the prevailing party;

3) the applicant must have achieved some degree of success on the merits; and

4) the applicant must have made a substantial contribution to a full and final determination of the issues.

Big B Mining Co. v. Commonwealth, Department of Environmental Resources, 624 A.2d 713, 715 (Pa. Cmwlth. 1993), *appeal denied*, 633 A.2d 153 (Pa. 1993). These four criteria had earlier been adopted by the Board in *Jay Township v. DER*, 1987 EHB 36, and followed again in *Kwalwasser v. DER*, 1988 EHB 1308, *aff'd*, 569 A.2d 422 (Pa. Cmwlth. 1990). In *Medusa Aggregates Co. v. DER*, 1995 EHB 414, 428, n. 6, the Board held that the same criteria apply to petitions for attorney's fees and costs filed under Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b). Likewise, in *BethEnergy Mining Co. v. DER*, 1995 EHB 148, 155, the Board held that these criteria apply to petitions filed under Section 5(g) of the Mine Subsidence Act, 52 P.S. § 1406.5(g). Because Section 5(i) of the Coal Refuse Disposal Act, 52 P.S. § 30.55(i), contains language identical to that of Section 4(b) of the Surface Mining Act, we hereby hold that the same four criteria also apply to petitions for attorney's fees and costs filed under Section 5(i) of the Coal Refuse Disposal Act.

For the reasons set forth below, we find that the Raymond Proffitt Foundation has not met three of the criteria of the *Big B Mining* test and, therefore, it is not entitled to an award of costs and fees.[2]

Prevailing Party

In accordance with the *Big B Mining* test, the applicant for costs and fees must be the prevailing party. In defining "prevailing party," Vesta Mining points us first to the definition

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[2] Because an order dismissing the appeal on the basis of mootness has been issued, we find that the first prong of the *Big B Mining* test has been met.

contained in *Black's Law Dictionary*:

> The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered.

Black's Law Dictionary (6th edition, 1990).

The Raymond Proffitt Foundation argues that one may be a prevailing party without having to obtain an adverse judicial decision against one's opponent. It cites us to the case of *Gardner v. Clark*, 503 A.2d 8 (Pa. Super. 1986). There, the court held that "a party prevails if he or she succeeds in obtaining substantially the relief sought." *Id.* at 10.

The facts in *Gardner* differ significantly from those of the present case. In *Gardner*, the plaintiff filed an action to quiet title to the defendants' residential real estate, based on a confession of judgment. The defendants claimed the confession of judgment did not meet the legal requirements. Before the action proceeded to trial, the plaintiff voluntarily discontinued the action, claiming he had received a settlement from his title insurance company. The defendants contended the discontinuance had been compelled by the merits of their defense.

The defendants filed for attorney's fees under two sections of the statute governing confessions of judgment, which stated that any debtor who prevails in an action arising under the statute shall be entitled to attorney's fees. In affirming the trial court's award of attorney's fees to the defendants, the Superior Court held, "The statute does not require that there be an adverse judicial decision in order to support an award of counsel fees." *Id.* at 10. The court determined it was enough that the defendants had "successfully resisted [the plaintiff's] attempt to enforce the judgment against their residence."

The Raymond Proffitt Foundation contends that *Gardner* operates as *stare decisis* in attorney's fees action before the Board, and that the Board's definition of "prevailing party" should be controlled by *Gardner* and not by definitions under the federal law. We disagree for several reasons. First, *Gardner* dealt with a specific statute designed to award attorney's fees to debtors against whom confessed judgments are entered and who are successful in preventing enforcement of such judgments. Unlike the statutes involved in the case before us, the statute in *Gardner* did not authorize an award of attorney's fees to the "prevailing party," but to a specific, identifiable group. As the Department points out in its response, the public policy behind the two fee-shifting provisions is different. The attorney's fees provision in *Gardner* is a means of protecting debtors from lenders who ignore due process protections. The attorney's fees provisions of the mining statutes are not designed to protect any particular group, and they vest broad discretion in the Board to determine when attorney's fees are appropriate. *Big B Mining*, 624 A.2d at 715.

Second, the Raymond Proffitt Foundation's argument ignores the Commonwealth Court decisions which have reviewed fee applications under the very statutes involved in this appeal. Specifically, the Commonwealth Court's decision in *Big B Mining*, 624 A.2d 713, which was decided seven years after the *Gardner* decision, sets forth the precise guidelines which the Board is to follow in awarding costs and attorney's fees in actions filed under Section 4(b) of the Surface Mining Act (and by implication, Sections 307(b) of the Clean Streams Law, 55(i) of the Coal Refuse Disposal Act, and 5(g) of the Mine Subsidence Act). The Commonwealth Court's decision in *Big B Mining,* which examined the attorney's fees provisions of the very statutes under which the present petition for attorney's fees was filed, provides much more in the way of *stare decisis* than does *Gardner*, which involved a wholly different statute and set of facts.

Third, contrary to the Raymond Proffitt Foundation's assertion, it is entirely appropriate that the Board may be guided by "definitions under the federal law" since Pennsylvania's Surface Mining Act, including its attorney's fees provision, was adopted in order to obtain primacy under the federal mining program and parallels much of the federal act.

The Raymond Proffitt Foundation also contends we should look to the definition of "prevailing party" under Pennsylvania's Costs Act, Act of December 13, 1982, P.L. 1127, 71 P.S. § 2031 -2035. The Costs Act defines "prevailing party" as follows:

> A party in whose favor an adjudication is rendered on the merits of the case or who prevails due to withdrawal or termination of charges by the Commonwealth Agency or who obtains a favorable settlement approved by the Commonwealth Agency initiating the case.

71 P.S. § 2032. Although the Raymond Proffitt Foundation recognizes that the Costs Act is not applicable in this matter, it asserts that its definition of "prevailing party" is instructive in the present case.

Again, we find that the definition of "prevailing party" in the Costs Act is not controlling due to differing public policies behind the Costs Act and the attorney's fee provisions of the mining statutes. The Costs Act is designed to deter unwarranted actions by a government agency against an individual, business or organization. *Jay Township,* 1987 EHB at 41. It allows a party to recover from the government when the agency has initiated an action. Because the purposes of the Costs Act differ from the statutes involved in the present matter, the definition of "prevailing party" in the Costs Act cannot supplant the criteria which the Commonwealth Court and Board decisions have established for an award of costs and attorney's fees under the mining statutes.

The Raymond Proffitt Foundation argues that even if we do not adopt the definition of

"prevailing party" set forth in the Costs Act and *Gardner*, a case should not have to proceed to a final judgment in order for attorney's fees to be awarded. It again cites *Gardner* which states, "To hold otherwise would compel. . .the submission of each case to a full trial for the purpose of effectuating the fee provision. . . ." *Gardner*, 503 A.2d at 10. We wholly agree that a party should not be required to keep an appeal ongoing solely for the purpose of obtaining attorney's fees. Moreover, we have awarded attorney's fees in cases where an appeal did not proceed to a final adjudication following a hearing or an award of summary judgment. In *Lucchino v. DEP*, EHB Docket No. 96-114-R (Opinion issued May 27, 1998), attorney's fees were awarded to a permittee after dismissal of an appeal for lack of standing. In *Jay Township v. DER*, 1987 EHB 36, attorney's fees were awarded to the township after a supersedeas was issued, but prior to an adjudication on the merits. However, in each of these cases, the successful party had *prevailed* on some element of the case. In *Lucchino*, the permittee succeeded in proving that the appellant had no standing to bring the appeal *and* that the appellant had brought the appeal in bad faith for the purpose of harassment. In *Jay Township*, the appellant succeeded in obtaining a supersedeas against the Department and the permittee. In this respect, the requirement that an applicant for attorney's fees must be a "prevailing party" is linked very closely to the requirement that the applicant have achieved some degree of success on the merits. Were this not so, Vesta Mining would also be entitled to attorney's fees as a "prevailing party" since the appeal was dismissed for mootness.

As Vesta Mining notes in its memorandum, the instant case is more akin to that of *Smith v. DER*, 1990 EHB 1281, than *Jay Township*. In *Smith*, a third-party appellant withdrew her appeal of a bond release prior to a hearing on the merits. The Board denied the permittee's request for attorney's fees, stating

> . . .the circumstances which led the Board to conclude that the appellant was a prevailing party in *Jay Township* are not present here. The Board has not ruled on a petition for supersedeas in this case. . . Moreover, hearings have not been held, and there is no indication on the record - as there was in *Jay Township* - that the cessation of the appeal is a result of the lack of merit in the legal position of the party against whom attorney fees are being sought.

Id. at 1284.

In the present appeal, the Raymond Proffitt Foundation cannot, by any stretch of the imagination, be said to have prevailed at any stage of the proceeding. Indeed, when the case ended, the Raymond Proffitt Foundation was facing possible dismissal of its appeal based on lack of standing. Though the standing issue had not yet been decided, Vesta Mining and the Department had brought forth substantial evidence, which at least called into question the Raymond Proffitt Foundation's status as a proper appellant.[3] We cannot find that the Raymond Proffitt Foundation was a "prevailing party" when we had not yet established that it was, in fact, a "proper party."

Success on the Merits

The third prong of the *Big B Mining* test is that the applicant for costs and fees must have achieved some degree of success on the merits. This requires success of a substantive nature, that is, success on one of the central issues of the case, rather than a purely procedural victory. *Township of Harmar v. DER*, 1994 EHB 1107, 1113.

The Raymond Proffitt Foundation argues that "success on the merits" may be construed where the petitioner has achieved the relief requested, without a formal adjudication, citing the Board's

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[3] In its memorandum of law, the Raymond Proffitt Foundation raises a question as to why the Department did not file a brief on the issue of standing. This is somewhat misleading since the Department did in fact join in the brief filed by Vesta Mining.

decision in *Jay Township v. DER*, 1987 EHB 37, and the ruling of the United States Supreme Court in *Farrar v. Hobby*, __ U.S. __, 113 S.Ct. 566, 573 (1992).

We agree that "success on the merits" does not necessarily entail a hearing and adjudication on the merits. However, even in the cases cited by the Raymond Proffitt Foundation, the petitioner for attorney's fees had achieved at least some degree of success on the merits of its claim. In *Jay Township*, the Board recognized that "[f]ees have been granted. . .in cases where the petitioner has achieved the relief requested without a formal adjudication by the tribunal." 1987 EHB at 43. The Board referred to the U.S. Supreme Court's ruling in *Maher, Commissioner of Income Maintenance of Connecticut v. George*, 448 U.S. 122 (1980), in which the Court held that the petitioner, which had obtained the relief requested through a settlement, was entitled to attorney's fees. Likewise, in *Farrar*, the United States Supreme Court, in examining fee provisions under the civil rights statutes, has held that a plaintiff may recover fees even though he has not obtained a judgment, so long as he obtains "comparable relief through a consent decree or settlement." In both *Maher* and *Farrar*, the Court recognized that a party which obtains the sought-after relief through a settlement, rather than a final ruling by the court, has achieved success on the merits of his claim.

The Raymond Proffitt Foundation asserts that it has obtained "comparable relief" through the withdrawal of the permit. It contends that it did so by settling with the parties when it agreed not to contest the Joint Motion to Dismiss for Mootness. It argues that it has achieved success on the merits because the purpose of its appeal was to remove Vesta Mining's permit, and this has been accomplished. While we agree that the outcome of this matter, i.e. the removal of the permit, is

partially what the Raymond Proffitt Foundation sought,[4] we do not agree that the Raymond Proffitt Foundation has achieved success on the merits of its appeal, entitling it to attorney's fees.

In *Jay Township*, as in the present case, the challenged permit was ultimately withdrawn. However, the facts surrounding the two cases differ substantially. In *Jay Township*, the permit was withdrawn after a hearing on the merits had been held and the presiding judge issued a supersedeas directing the permittee not to exercise any of its rights under the permit until further order of the Board. During the period in which the supersedeas was in effect, the permittee was given an opportunity to gather further information "to buttress the validity of its permit." In the course of performing further analysis, as requested by the appellants, testing revealed the presence of toxic material on the site in question. As a result of the testing, the permittee requested that its permit be cancelled. Following the permit cancellation, the appellants filed a petition for attorney's fees. In granting the fee petition, the Board determined that the appellants had achieved a degree of success on the merits because the appellants' efforts during the hearing on the merits led to a supersedeas of the permit during which the permittee was required to gather more evidence in support of the permit. The evidence-gathering during the supersedeas eventually led to the withdrawal of the permit.

The present case has not reached the stage where there has been any kind of decision on the merits of the appeal. Before the Raymond Proffitt Foundation can claim to have achieved some degree of success on the merits of its appeal, it must have had a right to bring the appeal in the first place. As stated earlier, a motion to dismiss the appeal for lack of standing was pending before the

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[4] In its notice of appeal, the Raymond Proffitt Foundation asserts, *inter alia*, that the Department was without authority to issue *any* permits under the 1994 amendments to the Coal Refuse Disposal Act because the amendments had not been approved by the federal Office of Surface Mining.

Board when the permit was withdrawn. The motion cast sufficient doubt on the Raymond Proffitt Foundation's status as a proper appellant that the Board ordered an evidentiary hearing to be held. Both sides presented strong evidence at the hearing in support of their position. It would be wholly inappropriate to award attorney's fees when it is not evident that the Raymond Proffitt Foundation would have been permitted to proceed with its appeal, much less succeed on the merits. As in *Smith v. DER*, 1990 EHB 1281, the appeal was withdrawn before the Board could issue a decision of any kind on the merits.

We sympathize with the Raymond Proffitt Foundation's argument that a party should not have to proceed with its appeal in order to obtain a decision on the merits solely for the purpose of seeking attorney's fees. The Board, like all courts, encourages the amicable resolution of disputes whenever possible. However, there is no indication here that a decision would have been rendered in favor of the Raymond Proffitt Foundation on the standing issue had it proceeded with its appeal. Further, even if the Raymond Proffitt Foundation had survived the motion to dismiss for standing, there is nothing to indicate that its summary judgment motion would have been granted or that it would have received any favorable ruling on the merits of its appeal. Moreover, the simple fact is that not every appeal warrants an award of attorney's fees. Where an appeal ends prior to any party having achieved some degree of success on the merits, attorney's fees will not be awarded. While the Raymond Proffitt Foundation may think that is a harsh result, it is, on the contrary, the only fair and just result.

Substantial Contribution to a Full and Final Determination of the Issues

The final prong of the *Big B Mining* test is that the applicant for attorney's fees must have made a substantial contribution to a full and final determination of the issues. The Raymond Proffitt Foundation argues that an applicant for attorney's fees must demonstrate *either* that it is a prevailing

party *or* that it has made a substantial contribution to a full and final determination of the issues, but not both. It relies on the Board's decision in *Jay Township*, 1987 EHB 36. We disagree with the Raymond Proffitt Foundation's reliance on *Jay Township* for this proposition. First, the Board in *Jay Township* did not expressly hold that only one criterion or the other need be proven. Rather, it was referring to language in the federal surface mining regulations. *Id.* at 42. Second, the parties had previously stipulated to the fact that the township was a prevailing party, *id.* at 38, and, therefore, the Board examined only whether a substantial contribution had been made to a determination of the issues. Seven years later, in *Big B Mining*, the Commonwealth Court set out the *four-part* test which the Board was to follow in determining whether to award attorney's fees. Board decisions subsequent to *Big B Mining*, have consistently required that each of the four criteria be met. Were we to adopt the Raymond Proffitt Foundation's argument, this would render the fourth prong of the *Big B Mining* test meaningless. Moreover, today we specifically affirm our earlier holdings that all four prongs of the test must be met before attorney's fees may be awarded.

The Raymond Proffitt Foundation argues that the fourth prong of the *Big B Mining* test is actually a requirement that causation be proven, which conflicts with the decision in *Gardner*. As we have stated earlier, *Gardner* is not controlling here. What is controlling is the Commonwealth Court's decision in *Big B Mining*, which clearly states that an applicant for attorney's fees must demonstrate that it made a substantial contribution to a full and final determination of the issues.

The Raymond Proffitt Foundation argues that it is impossible to meet this criterion when a case is dismissed for mootness. We do not agree that this is an impossible standard to meet. It is certainly conceivable that during the course of an appeal, which is ultimately dismissed as moot, a party may make a substantial contribution to a determination of the issues. This is essentially what

occurred in *Jay Township*, where the appellants succeeded in obtaining a supersedeas and the permit ultimately was withdrawn. The Board found that the appellants had substantially contributed to the outcome of the litigation since their efforts led to a supersedeas of the permit.

The Raymond Proffitt Foundation argues that if the fourth prong of the *Big B Mining* test is required, it can show that its efforts caused Vesta Mining to withdraw the permit. The Raymond Proffitt Foundation contends that it was in the best interest of Vesta Mining and the Department to have the permit withdrawn for the following reasons: 1) In the event of an adverse decision, Vesta Mining and the Department, at the very least, would have been liable for attorney's fees, and 2) an adverse decision would have affected other similar permits issued by the Department.

Vesta Mining disputes the Raymond Proffitt Foundation's allegations. It contends that if the exchange of properties between Laurel Run and itself had not occurred at the time in question, it would have continued to defend the permit. However, as a result of the transaction, the permit was allegedly useless to it. The purchaser of the property, Laurel Run, had the option of seeking a transfer of the permit or foregoing the permit. It chose to have the permit withdrawn. (Vesta Response, para. 43)

Considering the arguments and documentation submitted by the parties, we find that the Raymond Proffitt Foundation has not demonstrated that it substantially contributed to a determination of any of the issues in this appeal. Nor can we find that their efforts led to a favorable outcome of this appeal, as in *Jay Township*. There is no indication that Vesta Mining withdrew the permit due to the efforts of the Raymond Proffitt Foundation in this appeal. During the course of the appeal, a transaction occurred which rendered the permit useless to Vesta Mining. The new owner of the property elected not to seek a transfer of the permit.

It may very well be that Vesta Mining determined it was a more prudent business decision to sell the property than to engage in potentially long and expensive litigation. In the *Smith* decision, discussed earlier, the appellant withdrew her appeal "because of the time and expense necessary to proceed." *Smith*, 1990 EHB at 1284. The Board held that was not a sufficient basis to allow an award of attorney's fees to the permittee. As stated earlier, we will not require a third-party appellant to proceed to a final hearing and adjudication on the merits solely to enable it to recover attorney's fees. Likewise, in the case of a permittee which, prior to a determination of any of the issues in an appeal, decides not to act on or defend its permit, we will not require it to proceed with litigation solely to avoid being assessed attorney's fees. If a permittee decides to withdraw its permit, ostensibly not on the merits of the appellant's position, we should not penalize that action. The purpose of the attorney's fees provision is to award appellants who have prevailed in overturning an improperly-issued permit or to reimburse a permittee which has successfully defended a permit from an attack brought in bad faith or from an improper permit denial. By requiring parties to meet the criteria set forth in *Big B Mining*, we hope to insure that attorney's fees are awarded only in those instances where the legislature intended.

Bad Faith

The Raymond Proffitt Foundation asserts that Vesta Mining acted in bad faith by continuing the litigation, knowing that it would eventually withdraw the permit, and thereby causing the Raymond Proffitt Foundation to incur additional legal expenses. The evidence submitted does not support this contention. According to Vesta Mining's response, an Exchange Agreement between itself and Laurel Run was executed on October 31, 1998. The closing occurred on a Saturday, November 7, 1998. On November 9, 1998, Laurel Run requested that the permit be withdrawn, and on November 10, 1998,

Vesta Mining submitted a letter to the Department requesting a withdrawal of the permit. According to Vesta Mining's memorandum, its counsel intended to wait for the Department's response before notifying the Board. At the suggestion of counsel for the Raymond Proffitt Foundation, a conference call was held with Judge Renwand on November 16, 1998, prior to the cancellation of the permit, to apprise him of the situation. Following the cancellation of the permit on November 25, 1998, counsel for the Department prepared a Joint Motion to Dismiss, circulated it to the parties, and filed it on December 8, 1998.

The facts do not indicate that Vesta Mining engaged in any unnecessary delay or proceeded with the litigation in bad faith. Rather, they indicate that Vesta Mining proceeded in a very timely manner. The Raymond Proffitt Foundation argues that it is highly unlikely that the idea of a property sale and negotiations over its terms occurred entirely in the week between the October 31 execution of the Exchange Agreement and the November 7 closing. We disagree. In any commercial transaction, it is certainly conceivable that negotiations may be done under time constraints, and the final transaction is not completed until the actual closing. Moreover, had Vesta Mining contacted the Board to indicate that it was engaged in negotiations to sell the property, but that no closing had taken place, it is uncertain that the Board would have stayed the appeal.

Therefore, we find no merit to the argument that Vesta Mining acted in bad faith.

Chilling Effect on Citizen Lawsuits

The Raymond Proffitt Foundation asserts that if the Board fails to award costs and fees in this matter, it will have a chilling effect on citizen lawsuits under the mining laws. In support of its argument, it cites the Board's opinion in *Alice Water Protection Assn. v. DEP*, 1997 EHB 840, wherein the Board recognized the importance of citizen participation in the appeal process. *Id.* at 845.

However, there are important distinctions between *Alice Water* and the present matter. In *Alice Water*, the permittee had filed an application for attorney's fees and costs *against* a citizens group which had unsuccessfully appealed the issuance of a mining permit. The Board held as follows:

> To interpret Section 4(b) of the Pennsylvania Surface Mining Act and Section 307(b) of the Clean Streams Law as assessing attorney's fees against private individuals and citizens' groups who unsuccessfully challenge Departmental administrative actions will doubtless have a chilling effect on these citizens' constitutional right to bring an appeal before the Environmental Hearing Board.

Id.[5] Recognizing the potential chilling effect that could result from assessing attorney's fees against an unsuccessful citizens group, the Board held that such assessments would be made only where a citizens group had brought an appeal in bad faith.

The Board's ruling in *Alice Water* protects citizens groups from having to pay the opposing party's costs and attorney's fees when they bring an unsuccessful lawsuit in good faith. It does not, as the Raymond Proffitt Foundation seems to argue, entitle citizens groups to an award of costs and attorney's fees where they have not otherwise met the criteria set forth in *Big B Mining.*

We agree with the Raymond Proffitt Foundation that litigation expenses may pose a major barrier to appealing permits. For this reason, the mining laws provide for the award of costs and attorney's fees to a party which prevails in its appeal. Where a party, whether it be a citizens group or a permittee, has not prevailed in its appeal, in accordance with the requirements set forth in *Big B Mining*, it is not entitled to an award of costs and attorney's fees. Where a party does meet the

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[5] The quotes which the Raymond Proffitt Foundation ascribes to *Alice Water* on pages 27 and 28 of its memorandum of law are not holdings of the Board but, rather, arguments made by the Department in that matter.

requisite criteria, it will be entitled to an award. Rather than producing a chilling effect, this is likely to have the effect of making appeals less cost prohibitive to citizens groups.

On the other hand, were we to find that an appellant is a "prevailing party" without a determination that it had standing to pursue its appeal, this would likely have a chilling effect on settlements. This might well lead to a situation where the Department and permittee take each case to trial, refusing to consider settlement, for fear that the appellant will be determined to be a prevailing party for purposes of attorney's fees.

Fees Which Are "Incurred"

Finally, Vesta Mining and the Department assert that the Raymond Proffitt Foundation has not incurred attorney's fees, as required by the attorney's fee provisions of the Surface Mining Act, Clean Streams Law, and Coal Refuse Disposal Act. According to the affidavit of its secretary and treasurer, the Raymond Proffitt Foundation has an agreement that it will pay its counsel any attorney's fees and costs for work done on its behalf which "may be awarded in the Vesta Appeal." (Affidavit of Joseph Turner, para. 6) Under this fee arrangement, argue the Department and Vesta Mining, the Raymond Proffitt Foundation is not obligated to pay its attorney unless it receives a fee award.

Vesta Mining and the Department rely on the Board's decision in *BethEnergy Mining Co. v. DER*, 1995 EHB 148, in which the Board discussed the meaning of "incurring" legal expenses. That matter involved 52 appeals filed by 14 underground bituminous coal mine operators, challenging the validity of certain "standard conditions" contained in their coal mining activity permits. The Board agreed with the mine operators and held the conditions to be invalid. The mine operators then sought to recover not only costs and attorney's fees paid by themselves but also costs and fees paid by the principal trade association of the underground bituminous coal mine industry. Because the Board

determined that the trade association had assumed the obligation to pay the attorney's fees and costs associated with the litigation, the Board held that the trade association had incurred the expenses and, therefore, the mining companies could not recover them.

In reaching its decision in *BethEnergy*, the Board examined the meaning of the word "incur." Adopting the definition found in *Webster's Ninth New Collegiate Dictionary*, the Board held, "In order to incur attorney's fees and costs. . .a party must become liable for or subject to those expenses." *BethEnergy*, 1995 EHB at 157.

We hold that the Raymond Proffitt Foundation has incurred legal expenses. Such expenses are incurred so long as the work to which they pertain has been performed. Whether the fees have been paid is not relevant to the question of whether they have been incurred. Unlike the appellants in *BethEnergy*, there is no other entity which has taken on the obligation of paying the fees in question. Should the Raymond Proffitt Foundation be awarded attorney's fees in this matter, they are liable for their payment to counsel.

Adopting the Department and Vesta Mining's argument would place an applicant such as the Raymond Proffitt Foundation in a dilemma. If it receives an award of attorney's fees, then it has incurred such fees because it is liable for their payment. However, the applicant can never be awarded attorney's fees because it has not yet "incurred" such fees according to the Department's and Vesta Mining's argument.

Should an attorney wish to enter into this type of fee agreement with his client, we will not penalize him by holding that such an agreement precludes an award of attorney's fees. Such a fee arrangement may provide the only means by which a citizens group can afford to proceed with an appeal. Indeed, the Raymond Proffitt Foundation asserts in its memorandum of law that this type of

financial arrangement is typical of public interest lawsuits where a statute provides for an award of fees and costs. As the Raymond Proffitt Foundation further points out in its memorandum, this arrangement is typical of a contingency fee agreement.

Conclusion

In conclusion, we find that the Raymond Proffit Foundation has incurred legal fees in this matter. However, because it has not met the requisite criteria for obtaining an award of costs and attorney's fees pursuant to Section 4(b) of the Surface Mining Act, Section 307(b) of the Clean Streams Law, and Section 5(i) of the Coal Refuse Disposal Act, as set forth in *Big B Mining*, its application for costs and fees is denied.

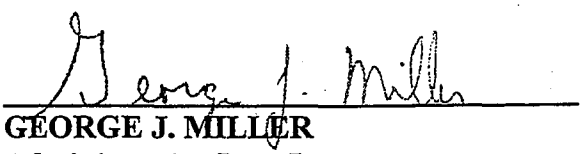
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RAYMOND PROFFITT FOUNDATION	:	
	:	
v.	:	**EHB Docket No. 98-020-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and VESTA MINING COMPANY, Permittee	:	

ORDER

AND NOW, this 26th day of March, 1999, the Raymond Proffitt Foundation's Application for Award of Costs, Attorney's Fees and Expert Fees is **denied**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 98-020-R

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: March 26, 1999

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

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

For Appellant:
John Wilmer, Esq.
Media, PA

For Permittee:
Anthony Polito, Esq.
Polito & Smock, P.C.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ADAM MARILUNGO, d/b/a MARILUNGO'S DISPOSAL SERVICE	:	
v.	:	**EHB Docket No. 96-271-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 31, 1999**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board grants the Department of Environmental Protection's (Department) motion for summary judgment where the Department properly declared a forfeiture of a bond posted in connection with the issuance of a Solid Waste Management Act[1] permit. The forfeiture was based on the Appellant's violations of the Act and the regulations promulgated thereunder, a Consent Order and Adjudication, and landfill closure obligations.

BACKGROUND

In April of 1987, Mr. Adam Marilungo purchased a solid waste landfill, commonly known as Richard's Landfill, and operated it under Solid Waste Permit No. 1005732 (permit). The landfill is located in Connellsville Township, Fayette County and consists of approximately eight acres. Mr. Marilungo submitted a $10,000 bond as required by Section 505(a) of the Solid Waste Management

Act, 35 P.S. § 6018.505(a), which the Department of Environmental Protection (Department) approved. On February 26, 1988, the Appellant entered into a Consent Order and Agreement with the Department which required Mr. Marilungo to bring the landfill into compliance with the rules and regulations of the Department and specifically to submit a methane gas monitoring and venting plan designed to meet a performance standard of less than 5% methane gas, which is the lower explosive limit for methane gas. (Department's Motion, Exhibit A-1) Following determinations by the Department that Mr. Marilungo had violated requirements of the Consent Order and Agreement and the issuance of a closure order by the Department, a 1989 Consent Order and Adjudication was executed by the Department and Mr. Marilungo and approved by this Board. (Department's Motion, Exhibit A-1)

Mr. Marilungo's closure of the landfill was determined by the Department to be inadequate and on March 12, 1996, the Department sent a letter to Mr. Marilungo notifying him of violations and its intent to forfeit the bond. (Department's Motion, Exhibit A-2) On August 7, 1996, the Department sent a letter to Mr. Marilungo specifying the minimum interim site closure activities that would be necessary for the Department to suspend its bond forfeiture proceedings. (Department's Motion, Exhibit A-3) In addition to certain grading, access, revegetation and other surface topography work, the correspondence specified that methane gas venting at the landfill must be adequate to alleviate methane exceedances[2]. In a letter dated September 6, 1996, the Department stated that it would consider extending the dates for Mr. Marilungo's revegetation obligations.

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[1] Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003.

[2] In order to avoid an "exceedance" of methane, combustible gas levels may not equal or exceed either the lower explosive limit [5% methane] at the boundaries of the site or 25% of the lower explosive limit [1.25% methane] in an adjacent area, including buildings or structures on adjacent

(Department's Motion, Exhibit A-4) Additional letters were sent by the Department to Mr. Marilungo, his counsel and the Board, acknowledging the efforts made by Mr. Marilungo to comply with the closure provisions and identifying further steps to be taken. (Appellant's Response, Exhibits A through H) On November 18, 1996, the Department declared Mr. Marilungo's $10,000 bond forfeit (Department's Motion, Exhibit B). Mr. Marilungo timely appealed the Department's action on December 19, 1996, but did not perfect his Notice of Appeal until January 6, 1997. This matter was reassigned from Judge Robert D. Myers to Judge Thomas W. Renwand on August 2, 1998. Currently before the Board is the Department's motion for summary judgment and supporting memorandum of law. The Appellant filed a response and the Department in turn filed a reply.

OPINION

The Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits submitted in support, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.1-1035.5; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). The record must be viewed in the light most favorable to the nonmoving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995). In its reply, the Department contends that the section of Mr. Marilungo's response purporting to raise "new matter" should be disregarded by the Board as procedurally defective and substantively improper. (*See* Appellant's Response, ¶¶ 21-33; Exhibits C through I) It is obvious that the section entitled "new matter" was included in Mr. Marilungo's response as a means of offering additional evidence to

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areas. 25 Pa. Code § 273.292(e).

support his contention that he acted in good faith to resolve the matter with the Department. The additional evidence is similar to the type of information included in the section entitled "answer" and, as such, is not prejudicial to the Department; we will therefore consider Mr. Marilungo's response in its entirety as part of the record before us.

In its motion for summary judgment, the Department asserts that its bond forfeiture action was appropriate and justified because methane gas regulatory exceedances continue at the landfill in violation of the Consent Order and Adjudication, the Act and the regulations promulgated thereunder, and Mr. Marilungo's landfill closure obligations. The Department clearly has the power to declare the bond forfeit based on violations of the Act, the Department's orders, and the regulations and permit conditions issued thereunder. *Fiore v. DEP*, 1995 EHB 1298. Section 505(d) of the Solid Waste Management Act (Act) states that the Department shall declare a bond forfeit if the operator of the municipal waste disposal facility fails or refuses to comply with the requirements of the Act. 35 P.S. § 6018.505(d). A person fails to comply with this Act by operating a solid waste disposal facility contrary to the rules and regulations promulgated under the Act, or in violation of any order of the Department or any term or condition of any permit issued by the Department. 35 P.S. § 6018.610(2). The regulations promulgated under the Act dictate that the Department shall act where:

> (2) The operator fails or refuses to comply with the Solid Waste Management Act, the regulations promulgated pursuant to the Solid Waste Management Act, an order of the Department, or the terms or conditions of the permit or the closure plan;
>
> . . .
>
> (4) The operator has failed to comply with a compliance schedule in an adjudicated proceeding, or consent order or agreement approved by the Department;
>
> (5) The Department determines that the operator cannot demonstrate or prove its intention or ability to continue to operate in compliance with the Solid Waste Management Act or the rules and regulations promulgated pursuant thereto;

. . .

(7) The operator has failed to properly achieve final closure of the facility under the Solid Waste Management Act or the rules and regulations promulgated thereunder, or the terms and conditions of a permit or an order of the Department;

(8) The operator fails or refuses to comply with post-closure measures according to schedules or plans approved by the Department.

25 Pa. Code § 271.351.

The Department's Declaration of Forfeiture letter sets forth the following violations of the Consent Order and Adjudication based on various Department inspections: (1) allowing the open burning of solid waste at the landfill; (2) failing to maintain the approved groundwater monitoring system; (3) failing to revegetate the filled two acre area of the landfill; (4) failing to maintain the approved methane monitoring plan and prevent off-site migration of methane; and (5) failing to maintain erosion and sedimentation controls at the landfill. The letter also sets forth the following violations of the Act: (1) failing to prevent access to the landfill by not providing a gate or other barrier at potential vehicle access points to block unauthorized access to the landfill when an attendant is not on duty; (2) allowing the disposal of construction/demolition waste at the landfill without the authorization of a permit; and (3) failing to comply with the August 7, 1996 closure agreement provisions.

Mr. Marilungo objected to the Declaration of Forfeiture letter on the grounds that "Mr. Marilungo had no financial capability to have this work done by others and all required work had to be done by him. Mr. Marilungo was physically unable to perform this work during the time period. This was not conveyed to the [Department] because Mr. Marilungo thought that his health would have improved enough to meet this dead line [sic]. . . . In addition, Mr. Marilungo had difficulty in leasing equipment to do this work." (Notice of Appeal) In his response to the

Department's motion, Mr. Marilungo avers that the methane gas at the landfill does not exceed the acceptable limits and contends that he has attempted to comply with all actions and requests made by the Department.

However, the Department's motion provides affidavit and documentary support for the grounds set forth in the Declaration of Forfeiture letter and evidence of continuing violations. A letter to Mr. Marilungo from the Department dated August 18, 1997 indicates that methane levels were between 32%-58%. Mr. Marilungo's affidavit and documents submitted in his response do not refute the Department's evidence. In fact, Mr. Marilungo submitted a methane gas assessment prepared by his consulting engineers with many readings exceeding 40% methane. Since regulatory limits range from 5%-1.25% methane, the data clearly indicates methane gas exceedances consistent with the Department's findings and in violation of the limits imposed by both the regulations and the Consent Order and Adjudication. (Department's Motion, Exhibit A-6) Moreover, since Mr. Marilungo failed in his Notice of Appeal to challenge the Department's determinations that he was not in compliance, Mr. Marilungo has waived his right to challenge this issue. *Pennsylvania Game Commission v. Department of Environmental Protection*, 509 A.2d 877 (Pa. Cmwlth. 1986), *aff'd*, 555 A.2d 812 (Pa. 1989).

Mr. Marilungo's physical or financial inability to perform the landfill closure obligations is not a valid defense to the Department's bond declaration forfeiture action. He is legally obligated to comply with the requirements of the Act and the regulations promulgated thereunder, the Consent Order and Adjudication, and the landfill closure obligations. The Department is entitled to summary judgment in this matter since Mr. Marilungo has not presented any material fact that would have to be adjudicated in a hearing. We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

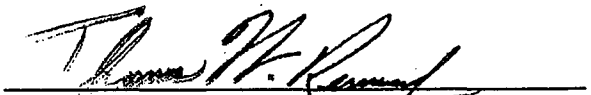
ADAM MARILUNGO, d/b/a MARILUNGO'S DISPOSAL SERVICE	:	
v.	:	**EHB Docket No. 96-271-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

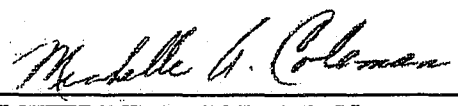
AND NOW, this 31st day of March, 1999, it is ordered that the Department of Environmental Protection's motion for summary judgment is **granted** and the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: March 31, 1999

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

For the Commonwealth, DEP:
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Southwest Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HRIVNAK MOTOR COMPANY	:	
	:	
v.	:	**EHB Docket No. 99-052-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 6, 1999**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

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

Synopsis:

A petition for supersedeas is denied without a hearing where the petitioner cites no legal authority, fails to plead facts supporting its petition with particularity, fails to state grounds sufficient for granting a supersedeas, and fails to support its petition with adequate affidavits.

OPINION

In conjunction with its appeal from an order and civil penalty assessed against it under the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.101 *et seq.*, Hrivnak Motor Company ("Hrivnak") has requested a supersedeas under Section 4(d) of the Environmental Hearing Board Act, 35 P.S. § 7514(d). After incorporating the objections set forth in its notice of appeal, Hrivnak argues in its petition for a supersedeas that it is entitled to a supersedeas because (1) DEP abused its discretion in imposing a civil penalty, (2) the civil penalty is too high, (3) Hrvinak is financially unable to pay the penalty, and (4) DEP has deprived Hrivnak of due process of law. DEP has filed

a motion asking that Hrivnak's petition be denied without a hearing. DEP's motion is granted for several reasons.

First, the Board will not grant a request for a supersedeas that cites no legal authority. 25 Pa. Code § 1021.77(b) and (c)(2); *Amber Energy, Inc. v. DEP*, 1997 EHB 640, 641; *May Energy, Inc. v. DEP*, 1997 EHB 637, 638; *Abod v. DEP*, 1997 EHB 512, 515. Hrivnak cites no legal authority in its petition. Although it has stated that DEP deprived it of due process, it fails to explain why with any degree of particularity.

In its response to the Department's motion to deny the supersedeas, Hrivnak cites *Tracey Mining Company v. Commonwealth of Pennsylvania,* 117 Pa. Cmwlth. 628, 544 A.2d 1075 (1988), but that case merely points out that this Board has supersedeas authority. It does not in any way – either legally or factually – provide any support for Hrivnak's request for a supersedeas in this appeal.

Secondly, the facts supporting a supersedeas request must be pleaded with particularity. 25 Pa. Code § 1021.77(c)(1). Hrivnak has failed to do so. The only facts mentioned in Hivnak's petition are those that it incorporated by reference from its notice of appeal. The only facts mentioned in the notice of appeal are that the Underground Storage Tank Indemnification Fund (the "Fund") and Hrivnak are engaging in corrective action related to tank releases that took place after February 1, 1994.

Hrivnak cites a few additional facts in an affidavit that it attached to its response to the Department's motion. We are not convinced that a party can cure deficiencies in its petition for supersedeas in a response to a motion to deny that petition. We need not decide that issue here because the facts cited in the response and the affidavit attached thereto essentially repeat the off-

point themes set forth in the notice of appeal: Hrivnak cannot pay the penalty, and Hrivnak and the Fund are complying with the Department's cleanup order.

The third reason for denying Hrivnak's petition overlaps the first and the second; namely, Hrivnak has failed to state grounds sufficient for the granting of a supersedeas. 25 Pa. Code § 1021.77(c)(4). The sparse facts that have been cited by Hrivnak fall far short of the necessary grounds for a supersedeas. Hrivnak has not alleged that it will suffer irreparable harm in the absence of a supersedeas. *See* 25 Pa. Code § 1021.78(a). To the contrary, it states that it is already performing remediation, and "thus, the ORDER is redundant." It has failed to allege that it is likely to prevail on the merits, and the limited facts noted do not support such a conclusion on their face. Hrivnak has also failed to address whether a supersedeas would result in harm to the public or to other parties and whether pollution or injury is ongoing. Hrivnak would have needed to address these matters at a minimum before a supersedeas could have been issued. 25 Pa. Code § 1021.78.

Hrivnak's objections regarding the civil penalty that DEP assessed against it are not the proper subject of a supersedeas petition. We have scheduled a separate hearing to consider what we have charitably interpreted as a claim of financial inability to prepay the penalty or post a bond. Other than the prepayment obligation, the civil penalty assessment itself has no immediacy that can appropriately be made the subject of extraordinary interlocutory relief. Hrivnak's plaints regarding the allegedly arbitrary and excessive nature of the penalty can only be resolved in the context of a hearing on the merits.

Finally, a supersedeas petition must be supported by affidavits setting forth facts upon which issuance of the supersedeas may depend. 25 Pa. Code § 1021.77(a); *Thomas v. DEP*, EHB Docket No. 95-206-C (Opinion and order issued July 24, 1998) at 4-5; *Goodman Group, Ltd. v. DEP*, 1997

EHB 697, 702; *E. P. Bender Coal Company v. DEP,* 1990 EHB 1624, 1626. The affidavit must be made on personal knowledge, contain facts that would be admissible in evidence, and show affirmatively that the signer is competent to testify to the matters stated therein. 25 Pa. Code § 1021.77(a)(i)(incorporating Pa. R. Civ. P. 1035.4). In short, the affidavit must stand on its own.

Here, Hrivnak merely filed a verification, which will ordinarily not substitute for an affidavit. *A&M Composting et al. v. DEP*, 1997 EHB 965, 968-69 (citing cases). The verification contains no facts, but instead, merely refers back to the petition, which is itself inadequate. By incorporating a defective petition, the verification is commensurately infirm.

As previously noted, Hrivnak also attached an afffidavit to its responsive filing. Even if we could consider such an after-the-fact submission, the affidavit does not cure any of the deficiencies in Hrivnak's earlier filings. It does not cite a single fact upon which issuance of a supersedeas may depend.

Any one of these deficiencies would by itself justify denial of Hrivnak's petition. Taken together, they allow for no hesitation. Accordingly, we issue the following order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

HRIVNAK MOTOR COMPANY	:	
	:	
v.	:	**EHB Docket No. 99-052-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 6th day of April, 1999, Hrivnak Motor Company's petition for supersedeas is DENIED.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 6, 1999

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

For the Commonwealth, DEP:
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Southeastern Regional Counsel

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TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HESTON S. SWARTLEY TRANSPORTATION COMPANY, INC.	:	
v.	:	**EHB Docket No. 99-017-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 8, 1999**

OPINION AND ORDER ON SECOND PETITION FOR SUPERSEDEAS

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

Synopsis:

A petition for supersedeas based solely upon the pendency of an appeal to the Commonwealth Court is treated as an application for a stay pursuant to Pa.R.A.P. 1781 and is denied for failing to demonstrate a likelihood of success in the appeal.

OPINION

The Department of Environmental Protection (the "Department") assessed a civil penalty of $325,265 against Heston S. Swartley Transportation Company, Inc. ("Swartley") on January 5, 1999 for failing to install Stage II vapor controls at its gasoline dispensing facilities in a timely manner. Swartley filed an appeal from the assessment with this Board on February 2. Swartley averred in its notice of appeal that it was financially unable to prepay the penalty or post an appeal bond as is normally required by the operative statute, the Air Pollution Control Act, 35 P.S. § 4001.1 *et seq.* (the "Act").

We scheduled a hearing for March 2, 1999 to address Swartley's averment of financial

inability as required by Section 9.1 of the Act, 35 P.S. § 4009.1. In our scheduling order, which was dated February 5, 1999, we directed Swartley to file (and serve upon the Department) all financial documents that it intended to rely upon in support of its averment of financial inability before February 22, 1999.

On February 11, 1999, Swartley moved for a continuance of the hearing. We held a conference call with counsel for both parties on the same day. We explained that the Board was constrained by the Act to hold the hearing on financial inability within 30 days of the date of the appeal. 35 P.S. § 4009.1(b). Although we could not continue the hearing beyond March 4, counsel agreed and this Board approved changing the hearing date from March 2 to February 25. Counsel for Swartley expressly agreed that, notwithstanding the earlier hearing date, Swartley would still be willing and able to serve its financial documents by February 22. We explained that the Department was entitled to see the documents in advance of the hearing in order to give the Department an opportunity to prepare for that hearing and to conduce an orderly, informative proceeding. Counsel indicated that he understood the requirement and the need for the requirement.

Swartley filed its financial documents on February 22, as required. Although Swartley has annual sales of approximately $48 million and operates numerous gasoline stations, Swartley inexplicably chose to serve extremely limited, incomplete, and piecemeal financial documents in support of its claim of financial inability.

We held a prehearing conference immediately before the hearing on February 25. Counsel for the Department noted that Swartley had served very limited financial information, which impaired the Department's ability to make an independent assessment of Swartley's financial health. Counsel argued that Swartley should be precluded from submitting any additional documents at the

hearing. Swartley's counsel did not argue to the contrary, but instead, indicated that Swartley would abide by the Board's original scheduling order and limit its exhibits to those that were previously turned over.

We thereupon held an evidentiary hearing and allowed the parties to submit post-hearing briefs. Swartley attempted to satisfy its burden of proving financial inability by relying upon the previously produced documents and the testimony of its secretary/treasurer. Swartley made much at the hearing and in its subsequent filings with this Board of the fact that the Department did not request additional financial documents on or before February 22. In that Swartley bore the burdens of proceeding and proof and had a clearly enunciated and explained obligation to produce its documents, however, we are at a loss to understand Swartley's effort to shift the blame for its inadequate presentation to the Department.

On March 15, we issued an opinion and order holding that Swartley had failed to meet its burden of proving financial inability. The order required Swartley to prepay the penalty before April 15 or suffer dismissal of its appeal. Swartley filed a motion for reconsideration, which the full Board rejected. Swartley also filed its first petition for supersedeas, which asked the Board to suspend the prepayment obligation while it considered the petition for reconsideration. When the Board denied the petition for reconsideration, the only basis for the first petition for supersedeas became moot, and it was denied.

Swartley has now filed a second petition for supersedeas. Swartley asks the Board to suspend the prepayment obligation while Swartley pursues a petition for review from the Board's March 15 order before the Commonwealth Court. Swartley's second petition is more appropriately styled as a request for a stay pending action on a petition for review pursuant to Pa. R.A.P. 1781, and

we will treat it as such.

When ruling upon an application for a stay pending appeal, the Board employs the same criteria that it employs in ruling upon petitions for supersedeas. *E. Marvin Herr v. DEP*, 1997 EHB 977, 978. *See also Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983). That is to say that, in considering whether to grant the stay, the Board will consider irreparable harm to the applicant, the likelihood of the applicant prevailing on the merits, and the likelihood of injury to the public or other parties.

Here, Swartley can only satisfy one of the three criteria. Swartley is probably correct in asserting that no harm to the public is likely if its prepayment obligation is put on hold. But as we have now repeatedly stated, Swartley has fallen far short of demonstrating that it cannot prepay the penalty. It necessarily follows that we cannot conclude that Swartley will suffer irreparable harm. For us to conclude otherwise would require us to essentially overrule our earlier findings, and we have no basis for doing so.

In any event, even assuming an appeal to Commonwealth Court at this time will be allowed, we do not believe that Swartley is likely to prevail on the merits of the appeal. Swartley presents two bases for its stay application. First, it continues to stand behind its procedural complaints. As previously noted, we find the complaints to be wholly without merit. Swartley was advised immediately of its obligation to produce all documents that it intended to rely upon in advance of the hearing. Imposing that obligation was entirely reasonable in light of the need to give the Department an opportunity to mount a reasoned challenge in advance of the hearing. This form of expedited discovery was particularly appropriate given the need to hold an evidentiary hearing within thirty days of the date the appeal was filed. Swartley has never questioned or challenged that

obligation, even to this day. Instead, in obvious conflict with the order, Swartley appears to believe that the Department should have requested additional documents. When the Department failed to do so, Swartley apparently felt justified in only supplying very limited, incomplete, and piecemeal information. Swartley's argument evidences a fundamental misunderstanding of the burden of proof in this matter. That burden was clearly on Swartley. 35 P.S. § 4009.1. *See also* 25 Pa. Code § 1021.101(a) (burden of proof on party asserting the affirmative of an issue). Swartley failed to meet that burden here. It had the opportunity to present a case and it failed to take full advantage of that opportunity. Although it is conceivable that Swartley could have overcome the shortcomings of its documentary presentation with testimony, it simply failed to do so. The testimony of Swartley's secretary/treasurer was vague, conclusory, uncorroborated, and entirely inadequate to fill the gaping holes left by the documentary production.

Swartley's misunderstanding of the burden of proof is further evidenced by its complaint that the Department presented no evidence of its own. By failing to make out a *prima facie* case, however, Swartley relieved the Department of that responsibility. In short, we do not believe it likely that Swartley will have any success in its appeal in challenging the procedural aspects of this matter.

Secondly, Swartley asserts that the Board should not have relied upon its decision in *Goetz v. DEP,* EHB Docket No. 97-226-C (September 10, 1998), because that case involved a different statute than the Air Pollution Control Act. Again, Swartley's argument has no merit. Regardless of which environmental statute is involved, the only question at hand is the ability to prepay a penalty or post a bond. An analysis of a party's financial condition has nothing to do with the substantive requirements of the underlying statute. It does not make any difference whether the

underlying penalty is assessed under the Tank Act, the Clean Air Act, or any other statute that requires prepayment. Furthermore, we relied upon *Goetz* in support of what we take to be the undeniable proposition that a party claiming financial inability cannot simply appear and state that it has no money. It must produce hard evidence that gives the Department a reasonable opportunity to challenge the claim and this Board a reasonable opportunity to independently assess the claim. That evidence must, among other things, include proof of the appellant's assets and liabilities. In the absence of hard evidence, the Legislature's objective in requiring prepayment could too easily be thwarted without sufficient proof or substantial justification. In short, we do not expect that Swartley will convince the Commonwealth Court that the Board's citation of *Goetz* in this matter was in error.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA

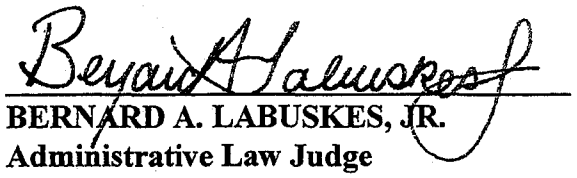
ENVIRONMENTAL HEARING BOARD

HESTON S. SWARTLEY TRANSPORTATION COMPANY, INC.	:	
v.	:	**EHB Docket No. 99-017-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 8th day of April, 1999, Heston S. Swartley Transportation Company, Inc.'s Second Petition for Supersedeas is DENIED.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 8, 1999

c: **(via Fax & 1st class mail)**

DEP Bureau of Litigation
Attention: Brenda Houck, Library
For the Commonwealth, DEP:
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Southeast Regional Counsel
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ENVIRONMENTAL HEARING BOARD
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CONCERNED CARROLL CITIZENS	:	
	:	
v.	:	**EHB Docket No. 97-278-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC., Permittee	:	**Issued: April 19, 1999**

OPINION AND ORDER ON MOTIONS TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Issues which should have been raised in an appeal of an earlier permit revision are dismissed on the basis of administrative finality. Summary judgment is entered against the appellant on all remaining issues due to the appellant's repeated failure to respond to motions to dismiss, treated as motions for summary judgment. A failure to respond deems all properly pleaded facts as admitted.

OPINION

This appeal concerns the New Eagle underground coal mine in Washington County, Pennsylvania. The permit to operate the mine was first held by USX Corporation, and in 1994 the Department approved the transfer of the permit to Maple Creek Mining. In 1996, the Department approved a renewal/revision of the permit (1996 permit renewal/revision) which, among other

things, added underground acreage to the permit area. In 1997, Maple Creek requested and received another revision to its permit to establish mine entries under a stream known as "Dry Run" and within the zone of potential influence of Dry Run. Following the Department's approval of the 1997 revision, Concerned Carroll Citizens filed this appeal.

Both the Department of Environmental Protection (Department) and Maple Creek Mining filed motions to dismiss the appeal based on mootness and administrative finality. Concerned Carroll Citizens failed to respond to either motion.

Because the Board determined that there may be potential issues of fact regarding the Department's and Maple Creek Mining's claim of mootness, the Board elected to treat the motions to dismiss as motions for summary judgment and provided Concerned Carroll Citizens with an additional opportunity to respond.[1] Concerned Carroll Citizens again filed no response.

Administrative Finality

The Department and Maple Creek Mining assert that certain objections raised by Concerned Carroll Citizens in their notice of appeal are barred by the doctrine of administrative finality because they are matters which should have been raised in an appeal of an earlier permit revision granted to Maple Creek Mining in 1996. These include the following: Objection 3 (relating to stream classifications), Objection 6 (relating to the Van Hoorhis Lane Stream), Objection 7 (relating to stream uses), Objection 11 (relating to a discharge referred to as the Dunkirk discharge), Objection 12 (relating to a gas well), Objection 13 (relating to the effect of mining on the area included in the 1996 permit renewal/revision) and Objection 14 (relating to permit boundaries).

---

[1] By Order of March 2, 1999, the Board granted Concerned Carroll Citizens until March 28, 1999 to file a response to the motions.

According to the affidavit of Philip E. Handte, Chief Mining Engineer of Maple Creek Mining, each of these issues were part of the 1996 permit renewal/revision, which was not appealed by Concerned Carroll Citizens. (Handte Affidavit, para. 2, 7) Concerned Carroll Citizens did not respond to Maple Creek Mining's motion and, therefore, we shall deem these facts to be admitted. 25 Pa. Code § 1021.70(f).

The doctrine of administrative finality bars an appellant from challenging any matters approved by the Department in prior permitting actions which the appellant did not appeal. *People United to Save Homes v. DEP*, 1996 EHB 1428. Here, Concerned Carroll Citizens did not appeal the 1996 permit renewal/revision. Therefore, it is barred from now challenging issues which were a part of that action. Because Objections 3, 6, 7, 11, 12, 13 and 14 of the notice of appeal relate to the 1996 permit renewal/revision which was not appealed, Maple Creek Mining's motion to dismiss is granted with respect to these objections.

Mootness

Maple Creek Mining and the Department assert that the remaining objections contained in the notice of appeal should be dismissed on the basis of mootness. These include the following: Objections 1, 2 and 4 (relating to the development of mine entries), Objection 5 (relating to the hydrologic effect of mine entries), Objection 8 (relating to piezometers and hydrologic information) and Objections 9 and 10 (relating to the stability of mine entries).

The 1997 permit revision authorizes the development of additional mine entries under Dry Run and an unnamed tributary to Dry Run. Prior to February 3, 1998, Maple Creek Mining completed the mining of entries directly beneath Dry Run. (Handte Affidavit, para. 6) Prior to June 3, 1998, Maple Creek Mining completed the mining of entries beneath the unnamed tributary to Dry

Run and within the zone of potential influence of Dry Run. (Handte Affidavit, para. 6) All activity contemplated by the 1997 permit revision was completed by June 3, 1998. (Handte Affidavit, para. 6) In February and June 1998, John Kernic, a Department hydrogeologist and lead permit reviewer for the 1997 permit revision, inspected the underground mine upon completion of both sets of entries and found the areas to be stable. (Kernic Affidavit, para. 12) In February, June and August of 1998, Mr. Kernic also inspected Dry Run and an unnamed tributary to Dry Run within the zone of potential influence, and observed no evidence that the mining conducted under the 1997 permit revision affected Dry Run or the unnamed tributary within the zone of potential influence. (Kernic Affidavit, para. 13) Because Concerned Carroll Citizens did not respond to the Department's and Maple Creek Mining's motions, we again deem these facts to be admitted. 25 Pa.Code § 1021.70(f).

Summary judgment may be granted where there is no genuine issue of any material fact. Pa.R.C.P. 1035.2. The adverse party is required to file a response to the motion identifying one or more issues of fact. Pa.R.C.P. 1035.3(a)(1). A failure to respond may result in the entry of summary judgment. Pa.R.C.P. 1035.3(d).

Because Concerned Carroll Citizens has failed to respond to the Department's and Maple Creek Mining's motions, after being given two opportunities to do so, and has failed to identify any issues of material fact, as required by Pa.R.C.P. 1035.3, summary judgment is entered against Concerned Carroll Citizens with respect to Objections 1, 2, 4, 5, 8, 9 and 10 of the notice of appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONCERNED CARROLL CITIZENS	:	
	:	
v.	:	**EHB Docket No. 97-278-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, Permittee	:	

ORDER

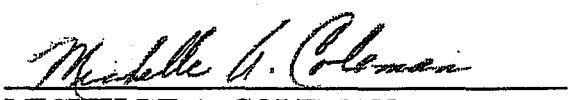
AND NOW, this 19th day of April 1999, the appeal of Concerned Carroll Citizens at EHB Docket No. 97-278-R is **dismissed**.

ENVIRONMENTAL HEARING BOARD

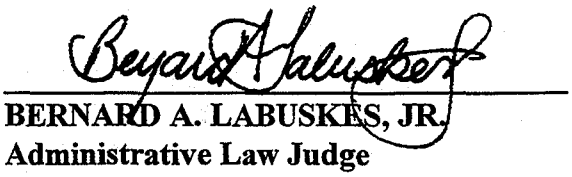
GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 97-278-R



MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 19, 1999

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

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Southwest Region

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For Permittee:
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Washington, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MARTIN N. LIVINGSTON, JR. for MARTIN N. LIVINGSTON, SR. and DOROTHY M. LIVINGSTON	:	
v.	:	**EHB Docket No. 99-045-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SPRINGETTSBURY TOWNSHIP, Permittee	:	**Issued: April 19, 1999**

OPINION AND ORDER ON MOTION TO QUASH APPEAL

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

Synopsis:

A third-party appeal is dismissed because it was filed more than 30 days after notice of the Department's action was published in the Pennsylvania Bulletin.

OPINION

On February 16, 1999, Martin N. Livingston, Jr. for Martin N. Livingston, Sr. and Dorothy M. Livingston ("Livingston") filed an appeal from the issuance by the Department of a water obstruction and encroachment permit to Springettsbury Township. The Department issued the permit on November 20, 1998. Springettsbury Township has moved to quash the appeal as untimely.

Notice of the permit issuance was published at Volume 28, No. 51, page 6234 of the Pennsylvania Bulletin on December 19, 1998. Because Livingston is not a person to whom the

Department's action was directed, and because notice of the permit issuance was published in the Pennsylvania Bulletin, Livingston was required to file his appeal within 30 days of that publication. 25 Pa. Code § 1021.52(a)(2)(i); *Lower Allen Citizens Action Group, Inc. v. Department of Environmental Resources*, 546 A.2d 1330 (Pa. Cmwlth. 1988); *Middleport Materials v. DEP*, 1997 EHB 78, 81. Under these circumstances, it is irrelevant if and when Livingston received actual notice. *Lower Allen Citizens*, 546 A.2d at 1331; *Middleport Materials*, 1997 EHB at 81. Livingston did not appeal until roughly a month beyond the 30-day deadline. Accordingly, we have no jurisdiction and this untimely appeal must be dismissed. *Rostosky v. Department of Environmental Resources,* 364 A.2d 761 (Pa. Cmwlth. 1976).

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

MARTIN N. LIVINGSTON, JR. for MARTIN N. LIVINGSTON, SR. and DOROTHY M. LIVINGSTON	:	
v.	:	**EHB Docket No. 99-045-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SPRINGETTSBURY TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 19th day of April, 1999, this appeal is DISMISSED.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 19, 1999

See next page for a service list.

EHB Docket No. 99-045-L

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

HESTON S. SWARTLEY TRANSPORTATION COMPANY, INC.	:	
v.	:	**EHB Docket No. 99-017-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 28, 1999**

OPINION AND ORDER ON MOTION TO DISMISS

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

Synopsis:

An appeal of a civil penalty assessment is dismissed for failure to prepay the penalty or post an appeal bond.

OPINION

We described the procedural history of this appeal in our previous opinion and order dated April 8, 1999, and it will not be repeated here. Suffice it to say that, after holding an evidentiary hearing, we rejected Heston S. Swartley Transportation Company, Inc.'s (Swartley's) claim of financial inability to file an appeal bond or prepay the civil penalty assessed against it under the Air Pollution Control Act. Accordingly, on March 15, 1999, we issued an order to Swartley directing it to prepay the penalty or post an appeal bond on or before April 15, 1999 or suffer dismissal of its appeal. Swartley has failed to do so. Therefore, we enter the following order.

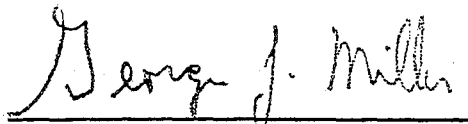
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HESTON S. SWARTLEY TRANSPORTATION COMPANY, INC.	:	
v.	:	**EHB Docket No. 99-017-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

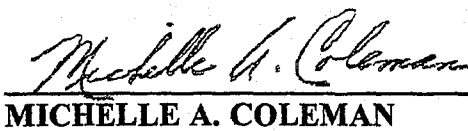
AND NOW, this 28th day of April, 1999, this appeal is DISMISSED.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 28, 1999

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CONRAIL, INC. and CONSOLIDATED RAIL CORPORATION	:	
v.	:	**EHB Docket No. 97-166-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** May 3, 1999

OPINION AND ORDER ON MOTION TO PLACE BURDEN OF PROCEEDING AND BURDEN OF PROOF ON APPELLANTS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board applies the procedural rule in effect at the time a document is filed. The Board denies a motion to place the burden of proceeding and the burden of proof on the opposing party when the party with the burden, here the Department of Environmental Protection, has failed to sustain its burden of proof to establish that the opposing party, Appellants, actually own the site and that they actually participated in the contamination.

OPINION

Conrail, Inc. and Consolidated Rail Corporation (Appellants) filed a notice of appeal challenging the Department of Environmental Protection's (Department) issuance of a July 9, 1997 unilateral administrative order concerning the Hollidaysburg Car Shop and Reclamation Plant located in Frankstown Township and Hollidaysburg Borough, Blair County (Site),

specifically requiring the cleanup of the Site. The Site, which is believed to be owned by Appellants, was used as a disposal area for solid waste supposedly generated at the Car Shop, the Reclamation Plant,[1] and Appellants' other facilities. The Frankstown branch of the Juniata River borders the Site on the north and converges with the Beaverdam tributary at the Site's eastern end.

Presently before the Board is the Department's September 18, 1998 motion to place the burden of proceeding and burden of proof on appellants and an accompanying memorandum. The Department alleges that the Board should shift the burden of proof and the burden of proceeding in this matter to Appellants because the Department has established that some degree of pollution or environmental damage is taking place or is likely to take place and that Appellants are, or should be, in possession of facts relating to the environmental damage.

On December 9, 1998, Appellants filed a response and accompanying memorandum of law.

On December 18, 1998, the Department filed a reply memorandum of law in support of its motion.

Background

The Board has been revising its procedural rules since 1995. The motion currently before the Board was filed one day prior to promulgation of a number of new rules, including revisions to the burden of proceeding and burden of proof rule. The old rule, in part, stated:

> (d) When the Department issues an order requiring abatement of alleged environmental damage, the private party shall

[1] The business operations that take place at the Reclamation Plant include dismantling and scrapping old or non-repairable railroad cars and salvaging, cleaning, and refurbishing parts from old or non-repairable railroad cars for reuse.

> nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established that :
>
> (1) Some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a *prima facie* case is made that a statute or regulation is being violated.
> (2) The party alleged to be responsible for the environmental damage will be presumed to have possession, or the duty to have possession, of facts relating to the quantum and nature of the damage.

25 Pa. Code § 1021.101(d). The new rule, which was promulgated on September 19, 1998, does not include a similar provision. 25 Pa. Code § 1021.101.

Application of Old Rule

The Department contends that under Board Rule 1021.101(d) the burden shifts to Appellants when the following two criteria are satisfied: 1) some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a *prima facie* case is made that a statute or regulation is being violated; and 2) the party alleged to be responsible for the environmental damage is in possession of the facts relating to the environmental damage or should be in possession of them. The Department alleges that these criteria are satisfied here because there is ample uncontroverted evidence that some degree of pollution or environmental damage is taking place, or is likely to take place at the Site, and that Appellants, the parties alleged by the Department to be responsible for the environmental damage are, or should be, in possession of facts relating to the environmental damage. The Department alleges that Appellants had this knowledge because they were required, among other things, to identify all hazardous wastes generated at the site and to ensure that these wastes were transported, pursuant to a manifest system, by licensed transporters to permitted treatment, storage and disposal facilities pursuant to the Solid Waste Management Act,

Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 – 6018.1003 (SWMA) and its implementing regulations.

Appellants contend the motion should be denied because the current rules do not apply to the present appeal. Appellants allege that courts have held, and the Pennsylvania Rules of Civil Procedure require, that any amendments to a procedural requirement apply to pending litigation. Thus, although the amendment to the Board rule on burden of proof and burden of proceeding was not promulgated, the amendment still applies to the instant motion.

In its reply the Department contends that the Board shall apply the rule in place at the time the motion is filed. The Department alleges that Appellants' argument is flawed because if one takes it to the logical conclusion, existing regulations would be repealed and without effect on the day new regulations are proposed. Furthermore, it is obvious that Board rules, unless otherwise specified, become effective when published in the *Pennsylvania Bulletin.*

We agree with the Department. The Board's rules do not include a specific provision addressing the effective date of an amendment to its rules. However, the Board has addressed the issue of the application of an amended rule. This Board and the Pennsylvania courts have ruled on numerous occasions that the Department is bound by its regulations, and indeed by the regulations which are in effect at the time a permit is issued even if the application had been submitted before the regulations became effective. *Kwalwasser v. DER*, 1986 EHB 24, 55. In fact the Board has addressed the issue regarding amendments to the Pennsylvania Rules of Civil Procedure and to the Rules of Appellate Procedure. In *City of Scranton and Borough of Taylor and Old Forge*, 1997 EHB 985, where the Permittee filed a motion for summary judgment on June 14, 1995, the Board held that in rendering its decision on the motion it would apply the former Rule 1035, instead of the new rules for summary judgment, Pa.R.C.P. 1035.1-1035.5,

since the motion, response, and legal memoranda were filed with the Board before the new rules became effective. *City of Scranton and Boroughs of Taylor and Old Forge*, 1997 EHB 985, Fn. 2. The Board reached the same conclusion regarding an amendment to one of the Rules of Appellate Procedure. In *City of Harrisburg v. DER*, 1993 EHB 220, the Board denied a motion for reconsideration of the Board's decision granting partial summary judgment. The Board noted that the language of the amended rule, Rule 341, did not govern in that instance because the action arose prior to July 6, 1992 which was the day the new rule became effective. *City of Harrisburg v. DER*, 1993 EHB 220, Fn. 2.

The Board believes that the same standard applies regarding its own rules. Furthermore, the language in the preamble of the final rulemaking clearly states the effective date of the new rules as, "The amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking." (emphasis added) The final-form regulations were published in the September 19, 1998 *Pennsylvania Bulletin*, Vol. 28, No. 38 which was the day after the Department filed the motion before the Board. Thus, the Board will apply the language of the rule, Rule 1021.101(d), which was in existence at the time the motion was filed.

Rule 1021.101(d)

As noted earlier Board Rule 1021.101(d) stated,

> When the Department issues an order requiring abatement of alleged environmental damage, the private party shall nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established that:
>
> (1) Some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a *prima facie* case is made that a statute or regulation is being violated.

> (2) The party alleged to be responsible for the environmental damage is in possession of the facts relating to the environmental damage or should be in possession of them.

25 Pa. Code § 1021.101(d).

The Department contends that there is little doubt that Appellants, the party alleged by the Department to be responsible for the environmental damage are, or should be, in possession of facts relating to the environmental damage because of the extensive regulatory requirements regarding the generation and disposal of hazardous waste under the SWMA.

Appellants contend that the Department has not sustained its burden of proof on this element. Appellants allege that the results of environmental sampling performed by the Department at the site are the only facts which relate to environmental damage and that in light of the Pennsylvania Railroad's and Penn Central's activities at the Site over a period of decades, the samples alone cannot establish the Department's assertions that Appellants are in possession of, or should be in possession of, any facts relating to environmental damage at the Site.

The Department contends in its reply that Appellants' allegations are incorrect because the order alleges, among other things, that Appellants, not Penn Central or the Pennsylvania Railroad, improperly disposed of the solid waste at the Site and that Appellants engaged in a number of activities in addition to the burial of drums.

Under Board Rule 1021.101(a), "In proceedings before the Board, the burden of proceeding and the burden of proof shall be the same as at common law in that the burden shall normally rest with the party asserting the affirmative of an issue. It shall generally be the burden of the party asserting the affirmative of the issue to establish it by a preponderance of the evidence." 25 Pa. Code § 1021.101(a). The moving party has the burden of proving that it is

entitled the relief requested. *Gasbarro v. DEP,* 1998 EHB 688; *Reading Anthracite Co. v. DEP*, 1997 EHB 581; *Bethenergy Mines, Inc. v. DEP*, 1997 EHB 282.

We agree with Appellants that the Department has failed to sustain its burden of proof on the element of possession of facts. Since the Department issued the order under the SWMA and the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001, we will consider the request in light of those statutes. The Commonwealth Court and the Board have held that liability for violations of the SWMA does not attach simply by reason of ownership of the land on which the violations took place. *DER v. O'Hara Sanitation Company*, 562 A.2d 973 (Pa. Cmwlth. 1989); *Barkman v. DER*, 1993 EHB 738, 745. Rather affirmative participation in the violations is required for corporate officers and employees, even when they were joint owners of the property. The Commonwealth Court and the Board have held that corporate officers are not liable for violations of the SWMA absent some affirmative participation in the violations. *Kaites v. Commonwealth v. DER*, 529 A.2d 1148 (Pa. Cmwlth. 1987); *Newlin Corporation v. DER*, 1989 EHB 1106, *affirmed* 579 A.2d 996 (Pa. Cmwlth. 1990). Also, that employees, even if they are joint owners of the land on which a facility is located, are not liable for violations of the SWMA absent some affirmative participation in the violations. *Blosenski v. DER*, 1992 EHB 1716; *Barkman v. DER*, 1993 EHB 738.

The Department as the moving party has the burden to prove by a preponderance of the evidence that it is entitled to the relief requested in its motion. The Department has not sustained its burden because it did not present any evidence that Appellants actually own the parcel which composes the Site in order to apply either the SWMA or the Clean Streams Law. Even if we assume that Appellants are the owners under the SWMA the Department must also establish that Appellants participated in the violations at the Site. However, the Department has not presented

any evidence, other than citing its own order which has the name of Appellants as the violator in its supporting memorandum, to sustain its burden of proof. Consequently, we must deny the Department's motion to shift the burden of proof. Furthermore, the factual issues of who did the dumping and who owns the property are matters for a hearing on the merits.

Accordingly, we enter the following order.

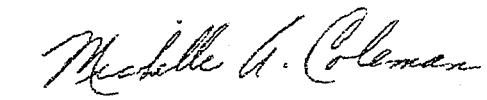
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONRAIL, INC. and CONSOLIDATED RAIL CORPORATION	:	
v.	:	**EHB Docket No. 97-166-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of May, 1999 the Department of Environmental Protection's motion to place burden of proceeding and burden of proof on Appellants is denied.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 3, 1999

See following page for service list.

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

CONRAIL, INC. and CONSOLDIATED RAIL CORPORATION	:	
v.	:	**EHB Docket No. 97-166-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** May 3, 1999

OPINION AND ORDER
ON MOTION TO COMPEL

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board will not consider documents filed by an individual who is not a real-party-in-interest to the case before the Board. The Board grants a motion to compel when 1) the attorney-client privilege is inapplicable because Appellants' counsel is arguing the privilege on behalf of a non-client; and 2) the joint defense privilege is inapplicable because the joint defense agreement was not signed and in effect prior to the sharing of information with a third party's counsel.

OPINION

Conrail, Inc. and Consolidated Rail Corporation (Appellants) have filed a notice of appeal challenging the Department of Environmental Protection' s issuance of a July

9, 1997 unilateral administrative order concerning the Hollidaysburg Car Shop and Reclamation Plant located in Frankstown Township and Hollidaysburg Borough, Blair County (Site). The Site, which is believed to be owned by Appellants, was used as a disposal area for solid waste supposedly generated at the Car Shop, the Reclamation Plant,[1] and Appellants' other facilities. The Frankstown branch of the Juaniata River borders the Site on the north and converges with Beaverdam tributary at the Site's eastern end.

History

On April 24, 1998, the Department filed a motion to compel the production of documents and answers to interrogatories.

On May 11, 1998, Appellants filed their response.

On May 19, 1998, the Department withdrew its first motion to compel since Appellants have provided the information sought by the Department.

Presently before the Board is the Department's second motion to compel responses to interrogatories and document production requests. Specifically, the Department wants Appellants to provide adequate responses to the Department's Fourth Request for Production of Documents and Third Set of Interrogatories.

Procedural Background

On December 3, 1998, the Department filed a motion to compel depositions of Carl Russo and Thomas Pendergast, both current employees of Consolidated Rail Corporation.

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[1] The business operations that take place at the Reclamation Plant include dismantling and scrapping old or non-repairable railroad cars as well as salvaging, cleaning, and refurbishing parts from old or non-repairable railroad cars for reuse.

On December 8, 1998, Mr. Russo's and Mr. Pendergast's attorney filed a response on their behalf. The response stated that Mr. Russo and Mr. Pendergast respectfully requested that the motion to compel be denied as unnecessary for Mr. Russo and be denied as premature for Mr. Pendergast.

On December 9, 1998, Appellants filed their response in which they did not object to the taking of the requested depositions, but only requested that the Board exercise its discretion to control the sequence and timing of discovery.

On December 10, 1998, the Department served Conrail with another request for information, its Fourth Request for the Production of Documents and Third Set of Interrogatories. These documents requested the following:

Interrogatories

1.a. Identify all communications between Conrail, including counsel for Conrail, and Richard L. Scheff for the period starting November 1, 1998 related to Mr. Scheff's representation of Carl Russo, Thomas Pendergast, and any other former or current Conrail employees in matter related to Conrail's Hollidaysburg Car Shop and Reclamation Plant;

b. Identify all persons with knowledge of these communications;

c. Identify all documents related to these communications.

2. Identify all documents provided by Conrail or counsel for Conrail to Richard L. Scheff for the period starting November 1, 1998 related to Mr. Scheff's representation of Carl Russo, Thomas Pendergast and any other former or current Conrail employees in matters related to Conrail's Hollidaysburg Car Shop and Reclamation Plant.

Request for Production of Documents

1. All documents relied upon in any way in responding to the Department's Third Set of Interrogatories.

2. All documents identified or the identity of which is requested in the Department's Third Set of Interrogatories.

(Exhibit 1, Department's Motion to Compel filed January 15, 1999)

On December 24, 1998, the Department filed a motion for the production of documents.

On January 4, 1999, Carl Russo filed a motion for protective order to reschedule his deposition.

On January 5, 1999, the Department filed its response. On the same day the Board issued an order in which it granted Mr. Russo's motion for protective order by canceling the scheduled January 7, 1999 deposition and rescheduling it for January 14, 1999 but with no further extension.

By January 11, 1999 letter the Department withdrew its December 24, 1998 motion to compel production of documents.

On January 11, 1999, Appellants responsed and objected to the document requests and interrogatories in each part thereof to the extent 1) they purport to require Appellants to divulge information or to produce documents protected by the attorney-client privilege, the joint defense doctrine, the work product privilege and/or other applicable privileges; 2) they seek to impose obligations on Appellants that are inconsistent with or go beyond the obligations imposed by the Pa.R.C.P.; 3) they seek documents not relevant to the issues involved in this litigation and which are not likely to lead to discovery of admissible evidence; 4) they are duplicative of each other; 5) they are vague; ambiguous or are construed in a manner placing an undue burden upon Appellants; and 6) they do not describe each item or category of documents sought by the Department with reasonable particularity as required by Pa.R.C.P. Rule 4009.11(b). In addition, Appellants

state that no documents were relied upon in responding to the Department ' s Third Set of Interrogatories.

On January 15, 1999, the Department filed its current motion to compel responses to interrogatories and document production requests. Specifically, the Department seeks 1) the identification and production of all correspondence within Conrail, including those with Conrail's counsel, and Conrail correspondence with Mr. Scheff, counsel to Mr. Russo, concerning his representation of Mr. Russo and 2) the identification of specific documents that were in Conrail's possession and were identified and/or produced to Mr. Scheff in connection with his representation of Mr. Russo.

On January 20, 1999 Mr. Russo filed his response in opposition to the motion in which he contends that in accordance with a joint defense agreement and strategy Appellants' counsel provided the Department's counsel with documents, all of which Conrail previously produced to the Department in response to prior discovery requests. Mr. Russo alleges that: 1) at all times the communications and document exchanges undertaken by defense counsel pursuant to this joint defense agreement and strategy were intended to be, and have been maintained in strictest confidence, 2) the communications between Appellants' counsel and Mr. Russo's counsel in furtherance of the joint defense effort are protected by the attorney-client and work-product privileges and may not be disclosed without his consent, and 3) there has been no waiver by Appellants.

In the Department's February 5, 1999 reply it contends Mr. Russo has no standing to be heard with respect to the motion to compel because Mr. Russo is not a party to this litigation and asks the Board to disregard his attorney's January 20, 1999 letter.

Standing

Pennsylvania applies the real-party-in-interest rule which states that all actions must be prosecuted by and in the name of the real-party-in-interest, without distinction between contracts under seal and parol contracts, and unless an exception applies, the application of this rule is mandatory. Standard Pennsylvania Practice 2d, § 14.22. A real-party-in-interest is generally defined to be a person so situated with reference to a particular cause of action that the person has the power to discharge the cause of action and to control proceedings brought to enforce it. *Id.,* § 14.23 To be the real-party-in-interest, then, one must not merely have an interest in the result of the action, but must be in such command of the action as to be legally entitled to give a complete acquittance or discharge to the other party upon performance. *Id.*

Mr. Russo, through his attorney, is not a real-party-in-interest since he does not have the power to discharge the cause of action or to control the proceedings because the Department is taking the action against Appellants and not Mr. Russo. Mr. Russo's participation in the matter is peripheral and restricted to his role or knowledge as an employee of Appellants. Thus, Mr. Russo does not have the power to discharge the cause of action or to control the proceedings, rather his interest is merely in the result. Consequently, Mr. Russo is not entitled to file a response to the Department's motion to compel. Therefore, the Board will not consider Attorney Scheff's January 20, 1999 letter filed in response to the Department's motion.

Privileges – Work Product Doctrine and Joint Defense

The burden of establishing that a privilege applies is on the party invoking it. *Andriz Sprout-Bauer, Inc. v. Beaver East, Inc.*, 174 F.R.D. 609 (M.D. Pa. 1997) citing

Colorado v. Schmidt-Tiago Construction Co., 108 F.R.D. 731, 734 (D. Colo. 1985). Whether the privilege applies is a question of law for the court to decide. Privileges in general are not expansively construed, because they necessarily impinge on the production of relevant evidence. *Andriz Sprout-Bauer, Inc. v. Beaver East, Inc.*, 174 F.R.D. 609 (M.D. Pa. 1997) citing *United States v. Nixon*, 94 S.Ct. 3090 (1974).

Work Product Doctrine

Appellants contend that the motion should be denied because the informational documents at issue are protected by the work product privilege. Appellants allege that the work product doctrine includes counsel's selection of important documents from among all of those produced in a case.

The Department argues that this allegation is flawed because it does not state the basic assumption underlying the work product doctrine which is that the disputed material must be prepared for a party that is in fact a client of the attorney. The Department alleges that the doctrine must fail for the fundamental reason that the documents were not prepared on behalf of any client represented by Conrail's counsel since Mr. Russo is not a client of Appellants' counsel. Rather, the documents at issue were prepared when Mr. Russo responded to an Office of the Attorney General ' s (OAG) criminal investigation and at that time Appellants' attorneys did not represent him because he retained his own counsel.

"Subject to the provisions of Pa. R.C.P. Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his attorney, consultant, surety. The discovery shall not include

disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes or summaries, legal research or legal theories...." Pa.R.C.P. 4003.3 The Board has noted that the work product doctrine rests upon considerations of "strong public policy. . . [I]t is essential that a lawyer work with a certain degree of privacy, from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Bradford Coal Co., Inc. v. DER*, 1985 EHB 938 citing *U.S. v. Noble*, 422 U.S. 225, 237 (1975). It appears that the information and documents compiled by Appellants' counsel for its current civil case with the Department is the material that the Department is addressing in its motion to compel. To the extent that the Department is requesting that material then the work product doctrine privilege applies. Thus, only Appellants' attorney's mental impressions, conclusions, opinions, memoranda, notes or summaries, legal research or legal theories are protected from discovery. Since we have determined that the material may not be privileged under the work product privilege, we must determine if appellants' counsel can protect the material under the joint defense privilege.

Joint Defense Privilege

Appellants contend in their response that the information and documents shared with Attorney Scheff are protected under the joint defense privilege.[2] Appellants allege that the communications and identification of documents between counsel for Appellants and Mr. Russo's counsel were made in the course of a joint defense effort and were

designed to further this effort and that the privilege has not been waived. Appellants believe that they and Mr. Russo have sufficient common interests regarding the illegal disposal of solid waste so that the privilege applies. Specifically, Appellants allege that both Mr. Russo and themselves face potential criminal charges related to alleged violations of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 - 6018.1003 (SWMA) arising from alleged disposal of solid waste at the Site. If Mr. Russo's waste management activities are found to violate the SWMA his activities potentially could be imputed to Appellants since he is their employee.

The Department contends that Appellants' arguments should be rejected because no valid joint defense agreement between the counsels of Appellants and Mr. Russo existed prior to the service of the Department's interrogatories and document production requests on December 7, 1998. In fact, the Department claims that Appellants have failed to meet their burden to show the existence of a valid joint defense agreement at the time the documents were forwarded to Mr. Scheff, have failed to show how the documents at issue furthered the joint defense strategy, have failed to show that Mr. Russo has no common interest with Appellants and no adverse interest to the Department, and incorrectly have attempted to merge this civil action before the Board with the criminal action related to the Site pending in the Attorney General's office.

The courts have noted that the joint defense privilege is an extension of the attorney-client privilege and the work product doctrine, and apply only if the other

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[2] This privilege is also known as the common interest doctrine or the common defense doctrine.

conditions of those privileges are satisfied. *See, e.g., Griffith v. Davis,* 161 F.R.D. 687 (C.D.Cal. 1995); *Waller v. Financial Corp. of America*, 828 F.2d 579, 583 n. 7 (9th Cir. 1987); *United States v. Bay State Ambulance and Hosp. Rental Serv.*, 874 F.2d 20, 28 (1st Cir. 1989); *Byrnes v. Jetnet Corp.*, 111 F.R.D. 68,71 (M.D.N.C. 1986). The joint defense privilege basically expands the application of the attorney-client privilege or the work product doctrine to circumstances in which it otherwise might not apply. *See Haines v. Liggett Group, Inc.*, 975 F.2d 81, 94 (3rd Cir. 1992) (applying joint defense doctrine to attorney-client privilege); *In re United Mine Workers of America Employee Ben. Plans Lit.*, 159 F.R.D. 307,313 n. 4 (D.D.C. 1994) (discussing application of common interest rule to both attorney-client privilege and work product doctrine). The privilege qualifies the requirement that a communication be made in confidence, and prevents waiver of the privilege to the extent confidential communications are shared between members of a joint defense. *Griffith v. Davis*, 161 F.R.D. 687 (C.D.Cal. 1995)

To establish a right to the privilege the party asserting it must show that: 1) the communications were made in the course of a joint defense effort, 2) the statements were designed to further the effort, and 3) the privilege has not been waived. *Andritz Sprout-Bauer, Inc. v. Beaver East, Inc.*, 174 F.R.D. 609 (M.D. Pa. 1997)

Appellants, the parties asserting this privilege, filed an affidavit of Attorney Scheff with their response. In the affidavit Attorney Scheff swears that: 1) on or about October 2, 1998, he was retained by one or more of Appellants' employees to represent them in connection with the Pennsylvania OAG's ongoing criminal investigation relating to, among other things, alleged waste disposal activities at Appellants' Hollidaysburg Reclamation Plant; 2) at that time Mr. Russo was not one of the clients who requested his

services; 3) from the inception of his representation of Appellants' employees he and counsel for Appellants agreed to a joint defense agreement and strategy based upon their mutual conclusion and agreement that their respective clients have common interests and defenses in connection with the pending OAG investigation and the related administrative proceeding before the Board; 4) during the week of Thanksgiving, 1998, Mr. Russo engaged him to represent him in matters relating to the ongoing criminal investigation being conducted by the OAG; 5) in accordance with the Joint Defense Agreement previously established and with Mr. Russo's approval, Mr. Russo became a party to the Joint Defense Agreement; 6) the Joint Defense Agreement was entered into orally on October 2, 1998 and reduced to writing in December, 1998 and formally executed on January 28, 1999; and 7) pursuant to the Joint Defense Agreement and in furtherance of the joint defense effort between Appellants and Mr. Russo, on or about December 7, 1998, counsel for Appellants transmitted to him certain documents that counsel had selected as most relevant to Mr. Scheff's representation of Mr. Russo.

Pa. R.C.P. Rule 201 requires, "Agreements of attorneys relating to the business of the court shall be in writing, except such agreements at bar as are noted by the prothonotary upon the minutes or by the stenographer on his notes." Pa.R.C.P. Rule 201. Agreements covered by this rule include those regarding the extensions of time for the filing of pleadings, extensions of time for complying with discovery orders agreements as to the admissibility of evidence, stipulations and similar matters. Standard Pennsylvania Practice, Goodrich Amram 2d Procedural Rules Service with Forms, § 201:1.

Based on the Rules of Civil Procedure it is clear that a joint defense agreement is the type of agreement relating to the business of the court that the rule's drafters had in

mind when they wrote the rule requiring that such agreements be reduced to writing. The issue then becomes when did the agreement become effective. Commonwealth Court has held that a proposal among counsel at a hearing, expressed upon the record, to enter into an extension agreement to be subsequently evidenced by a writing is not effective unless and until it is reduced to writing as proposed, in accordance with Rule 201. *Brookhaven v. Zoning Hearing Board*, 427 A.2d 1281 (Cmwlth. Ct. 1981). Consequently, in this case the joint defense agreement, which was orally agreed to prior to Appellants' sharing information with Mr. Scheff but only reduced to writing after the exchange, did not become effective until it was signed in January, 1999. Thus, since the information and documents were shared with Mr. Scheff prior to the effective date of the agreement, Appellants' assertion of the privilege can not be sustained.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONRAIL, INC. and CONSOLIDATED RAIL CORPORATION	:	
v.	:	**EHB Docket No. 97-166-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of May, 1999 the Department of Environmental Protection's motion to compel responses to interrogatories and document production in response to the Department's Fourth Request for Production of Documents and Third Set of Interrogatories is granted in accordance with this opinion.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 3, 1999

See following page for service list.

EHB Docket No. 97-166-C

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SECRETARY TO THE BOARD

CONRAIL, INC. and CONSOLIDATED RAIL CORPORATION	:	
v.	:	**EHB Docket No. 97-166-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** May 3, 1999

OPINION AND ORDER
MOTION TO SUSTAIN OBJECTIONS TO SUBPOENA

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants Appellants' motion to sustain objections to a subpoena and prohibits the Department of Environmental Protection from obtaining documents generated by an agent of Appellants' attorneys under the attorney-client privilege when the attorneys requested and used the information to render legal advice to their client.

OPINION

Conrail, Inc. and Consolidated Rail Corporation (Appellants) filed a notice of appeal challenging the Department of Environmental Protection's (Department) issuance of a July 9, 1997 unilateral administrative order concerning the Hollidaysburg Car Shop and Reclamation Plant located in Frankstown Township and Hollidaysburg Borough, Blair County (Site). The Site, which is believed to be owned by Appellants, was used as

a disposal area for solid waste supposedly generated at the Car Shop, the Reclamation Plant,[1] and Appellants' other facilities. The Frankstown branch of the Juniata River borders the Site on the north and converges with the Beaverdam tributary at the Site's eastern end.

Presently before the Board is the Appellants' September 21, 1998 motion to sustain objections to subpoena and accompanying memorandum. The Appellants request that the Board sustain its objections to the subpoena and prohibit the Department from seeking production of an environmental consultant's report to counsel on the grounds that the document and information are protected by the attorney-client privilege.

On November 25, 1998, the Department filed its response in opposition and an accompanying memorandum.

On December 14, 1998, Appellants filed a reply to the Department's response.[2]

History

The Pennsylvania Rules of Civil Procedure state, "A responsive pleading shall admit or deny each averment of fact in the preceding pleading or any part thereof to which it is responsive. A party denying only a part of an averment shall specify so much of it as is admitted and shall deny the remainder. Admissions and denials in a responsive pleading shall refer specifically to the paragraph in which the averment admitted or denied is set forth." Pa. R.C.P. Rule 10219(a). In addition, the Rules of Civil Procedure state, "Averments in a pleading to which a responsive pleading is required are admitted

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[1] The business operations that take place at the Reclamation Plant include dismantling and scrapping old or non-repairable railroad cars and salvaging, cleaning, and refurbishing parts from old or non-repairable railroad cars for reuse.

[2] Appellants moved to supplement the record in their response. We see no need to address this motion in light of our decision regarding this motion .

when not denied specifically or by necessary implication. A general denial or demand for proof, except as provided by subdivisions (c) and (e) of this rule, shall have the effect of an admission." Pa. R.C.P. Rule 1029(b).

The Department did not specifically deny portions of the specific allegations raised by Appellants. Thus, those facts are deemed admitted by the Department and the facts in this case are set forth below.

During the week of June 23, 1997 in response to, among other things, allegations that drums and other containers had been buried at the Hollidaysburg reclamation plant currently owned by Appellants, agents of the Pennsylvania Office of Attorney General executed a search of the reclamation plant to locate drums and other waste materials. On or about July 9, 1997, the Department issued a unilateral administrative order to Appellants requiring Appellants, among other things, to investigate the presence of contamination at the Hollidaysburg Reclamation Plant and Hollidaysburg Car Shop and to submit and implement a closure plan in accordance with 25 Pa. Code Chapter 265 and/or a cleanup plan in accordance with the Pennsylvania Land Recycling and Environmental Remediation Standards Act (Act 2), Act of May 19, 1995, P.L. 4, *as amended*, 35 P.S. §§ 6026.101 – 6026.908.

On August 8, 1997, Appellants filed a notice of appeal that, among other things, denied that Appellants disposed of the drums and other containers that were buried at the Site.

On October 30, 1997, the Department served upon Appellants its first set of interrogatories and document requests. In response to this discovery, Appellants served answers and produced 11 boxes of documents. Appellants identified on a privilege log

the documents they withheld on grounds of privilege. The log identified McLaren Hart as the consulting firm that prepared a report as the result of an audit that it conducted in 1995 "under the direction of Conrail's (Appellants) legal counsel." The Department has never moved to compel production of the report or related documents. On August 26, 1998, the Department requested the Board issue a subpoena to McLaren Hart seeking production of all documents related to the Site, including the report. The subpoena was issued as a matter of course. On August 27, 1998, in accordance with Rule 4009.21 of the Pennsylvania Rules of Civil Procedure, the Department notified Appellants of its intent to serve the subpoena and Appellants' right to object to the subpoena within twenty days. On September 15, 1998, Appellants filed and served a timely objection.

Appellants contend that Pa. R.C.P. Rule 4009.21(d)(2) empowers the Board to examine Appellants' objections and to sustain the objections. Appellants allege that the report is protected by the attorney-client privilege because: 1) McLaren Hart served as Appellants' counsel's agent and was employed to assist counsel in providing legal advice; 2) McLaren Hart, an environmental consultant, was hired to perform an environmental audit of the Site since McLaren Hart was better qualified than counsel to gather information concerning operational and other technical matters which necessarily form the basis for any legal advice that counsel may render on Appellants' compliance with applicable environmental law; 3) McLaren Hart acted under Appellants' counsel's direction and with counsel's participation to gather the necessary information; 4) the report was delivered to counsel to assist him in interpreting information from Appellants' employees; 5) counsel edited the report and rendered legal advice based upon its

contents; 6) the report has been kept confidential; and 7) the disclosure of the audit would chill attorney-client relations.

The Department argues against this allegation. The Department alleges: 1) that there was no attorney-client privilege since no attorney-client relationship existed; 2) that the environmental audit is not protected because the services sought were not for the purpose of assisting counsel in providing legal advice but rather technical expertise; 3) that Appellants' counsel only had a minimal involvement in the conduct or oversight of the audit, rather the audit was made by Appellants' Board of Directors, not its counsel; 4) that the work was directed in part by Appellants' senior environmental counsel who was not acting as a lawyer since she participated in the decision to file the appeal; and 5) that the Department's policy on environmental audits is that the Department will not request or use an environmental audit to initiate a civil or criminal action, but may seek such information to the extent that it has independently identified a violation.

Appellants allege in their reply that the report was designed to, and did, assist Appellants' counsel in providing legal advice as exemplified by the list of objectives set forth in the report itself, that Appellants' in-house and outside counsel revised the report to reflect the counsels' legal conclusions and advice, and that all Appellants' counsel acted in a legal capacity.

Discussion

Pennsylvania Rules of Civil Procedure Rule 4009.21 states :

> (a) A party seeking production (of documents and things) from a person not a party to the action shall give written notice to every other party of the intent to serve a subpoena at least twenty days before the date of service. A copy of the subpoena proposed to be served shall be attached to the notice.

(b) The written notice shall not be given to the person named in the subpoena.
(c) A party may object to the subpoena by filing of record written objections and serving a copy of the objections upon every other party to the action.
(d) (1) If objections are received by the party intending to serve the subpoena prior to its service, the subpoena shall not be served. The court upon motion shall rule upon the objections and enter an appropriate order.
(2) If objections are not received as provided in paragraph (1), the subpoena may be served subject to the right of any party or interested person to seek a protective order.

Pa.R.C.P. Rule 4009.21. The attorney-client privilege is codified at Section 5928 of the Judicial Code. 42 Pa.C.S. § 5928. This section states that an attorney is not permitted to testify to confidential communications made to the attorney by the attorney's client, unless the attorney-client privilege is waived by the client. Courts have noted that the attorney-client privilege obstructs the truth-finding processes and runs counter to the aims of the law; therefore, it should be construed narrowly. *Clever v. DEP,* 1998 EHB 1174; *The Barnes Foundation v. Township of Lower Merion,* 1997 U.S. Dist. LEXIS 5202 (E.D. Pa., 1997); *In re Grand Jury Proceedings,* 517 F.2d 666 (5th Cir. 1975).

In a discovery dispute, the party asserting the attorney-client privilege has the burden of showing by affidavit or record evidence that precise facts exist as to bring the communication at issue within the narrow confines of the privilege.[3] *Maleski v. Corporate Life Ins. Co.*, 646 A.2d 1 (Pa. Cmwlth. 1994); *Kocher Coal Company v. DER,* 1986 EHB 945; *The Barnes Foundation v. Township of Lower Merion,* 1997 U.S. Dist. LEXIS 5202 (E.D. Pa., 1997).

[3] Some cases place the burden of proof on the party asserting that disclosure would not violate the attorney-client privilege. *See, e.g., Brennan v. Brennan* 422 A.2d 510 (Pa.Superior 1980). However, those cases do not involve a discovery dispute in a civil matter.

The Pennsylvania Superior Court has recognized that the attorney-client privilege attaches to the attorney's agents. *Commonwealth v. Mrozek*, 657 A.2d 997 (Pa. Super. 1995); *Commonwealth v. Noll*, 662 A.2d 1123 (Pa. Super. 1995). Furthermore, Wigmore states,

> The privilege protects communication to the attorney's clerks and his other agents (including stenographers) for rendering his services. The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.

Citing 8 Wigmore *Evidence* § 2301. The court held that where legal assistance is rendered by an agent of an attorney, communications are permanently protected from disclosure by the agent, the attorney, or the client, unless waived by the client. *Commonwealth v. Noll*, 662 A.2d 1123 (Pa. Super. 1995). The Federal District Court for the Middle District of Pennsylvania has held that documents provided by an environmental consultant to in-house or outside counsel for the purpose of explaining or interpreting technical data so as to allow counsel to provide legal advice to a client in connection with, among other thing, responding to demands of the state or federal regulators are protected under the attorney-client privilege. *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609 (M.D. Pa. 1997) This court also held that the privilege applied to environmental consultant generated reports if they were circulated among the consultants and attorneys for comment and review if the drafts contain comments or notations of counsel. *Id.*

We agree with Appellants that the McLaren Hart report is protected by the attorney-client privilege. Appellants presented sufficient evidence to establish that they hired McLaren Hart to act as an agent of Appellants' counsel and to assist in-house and outside counsel by providing technical assistance in order to render legal advice regarding the Site. (Appellants' Exhibit A: Affidavit of Rodney B. Griffith, Esq.; Department's Exhibit B: Deposition of Rodney B. Griffith, Esq. pp. 55-71) Attorney Griffith testified that Appellants' counsel submitted comments on the draft report of McLaren Hart and consequently the final report was different from the draft report as the result of Counsels' comments. (Department's Exhibit B: Deposition of Rodney B. Griffith, Esq. pp. 60-62) Furthermore, Raymond W. Kane, an environmental consultant hired by Appellants' counsel along with McLaren Hart to perform an environmental audit at the Site, testified that he was instructed that attorney-client privilege procedures were to be followed in this case thus written communications, such as the report, would be sent only to Appellants' counsel. (Department's Exhibit A; Deposition of Raymond W. Kane, p.77) Appellants have sustained their burden of proof to invoke the attorney-client privilege regarding the report.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONRAIL, INC. and CONSOLIDATED RAIL CORPORATION	:	
v.	:	**EHB Docket No. 97-166-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of May, 1999 the Board grants Conrail, Inc. and Consolidated Rail Corporation's Motion to Sustain its Objections to the Subpoena and prohibit the Department from obtaining documents protected by the attorney-client privilege in accordance with this opinion.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 3, 1999

EHB Docket No. 97-166-C

c: **DEP Bureau of Litigation**
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SECRETARY TO THE BOARD

GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 98-166-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBINSON COAL COMPANY, Permittee	:	**Issued: May 10, 1999**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Partial summary judgment is granted to the Department. The Appellant is collaterally estopped from raising issues which have been litigated and adjudicated in an earlier appeal. The Appellant is barred by the doctrine of administrative finality from raising issues which should have been raised in an earlier appeal. Matters pertaining to a Stage I bond release are outside the scope of an appeal of Stage II and III bond releases and are, therefore, barred on the basis of relevancy. Where it is not clear on the face of the notice of appeal that certain issues are outside the scope of this appeal, summary judgment will not be granted; however, the Appellant will be required to specify in detail the basis for his objections.

OPINION

This matter involves the appeals of George M. Lucchino from the Department of Environmental Protection's (Department) approval of bond releases for two surface mines operated by Robinson Coal Company (Robinson) in Washington County, Pennsylvania. The Department approved Stage II and III bond release for the McWreath I site, and Stage III bond release for the McWreath II site. The Department has filed a motion for summary judgment, asserting that a large part of Mr. Lucchino's appeal is barred by the doctrines of collateral estoppel, administrative finality and relevancy. It further asserts that the facts surrounding the remaining issues are not in dispute and that the Department is entitled to judgment on them as a matter of law. Mr. Lucchino filed a response to the Department's motion. Although Mr. Lucchino's response fails to comply with the Board's rule at 25 Pa. Code § 1021.70(e), governing responses to motions, we shall nevertheless consider it in ruling on the Department's motion, given Mr. Lucchino's status as a *pro se* appellant. In accordance with 25 Pa. Code § 1021.73(e), the Department also filed a reply.

In its supporting brief, the Department sets forth a comprehensive history of the ongoing saga surrounding Mr. Lucchino and the McWreath mine sites. Substantial Board resources have been devoted to hearing, analyzing and adjudicating these claims. In an appeal docketed at EHB Docket No. 95-185-R (Consolidated with No. 96-222-R), Mr. Lucchino challenged the Department's release of the Stage I and II bonds for the McWreath II site. Following a hearing which spanned several weeks and two site visits to Mr. Lucchino's property, the Board issued an adjudication finding no merit to Mr. Lucchino's appeal. *Lucchino v. DEP and Robinson Coal Co.*, 1998 EHB 473. Mr. Lucchino appealed the Board's decision to the Commonwealth Court, and the court affirmed the Board. *Lucchino v. Department of Environmental Protection*, No. 1730 C.D. 1998 (December 4,

1998).

Standards for Bond Release

The standards for bond release are set forth in Section 4(g) of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, 52 P.S. §§ 1396.1 – 1396.31, at § 1396.4(g), and in the regulations at 25 Pa. Code § 86.174.

A site qualifies for Stage I bond release when the area "has been backfilled or regraded to the approximate original contour or approved alternative, and when drainage controls have been installed in accordance with the approved reclamation plan." 25 Pa. Code § 86.174(a).

A site qualifies for Stage II bond release when it meets the following standards:

(1) Topsoil has been replaced and revegetation has been successfully established in accordance with the approved reclamation plan.

(2) The reclaimed lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of the acts, regulations thereunder or the permit.

(3) If prime farmlands are present, the soil productivity has been returned to the required level when compared with nonmined prime farmland in the surrounding area, to be determined from the soil survey performed under the reclamation plan....

(4) If a permanent impoundment has been approved as an alternative post-mining land use, the plan for management of the permitted impoundment has been implemented to the satisfaction of the Department.

25 Pa. Code § 86.174(b).

A site qualifies for Stage III bond release when it is capable of supporting the approved post-mining land use; the permittee has achieved compliance with the applicable statutes, regulations and permit conditions; and the applicable liability period has expired.[1] 25 Pa. Code § 86.174(c).

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1 The liability period for a surface mine is five years after completion of augmented seeding, fertilization, irrigation or other work necessary to achieve permanent revegetation of the permit

Collateral Estoppel

We first address the Department's claim that a number of the issues which Mr. Lucchino has raised in his appeal were raised and adjudicated in prior appeals filed by Mr. Lucchino in connection with earlier bond releases on the McWreath II site. Having reviewed Mr. Lucchino's notice of appeal and response, we agree that Mr. Lucchino is attempting to resurrect issues which were litigated at considerable length in his earlier appeals, and which have been ruled on by the Board.

The doctrine of collateral estoppel prevents a question of law or issue of fact which has been litigated and adjudicated in a court of competent jurisdiction from being relitigated in a subsequent suit. *Meridian Oil and Gas Enterprises, Inc. v. Penn Central Corp.*, 614 A.2d 246, 250 (Pa. Super. 1992). It is designed to prevent relitigation of issues which have been decided and have substantially remained static, both factually and legally. *Booher v. DER*, 1992 EHB 1638, 1645.

With regard to the Stage III bond release for the McWreath II site, Mr. Lucchino contends that Robinson trespassed on his property (Objection 3.i), that Robinson mined off the permitted and bonded area (Objection 3.j), that the reclaimed area is too rough to mow (Objection 3.k) and that the reclaimed area contains numerous depressions (Objection 3.l). He also contends that Robinson is responsible for a seep near his driveway (Objection 3.n) and "wash out" near the Ann Pershina property line (Objection 3.o). Mr. Lucchino raised each of these issues in his earlier appeal and testified at great length regarding these matters at the hearing. Indeed, in support of his response, Mr. Lucchino has attached portions of the transcript from the prior hearing. In addition, the Board conducted two site views of Mr. Lucchino's property and observed the areas where Mr. Lucchino alleged there were problems. These issues have been fully litigated and adjudicated in the previous

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area. 25 Pa. Code § 86.151(a).

appeal, and Mr. Lucchino is collaterally estopped from relitigating them in the present appeal.

In his response, Mr. Lucchino argues, "After the Board's ruling of May 15, 1998, the Regulations have been modified, regarding bond release." (Response, para. 4) He contends that since the regulations have changed, he has not had a "full and fair opportunity to litigate. . .under the new law. . . ." Mr. Lucchino is referring to Section 86.175 of the regulations, which was amended in November 1997. *See* 25 Pa. Code § 86.175. Section 86.175 sets forth the schedule for release of bonds.

Prior to its amendment, Section 86.175 read in relevant part as follows:

> The Department will not release any portion of the liability under bonds applicable to a permit area or designated phase of a permit area until it finds that the permittee has accomplished the reclamation schedule of this section.

25 Pa. Bulletin 5837. The amended section now reads as follows:

> The Department will not release any portion of the liability under bonds applicable to a permit area or designated phase of a permit area until it finds that the permittee has complied with §§ 86.171, 86.172 and 86.174 (relating to procedures for seeking release of bond; criteria for release of bond; and standards for release of bonds.)

25 Pa. Code § 86.175(a).

We find no merit to Mr. Lucchino's argument that the amendment to Section 86.175 requires a re-opening of issues litigated in his earlier appeal. First, Section 86.175 was amended in November 1997, six months *prior* to our May 15, 1998 adjudication. If Mr. Lucchino believed that the change in regulation affected the issues raised in his earlier appeal, the appropriate manner for addressing this would have been to request leave to supplement his post-hearing brief in that appeal.

Now is not the time for redressing issues which Mr. Lucchino feels were not adequately addressed in his earlier appeal.

Second, and more important, the amendment to Section 86.175 did not add any new standards for bond release. It merely added a cross-reference to other existing sections of Chapter 86 relating to bond release, with which the permittee was already required to comply. 27 Pa. Bulletin 6054; 25 Pa. Bulletin 5891. It did nothing to change the already-existing standards. Therefore, the amendment to Section 86.175 provides no basis for reopening issues litigated in the earlier appeal.[2]

The Department also asserts that numerous regulatory, statutory and permit provisions cited by Mr. Lucchino have been litigated in his prior action. Mr. Lucchino's appeal contends that 37 regulations (spanning Chapters 86 and 87 of the mining regulations), six permit conditions, two permit modules, and one statutory provision have been violated by the Stage III bond release at the McWreath II site. With regard to the Stage II and III bond releases at the McWreath I site, he contends that only 36 regulations have been violated, in addition to the same six permit conditions, two modules and one statutory provision. Unfortunately, he fails to provide any reason why he believes these provisions have been violated. While the Board may be called upon to make rulings requiring great wisdom, it has not yet mastered the art of reading appellants' minds. The Department is correct in stating that a number of these provisions were litigated by Mr. Lucchino in his earlier appeal and that a number of the provisions do not appear to be relevant to Stage II and III bond release. Nevertheless, without knowing Mr. Lucchino's basis for believing these provisions have been violated by Robinson and the Department in the present action, we cannot summarily dismiss

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2 Section 86.174 was also amended at the same time. However, with the exception of a minor

his objections at this time. Summary judgment is appropriate only where the right to judgment in the movant's favor is clear and free from doubt. *Hayward v. Medical Center of Beaver County*, 608 A.2d 1040 (Pa. 1992); *Township of Florence v. DEP*, 1996 EHB 1399, 1400. However, by separate order of this Board, Mr. Lucchino will be required to specify in detail in his pre-hearing memorandum the basis for his objections before being permitted to litigate them. Any matters which were litigated in the appeal of the Stage I and II bond release for the McWreath II site, or which should have been raised in that appeal, will not be permitted in this appeal.[3]

Administrative Finality

The Department argues that because Mr. Lucchino did not appeal the Stage I bond release for the McWreath I site, he is barred by relevance and the doctrine of administrative finality from raising any issues relating to Stage I release. We agree that the doctrine of administrative finality bars Mr. Lucchino from litigating any matters related to the Stage I bond release for the McWreath I site. Where a party is aggrieved by an administrative action of the Department and fails to pursue his statutory appeal rights, neither the content nor the validity of either the Department's action or the regulation underlying it may be attacked in a subsequent administrative or judicial proceeding. *Smedley v. DEP*, 1998 EHB 1281, 1284.

With regard to the McWreath I site, Mr. Lucchino asserts that the area reclaimed by Robinson is filled with numerous depressions (Objection 3.k). Because backfilling and regrading to approximate original contour is a factor of Stage I bond release, 25 Pa. Code § 86.174(a), and Mr. Lucchino did not appeal the Department's approval of Stage I bond release for the McWreath I site, he is now barred by the doctrine of administrative finality from raising

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change to the title of subsection (d), the text remained the same. 27 Pa. Bulletin 6044.

this issue.

In Objection 3.j of his notice of appeal, Mr. Lucchino avers that the area reclaimed by Robinson is too rough to mow. The Department argues that this objection also relates to Stage I bond release and is, therefore, barred by administrative finality. However, a requirement of Stage II bond release is that vegetation has been successfully established in accordance with the approved reclamation plan. 25 Pa. Code § 86.174(b)(1). On its face, Objection 3.j could relate to Stage II bond release. Without further information, we cannot grant the Department's request to dismiss this objection.

Likewise, we must deny the Department's request to dismiss Mr. Lucchino's objection that Robinson did not comply with certain permit conditions.[4] The Department asserts that these permit conditions are not related to Stage II or III bond release. However, because Mr. Lucchino's appeal fails to set forth the content of the allegedly violated conditions, and because we do not have a copy of the permit conditions in their entirety before us, we are at a loss to rule that the conditions in question have no relevance to the present appeal.

Other Matters

Other matters raised by Mr. Lucchino are simply outside the scope of the appeal. With regard to the Stage II and III bond releases for the McWreath I site, Mr. Lucchino raises an issue regarding the alleged seep near his driveway (Objection 3.m). The "driveway seep" was discussed at great length by Mr. Lucchino during the hearing on his earlier appeal of the McWreath II bond releases, and was also a part of one of the site views for that appeal. *Lucchino*, 1998 EHB at 479-80, Findings of Fact 44-48, and at 482-83. Not only is Mr. Lucchino collaterally estopped from

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3 At that time, the Board will entertain motions to limit issues.

relitigating this issue in the present appeal, but it is also outside the scope of that portion of this appeal relating to the McWreath I site.

In his appeal of both the Stage III bond release for the McWreath II mine site and the Stage II and III bond releases for the McWreath I site, Mr. Lucchino contends that "[v]iolations of the mining regulations or permit conditions, which occurred when the site was being mined, are relevant to Stage I or Stage II or Stage III Bond Release." In addition, with regard to the McWreath I site, Mr. Lucchino avers that Robinson mined off the permitted and bonded area (Objection 3.i). This Board has already addressed this issue and has ruled that alleged violations of the mining regulations or permit conditions which occurred when the site was being mined are not relevant to bond release. *Lucchino*, 1998 EHB at 483, 484. The Board's ruling was affirmed by the Commonwealth Court. *Lucchino v. Department of Environmental Protection*, No. 1730 C.D. 1998 (December 4, 1998), *slip op.* at 3. Moreover, the Board further found that any violations alleged to have occurred during mining had been corrected. *Lucchino*, 1998 EHB at 483.

With regard to the remaining issues, the Department has provided the affidavit of Mining Specialist, Larry Jadyk, whose job it is to inspect mine sites for Stage II and III bond release. Mr. Jadyk inspected both the McWreath I and II sites to determine whether they met the criteria for bond release. He states in his affidavit that Robinson has completed the reclamation work necessary for bond release. Although Mr. Lucchino has not provided an affidavit or other documentation to counter Mr. Jadyk's observations, we cannot grant summary judgment based on Mr. Jadyk's conclusions alone. The issue of whether Robinson has met the regulatory requirements entitling it to bond release involves questions of fact, on which the Board must hear testimony. *See, e.g.,*

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4 Mr. Lucchino's appeal contains several objections which have no corresponding number.

Township of Florence, 1996 EHB at 1404-05 (Declarations of Department personnel regarding landfill emissions did not constitute sufficient uncontroverted evidence on which the Board could grant summary judgment to the permittee.)

In conclusion, summary judgment is granted to the Department on Objections 3.k and 3.m with regard to the McWreath I bond releases and Objections 3.i, 3.j, 3.k, 3.l, 3.n and 3.o with regard to the McWreath II bond release. In addition, summary judgment is also granted to the Department with respect to Mr. Lucchino's claim that violations occurred during mining.

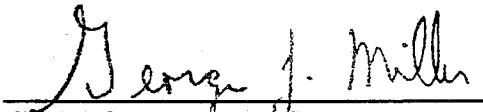
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 98-166-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBINSON COAL COMPANY, Permittee	:	

ORDER

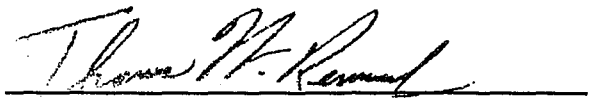
AND NOW, this 10th day of May, 1999, the Department's Motion for Summary Judgment is granted in part. The Department is granted summary judgment on Objections 3.k and 3.m with regard to the McWreath I bond releases and Objections 3.i, 3.j, 3.k, 3.l, 3.n and 3.o with regard to the McWreath II bond release. Summary judgment is further granted to the Department with respect to Mr. Lucchino's claim that violations occurred during mining.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Docket No. 98-166-R



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 10, 1999

c: **DEP Bureau of Litigation**
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Southwest Region

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Neville Island, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JEANETTE M. FARMER	:	
GMEC ASSOCIATES, INC.	:	
aka GMEC	:	
FARMER CO./GMEC	:	
	:	
v.	:	**EHB Docket No. 98-129-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued:** May 14, 1999
PROTECTION	:	

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

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

Synopsis:

The Department of Environmental Protection (the "Department") invalidated a company certification issued pursuant to the Storage Tank and Spill Prevention Act (the "Act"), 35 P.S. § 6021.101 *et seq.*, when it discovered that it had issued two certifications to the same company. The Department also denied a subsequently formed corporation's attempt to renew that improvidently granted certification three years later. The Department's actions were proper and this appeal is dismissed.

OPINION

The essential facts of this matter are not disputed. M.W. Farmer & Co.[1] obtained a "company certification" from the Department on March 9, 1992. (Affidavit of Jeanette Farmer, paragraph 2.) A company certification permits a company to perform tank handling or inspection activities and employ certified installers and inspectors. 25 Pa. Code § 245.121.

On June 19, 1995, M.W. Farmer & Co. registered the fictitious name of "G.M.E.C." (Farmer affidavit, paragraph 4.) G.M.E.C. was not a legal entity separate from M.W. Farmer & Co. Rather, G.M.E.C. was simply another name that M.W. Farmer & Co. was entitled to use in the course of conducting its business. *See* Fictitious Names Act, 54 Pa. C.S. § 332. In the eyes of the law, G.M.E.C. and M.W. Farmer & Co. were one and the same.

An applicant identifying itself as "GMEC" applied for a company certification on September 15, 1995.[2] The Department approved GMEC's application three days later. (Farmer response to DEP motion, paragraph 13.) The Department should not have done so. At the time, GMEC was nothing more than a registered fictitious name for M.W. Farmer & Co. M.W. Farmer & Co. was already a certified company. The Department issued two different certifications to the same company. The Department presumably did not catch the error because GMEC (aka M.W. Farmer & Co.) did not list its own federal tax identification number. Instead, it listed the social security

[1] "M.W. Farmer & Co." appears in several different forms throughout the documents and pleadings of record, including "Farmer Co." (Notice of Appeal), "M.W. Farmer Company" (Appellants' response to motion for summary judgment), "M.W. Farmer Co." (Registration of Fictitious Name, DEP Motion Ex. 3), "M. W. Farmer & Company" (Employer's Initial Statement, DEP Motion Ex. 6), and "M W Farmer & Co" (DEP Certification , DEP Motion Ex. 10). It is apparent that all of these appellations refer to the same entity, and we will use "M.W. Farmer & Co."

[2] The Appellants have treated "G.M.E.C." and "GMEC" as synonymous, and we will do the same. (Farmer affidavit, paragraph 4; Notice of Appeal, objection (3)).

number of Luis Gonzales. (Farmer affidavit, paragraph 8.) The application also listed Luis Gonzalez as the president of the company and Richard Merrell as its vice-president, when, in fact, those two individuals were not at the time officers of GMEC (aka M.W. Farmer & Co.). (Appellants' response to DEP motion, paragraph 36.)

About two months later, on November 20, 1995, "G.M.E.C. Associates, Inc." submitted articles of incorporation to the Department of State's Corporations Bureau. (Farmer affidavit paragraph 10.) Luis Gonzales was the incorporator. (Farmer affidavit, paragraph 10; DEP motion Exhibit 2.) It was on that date that G.M.E.C. Associates, Inc.'s corporate existence legally began. *See* Section 103(a) of the Business Corporation Law, 15 Pa. C.S. § 1309(a) (corporate existence begins upon filing of articles of incorporation where no other date is specified).

The sole question in this appeal boils down to whether "G.M.E.C. Associates, Inc." can utilize the company certification that was obtained by "GMEC" at a time when GMEC was merely another name for M.W. Farmer & Co. The question is before us because "GMEC" filed a *renewal* application for a company certification on April 29, 1998. "GMEC" listed M.W. Farmer & Co.'s federal tax identification number (23-2531914) on the renewal application. (Farmer affidavit, paragraph 15.) "G.M.E.C. Associates, Inc." had a different tax number (23-2831001).(*Ibid.*) It was during its review of the renewal application that the Department perceived for the first time that the *original* certification had been improvidently issued. Accordingly, it simultaneously invalidated the original certification and denied the renewal application. The Department sent its invalidation letter to "Jeanette M. Farmer and Michael W. Farmer [,] Farmer Co./GMEC." This appeal of that letter was filed by "Jeanette M. Farmer [,] GMEC Associates, Inc. aka GMEC [,] Farmer Co./GMEC." The Department has moved for summary judgment and the Appellants have opposed that motion.

The Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R. Civ. P. 1035.2; *M.W. Farmer Co. v. DEP*, EHB Docket No. 98-055-C (Opinion and order issued December 1, 1998). As previously noted, the essential facts in this appeal are not disputed. The matter is, therefore, ripe for summary judgment.

It is important to point out that the Department took two actions here: It invalidated GMEC's 1995 certification, and it refused to renew that application in 1998. In challenging the Department's invalidation of the original certification, the Appellants would have us disregard the fact that GMEC did not exist as a separate legal entity at the time. They argue that they intended to eventually operate GMEC as a separate entity. (Farmer affidavit, paragraph 6.) In our view, the Appellants' future plans as they existed in September 1995 are irrelevant. The undisputed fact remains that, at the time that it applied for and obtained the original company certification, GMEC was simply another legal moniker that could be used by M.W. Farmer & Co. It was not a separate company in the eyes of the law. 54 Pa. C.S. § 332.

Aside from the commonsensical notion that the Department should not issue two separate certifications to the same company, the Department's action in invalidating the original application is fully supported by the applicable regulations. 25 Pa. Code § 245.131 provides that a company certification "will not be valid if obtained through fraud, deceit, or the submission of inaccurate data or qualifications." The 1995 application contained several pieces of inaccurate data. First, it is at least questionable whether GMEC should have been listed as a "company." In any event, the

application specifically directed the applicant to list all other names used by the company within the previous seven years. (DEP motion, Ex. 7) GMEC should have listed its corporate alias, M.W. Farmer & Co. It did not. It left the section blank. GMEC (aka M.W.Farmer & Co.) also listed the wrong federal tax identification number, and it listed the wrong officers. Finally, the application required GMEC to list all other certifications held by the company. Again, GMEC should have, but did not, list M.W. Farmer & Co.'s certification. In short, the entire application left the impression that GMEC was a separate, independent company when the Appellants do not deny that legally it was not.

The Department has never accused the Appellants of fraud or deceit in filing the application the way that they did. We too are willing to give the Appellants the benefit of the doubt by concluding that they honestly, albeit mistakenly, believed that GMEC should have been treated as a separate legal entity when in fact it was nothing more than a legal alias. But regardless of whether their conduct was reasonable or unreasonable, they were mistaken. The application was replete with inaccurate data, and the Department did not abuse its discretion or act arbitrarily and capriciously or otherwise in violation of the law in declaring the certification invalid once those inaccuracies were discovered.

The second action of the Department that is being challenged is its denial of "GMEC's" renewal application. Although denying the renewal of a certification that was improvidently granted in the first place would seem to follow as night follows day, the Appellants again argue that the Department should have ignored legal formalities. They seem to suggest that - - although the original certification was based on inaccurate data - - "G.M.E.C. Associates, Inc." was a legitimate, separate company at the time of the *renewal* application, so the Department should have looked past

the deficiencies in the original application. In other words, it should have treated the original certification as having been issued to G.M.E.C. Associates, Inc.

Once again, the Appellants' argument flies in the face of logic and the law. For the Department to have renewed a certification that unquestionably was improvidently granted in the first instance would have impermissibly perpetuated an error. Rather than clarifying the books, confusion would have continued to reign.

Furthermore, even assuming for purposes of argument that G.M.E.C. Associates, Inc. could have stepped into the shoes of GMEC (aka M.W. Farmer & Co.), the original applicant, it had an obligation to amend the original company certification correcting the inaccurate or changed information. 25 Pa. Code § 245.125(b). It never did so.

Finally, the renewal application itself contained inaccurate data, independently justifying its denial under 25 Pa. Code § 245.131. Most strikingly, the company was incorrectly identified as "GMEC", which if not deliberately intended to mislead certainly had the effect of perpetuating the errors in the original application. G.M.E.C. Associates, Inc. did not list its own federal tax identification number. If G.M.E.C. Associates, Inc. was nothing more than a continuation of GMEC as the Appellants assert, then GMEC (aka M.W. Farmer & Co.) should have been identified in the sections in the application regarding previous company names and licenses. The Department was entirely justified in denying the renewal for all of these reasons.

To repeat, the Department has not accused G.M.E.C. Associates, Inc. of any deliberate wrongdoing. There is nothing that precludes G.M.E.C. Associates, Inc. from applying for its own company certification at any time. In the meantime, nothing that the Department has done regarding GMEC Associates, Inc. or "GMEC" has affected M.W. Farmer & Co.'s company certification. In

short, our ruling should have little practical significance to the parties. It seems that it would have been far less problematic and expensive for G.M.E.C. Associates, Inc. simply to have pursued its own company certification application if it was truly interested in operating as a separate company, rather than prosecuting this appeal. It is not too late to pursue that course.

Appellants also generally aver in their Notice of Appeal that the Department violated "the Appellant's" constitutional right to practice a chosen profession by arbitrarily depriving it of life, liberty and property without due process of law. We find no such violation.

A party challenging the constitutionality of an exercise of the state's police power affecting a property interest bears a heavy burden of proof. *Adams Sanitation Company, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Protection*, 715 A.2d 390, 395 (Pa. 1998). The standard to be used when considering whether there has been an unconstitutional exercise of the state's police power is as follows:

> To justify the State in ... interposing its authority on behalf of the public, it must appear, first that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Id., (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894). The determination of whether a governmental action is unduly oppressive involves consideration of the economic impact of the action on the property holder and whether the governmental interference with property can be characterized as a physical intrusion. *Id.,* citing *United Artists' Theatre Circuit, Inc. v. City of Philadelphia*, 535 Pa. 370, 381, 635 A.2d 612, 618 (1993).

The public is clearly interested in the protection of the land and water of the Commonwealth

against releases from faulty storage tanks. *See* Section 102 of the Act, 35 P.S. § 6021.102. The certification regulations are a useful component of the tank program. Requiring the Appellants to provide accurate data in a certification application cannot be described as unduly oppressive to any one of the entities or individuals involved. We conclude that the Department's lawful effort to clear up the paper trail in this matter was reasonably necessary and appropriate and not in violation of the Appellant's constitutional right to practice a chosen profession.

Accordingly, we enter the following order:

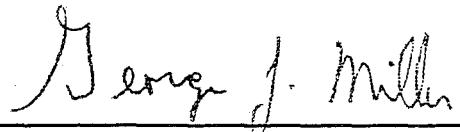
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JEANETTE M. FARMER	:	
GMEC ASSOCIATES, INC.	:	
aka GMEC	:	
FARMER CO./GMEC	:	
	:	
v.	:	**EHB Docket No. 98-129-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

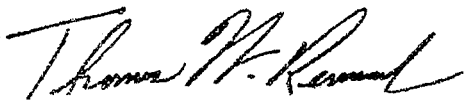
ORDER

AND NOW, this 14th day of May, 1999, it is ordered that the Department's motion for summary judgment is GRANTED and this appeal is DISMISSED.

ENVIRONMENTAL HEARING BOARD

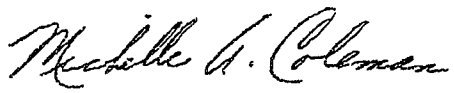


GEORGE J. MILLER
Administrative Law Judge
Chairman

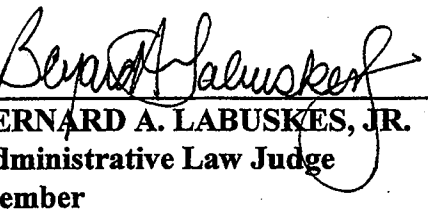


THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 98-129-L



MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED:

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

For the Commonwealth, DEP:
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Northcentral Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SPRINGFIELD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 97-071-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 18, 1999**

OPINION AND ORDER
ON MOTION TO DISMISS AND
MOTION FOR ALTERNATIVE RELIEF

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

Synopsis:

A motion to Dismiss an appeal as untimely is granted where the appellant filed its appeal with the board more than 30 days after receiving written notice of a permit issuance. The appellant, request for permission to file an appeal *nunc pro tunc* is denied because the appellant has failed to show good cause for the granting of such extraordinary relief.

OPINION

The Department of Environmental Protection ("The Department") issued NPDES Permit No. PA0051284 ("The Permit") to Springfield Township (The "Township") on February 11, 1997. The Township has filed an affidavit with this Board stating that it received actual notice of the permit issuance on or about February 13, 1997. The Township filed its notice of appeal on March 27, 1997. The Department has moved to dismiss the appeal as untimely.

Although the operative regulation has since been revised and clarified, at the time this appeal was filed, 25 Pa. Code § 1021.52(a) read as follows:

> Except as specifically provided in § 1021.53 (relating to appeal *nunc pro tunc*), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the Pennsylvania Bulletin unless a different time is provided by statute, and is perfected in subsection (b).

The Board has held in numerous cases involving this regulation that, with the exception of third party appeals and appeals *nunc pro tunc*, appellants before the Board must file their appeal within 30 days of receiving written notice of the Department's action or within 30 days of publication in the *Pennsylvania Bulletin*, **whichever comes first**. *George v. DEP*, EHB Docket No. 97-095-C (Opinion issued September 17, 1997); *Hoffman v. DEP*, EHB Docket No. 96-237-C (Opinion issued March 26, 1997); *Cogs and Associates, Inc. v. DEP,* EHB Docket No. 96-188-C (Opinion issued March 26, 1997); Ziccardi v. DEP, EHB Docket No. 96-161-R (Opinion issued January 6, 1997).

It is clear from Township's affidavit that it received actual notice of the permit issuance on or about February 13, 1997. The receipt of that letter triggered the 30-day appeal period, which then would have lasted until March 15, 1997. Because that date was a Saturday, a filing by Monday, March 17, 1997 would have been timely. The actual filing on March 27, 1997 therefore was late and deprived this Board of jurisdiction.

The Township has filed a motion for alternative relief requesting that the Board allow it to file an appeal *nunc pro tunc* under 25 Pa. Code § 1021.53(f). The Board's regulation at 25 Pa.

Code § 1021.53(f) provides as follows:

> The Board upon written request and for good cause shown may grant leave for the filing of any 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.

The Commonwealth Court has held that "good cause shown" includes delays in filing caused by breakdown of the agency's administrative processes. Borough of *Bellefonte v. Department of Environmental Resources*, 570 A.2d 129 (Pa. Cmwlth. 1990), *appeal denied*, 577 A.2d 891 (Pa.1990). Springfield Township argues that the Board's interpretation of 25 Pa. Code § 1021.52(a), which it argues is flawed (because it did not allow for filing an appeal 30 days after publication in the Pennsylvania Bulletin where that publication occurred after actual notice), constitutes a breakdown in the operation of the Board sufficient to permit a *nunc pro tunc* appeal. We obviously disagree that the board's interpretation of the operative regulation was flawed. In any event, the Board's interpretation of the regulation does not equate to a breakdown in administrative processes. Therefore, the Township's motion for alternative relief is denied.

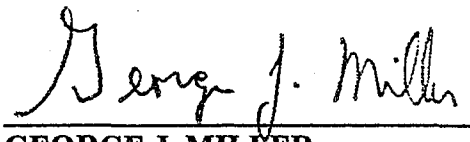
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SPRINGFIELD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 97-071-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

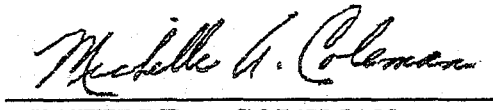
AND NOW, this 18th day of May, 1999, it is ordered that the Department of Environmental Protection's motion to dismiss is granted, and this appeal is dismissed as untimely. Springfield Township's motion for alternative relief is denied.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: March 18, 1999

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

F.R. & S., INC. d/b/a PIONEER CROSSING LANDFILL	:	
v.	:	**EHB Docket No. 97-247-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** May 19, 1999

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board affirms the assessment of a civil penalty against a solid waste landfill in the amount of $334,500 for offenses arising from violations of the Solid Waste Management Act, its regulations and a condition of the facility's permit requiring it meet a deadline for the installation of a cap and gas management system in a portion of the landfill. This is a reduction of the original $352,000 penalty because the Department failed to prove that a penalty assessed for turning off the power to a leachate collection system and the penalty for elevated gas levels at the boundary of the site were reasonable and appropriate.

BACKGROUND

This appeal by F.R. & S., Inc. d/b/a/ Pioneer Crossing Landfill (Permittee), which was filed on November 13, 1997, challenges an assessment of civil penalties by the Department of Environmental Protection. The civil penalties being appealed were assessed in the amount of

$352,000 for violations of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended,* 35 P.S. § 6018.101 - 6018.1003, arising from the operation of the Pioneer Crossing Landfill, located in Exeter Township, Berks County. With the exception of a civil penalty assessed for its failure to complete a capping project by the permit deadline, the Permittee has challenged both the amount of the civil penalties and the facts underlying the violations. *See F.R. & S., Inc. v. DEP*, 1998 EHB 336.[1]

A hearing on the merits was held for three days on December 1-3, 1998, before Administrative Law Judge George J. Miller. Following the hearing, the parties filed requests for findings of fact and conclusions of law and supporting legal memoranda. [2] The record consists of the pleadings, a transcript of 753 pages and 74 exhibits. After a full and complete review of the record we make the following:

FINDINGS OF FACT[3]

1. The Department of Environmental Protection is the agency of the Commonwealth charged with the duty and responsibility to administer and enforce the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119 (1950), *as amended,* 35 P.S. §§ 4001-4106 (APCA); the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended,* 35 P.S. §§ 6018.101-6018.1003; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended,*

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[1] The Board granted a motion for summary judgment which dismissed the Permittee's claim of discriminatory enforcement in the assessment of the civil penalty. *F.R.& S., Inc. v. DEP*, 1998 EHB 947.

[2] The last brief filed in this matter was received by the Board on April 13, 1999.

[3] The Department's exhibits admitted into evidence are referenced as "Ex. C-__", and the Permittee's as "Ex. PCL-___." A joint stipulation was entered into by all parties as Ex. B-1 and is referenced as "J.S." The notes of testimony are designated "N.T."

71 P.S. § 510-17 (Administrative Code), and the rules and regulations promulgated thereunder. (J.S. 1)

2. F.R.& S., Inc. (Permittee) is a Pennsylvania corporation which owns and operates a municipal waste landfill called Pioneer Crossing Landfill. (J.S. 2)

3. The landfill, located in Birdsboro, Exeter Township, Berks County, Pennsylvania, is approximately 92.4 acres in size and operates under the Solid Waste Permit Number 100346, which was issued by the Department on or about September 5, 1990, and further modified on December 17, 1993, September 7, 1995 and March 25, 1996. There have been additional modifications since March 25, 1996. (J.S. 3)

I. CAPPING AND GAS MANAGEMENT

A. Permitting and Construction

4. Mr. Gian Singla, Permittee's employee and agent, was the landfill manager during the events related to this appeal. Mr. Singla managed and operated the landfill for the Permittee on a day-to-day basis. (Mascaro, N.T. 604-05)

5. The older area of the landfill relevant to this appeal did not have a synthetic liner. It had numerous leachate seeps and flows. (Werner, N.T. 17-18)

6. In August, 1994, the Department inspector observed that Pioneer Crossing had completed disposal in the older portion. The inspector notified the landfill that under the Department's regulations, it was obligated to cap the 15 acre, older portion within one year. (Werner, N.T. 18; *see* Oren, N.T. 207)

7. On September 11, 1995, Pioneer Crossing requested an extension of time in which to cap the older portion of the landfill. (Oren, N.T. 204)

8. In requesting the extension, the Permittee assured the Department that it could start the project around July 1, 1996, and complete it by September 15, 1996. The landfill also informed the Department that it knew that before it could start capping, it would have to obtain the Department's approval for a gas management system. (Oren, N.T. 204-05; Ex. C-21)

9. As a result of the Permittee's request for an extension, the Department modified the permit to require that

a. the capping as shown on Plan Lf-2 be completed by December 31, 1996; and

b. the gas extraction system must be installed in conjunction with the cap because of the potential for gas migration.

(Ex. C-1; J.S. 4)

10. Fifteen acres of the "older" thirty acres of the landfill were required to be capped in accordance with the permit modification. (Oren, N.T. 207; Rivera, N.T. 151; Ex. C-1)

11. In order to comply with this permit condition, the Permittee was required first to submit an application for a gas management plan (for the control of migrating gases), and after the Department reviewed and approved of the plan, the Permittee was required to install the system in conjunction with the capping. (Oren, N.T. 290; *see also* Brown, N.T. 733)

12. Mr. Roger Fitterling, an Air Quality Engineer in the Department's Reading District Office, testified about the Permittee's gas management system. Mr. Fitterling has worked for the Department since 1979. His responsibilities include reviewing plan approval applications. (N.T. 24-25, 30)

13. A gas management plan requires an air quality plan approval. Mr. Fitterling

testified that a company must submit an application to the Department. The Department publishes receipt of the application in the Pennsylvania Bulletin and does a technical review of the application. If the application is approved by the Department, the Department issues a plan approval, analogous to a building permit, to the Permittee. The Permittee then has a period of time in which to do the construction and start up operations. (N.T. 26, 27, 30-32)

14. In April 1996, Mr. Fitterling spoke with the Permittee's manager, Mr. Gian Singla, about the timing of the application process. He mailed a plan approval application package to the landfill. (N.T. 37-38)

15. On June 20, 1996, Elias Rivera, a solid waste specialist employed by the Department, performed a regular inspection of the landfill. He asked Gian Singla about the capping schedule. Mr. Singla told him that there was nothing being developed yet and that there would be answers forthcoming eventually. (Rivera, N.T. 89)

16. By letter dated July 11, 1996, Mr. Rivera followed up by requesting a start date for construction activities and whether the work was to be done by landfill employees or an outside contractor. The letter also noted the Department's concern that the project be completed promptly to control leachate generation rates and odors produced by that portion of the landfill. (Rivera, N.T. 89; Ex. C-6)

17. On August 13, 1996, the Department wrote to the Permittee requesting a schedule for installation of the gas management system and capping, and expressing concern that the Permittee had not even submitted an application for a plan approval. (Fair, N.T. 471-73; Ex. C-43)

18. The Permittee replied to the Department's August letter. Although the Permittee indicated that manpower and cover materials had been acquired, it did not submit an application for

plan approval or provide a schedule for the capping. (Fair, N.T. 471-74; Ex. C-44)

19. On August 28, 1996, Mr. Rivera inspected the landfill. During this inspection, Mr. Rivera again asked the landfill manager, Mr. Singla, if the landfill had a capping schedule. He informed Mr. Rivera that no schedule had been developed. (Rivera, N.T. 107-08)

20. In September 1996, Mr. Fitterling again spoke with Mr. Singla. At that time, Mr. Singla informed the Department that he could not find the application package. Mr. Fitterling mailed the Permittee another application package. (N.T. 32; Ex. C-2)

21. Shortly after his September telephone conversation, Mr. Fitterling met with the landfill's president, Pasquale Mascaro, counsel, William Fox and landfill manager, Gian Singla. Mr. Fitterling reiterated that the landfill needed to get the plan approval application submitted to the Department. (N.T. 34, 35)

22. On September 27, 1996, the Department wrote to the Permittee again. The landfill had advised the Department that the landfill planned to cap only five acres of the older portion by the deadline. The Department notified the Permittee that it was not acceptable if the landfill missed the capping deadline and capped only a portion of the 15 acres. The Department noted that it was essential that gas migration be brought under control to address the continuing malodors. It reminded the Permittee that it was obligated to submit an application for a gas management system before construction of the cap and installation of the gas management system. (Fair, N.T. 474-75; Ex. C-46)

23. On October 4, 1996, the Department issued an Administrative Order to the Permittee. (J.S. 10; Fair, N.T. 476; Oren, N.T. 222; Ex. C-47)

24. In the Order, the Department required the Permittee, among other things, to

submit an application for plan approval for the gas management system for the 15 acre older portion of the landfill within 14 days. (Oren, N.T. 223; Ex. C-47)

25. The Permittee did not appeal the October 4, 1996 Order. (J.S. 11; Fair, N.T. 478)

26. On or about October 7, 1996, the Permittee submitted its application for a plan approval to construct a gas management system. (Fitterling, N.T. 35-36; Oren, N.T. 224; Fair, N.T. 482; Exs. C-3, PCL-2)

27. On November 6, 1996, the Department issued an Administrative Order to the Permittee. This order required the Permittee to, among other things, install gas collection wells in accordance with the October plan approval application and complete that portion within twenty days of the order. (J.S. 13; Fair, N.T. 480; Ex. C-48)

28. The Permittee did not appeal the November 6, 1996 Order. (J.S. 14; Fair, N.T. 481)

29. The Permittee did not complete the 15 acre capping project by December 31, 1996. (J.S. 19; Oren, N.T. 260)

30. The capping project was certified as completed on May 12, 1997. (Oren, N.T. 327; Ex. C-10)

B. Gas Management at the Landfill

31. John Oren is a sanitary engineer for the Department. His responsibilities include permitting solid waste landfills. He has been with the Department for 11 years. He testified both as a fact witness and as an expert on the issues of gas migration, gas production, and landfill operation. (Oren, N.T. 192-93)

32. David C. Brown, P.E., is the director of engineering for J.P. Mascaro. He has

been with the company for 11 years. He testified both as a fact witness and as an expert on issues of landfill design, construction and permitting. (Brown, N.T. 707-10)

33. The waste at the Pioneer Crossing Landfill decomposes and produces gases. (J.S. 5; Oren, N.T. 196-97)

34. A landfill controls off-site migration of odors from its decomposition gases by installing a gas extraction system and capping the waste. A gas management system (also called a gas extraction system) extracts the gases out of the landfill and burns them. A cap on a landfill controls the gases by not allowing them to escape. A cap on a landfill also ultimately controls leachate outbreaks by preventing rain water from entering the landfill and further prevents any leachate from escaping. (Oren, N.T. 202-03)

35. Methane gas will travel the "path of least resistance." A landfill is a source of high pressure, therefore if an area is uncovered, methane will vent into the air. If there is cover preventing gas from escaping vertically, it will travel horizontally. (Oren, N.T. 199)

36. During an inspection conducted on August 28, 1996, sampling of one gas monitoring well at the boundary of the landfill indicated that the landfill had combustible gas levels equaling or exceeding the lower explosive limit. (Rivera, N.T. 107; Ex. C-12)[4]

37. Because of the elevated methane level, the Department recommended that the landfill do a migration delineation to determine if any of the landfill combustible gas had escaped the boundaries and to submit that report within 14 days. The Department also recommended that the landfill implement an active forced gas ventilation. (Rivera, N.T. 110; Ex. C-12)

38. In an Administrative Order dated October 4, 1996, the Department again required

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[4] See Findings of Fact Nos. 74-90.

the Permittee to submit a written report delineating the extent of combustible gas migration from the landfill to the north, east and south of the landfill. The Department also required the landfill to submit within 14 days a remediation plan to control the migration of gas at the boundaries of the landfill -- a plan for active forced ventilation of gas pursuant to 25 Pa. Code § 273.292(f). (Oren, N.T. 223; Ex. C-47)

39. On November 13, 1996, the Permittee submitted its gas migration study. It showed that gases generated at the landfill were being detected in the monitoring wells at the landfill boundary and were migrating beyond the boundary. The study showed that methane gas levels exceeded the lower explosive limit at or near the areas of the property boundary, and that especially high levels of methane were present in the soil near the trailer home park. Specifically the report indicated:

a. Gas Well G-5 was about 50 feet from an occupied trailer. It had a methane concentration of 8.7%, which was above the lower explosive limit of 5%.

b. Well G-4 had a methane concentration of 43%. It was eight times the lower explosive limit.

(J.S. 15; Oren, N.T. 224-29; Exs. C-27, PCL-16)

40. In a cover letter accompanying this gas migration study, the Permittee suggested that drilling 10 gas extraction wells satisfied the requirement of a plan for an active forced ventilation system. (Ex. PCL-15)

41. On November 19, 1996, the Department noted that gas extraction wells are not an active forced ventilation system. It advised the landfill that the presence of explosive gases in soil

near residences required immediate attention. It directed the landfill to provide the Department with a plan for an active forced ventilation system to control the migration of gas off of the property to the trailer park. (Oren, N.T. 240-45; Fair, N.T. 483; Ex. C-49)

42. On November 26, 1996, the Permittee wrote to the Department about the "safety issues involved" with gas migration, and suggested that the newly installed extraction wells "alone may solve the gas migration problems." (Fair, N.T. 484-85; Ex. C-50)

43. On November 29, 1996, the Permittee submitted a gas remediation plan for the Department's review. (J.S. 16)

44. The Department determined that the plan failed to propose an active forced ventilation system as required by 25 Pa. Code § 273.292. (Oren, N.T. 246-47)

45. On December 10, 1996, the Department issued an Administrative Order to the Permittee directing it, among other things, to submit a plan for an active forced ventilation system for the landfill boundary. (J.S. 17; Fair, N.T. 486; Oren, N.T. 248; Ex. C-51)

46. The Permittee did not appeal the December 10, 1996 Order. (J.S. 18; Fair, N.T. 487)

47. The Department's expert witness, Mr. Oren, testified to a reasonable degree of scientific certainty that if the Permittee had taken steps to install an effective gas management system, the potential for gas migration would have been reduced because the capping project would have created an area of negative pressure. (N.T. 264, 340)

48. However, gas emissions would not be completely eliminated after completion of the capping project. (Oren, N.T. 347; Brown, N.T. 734)

49. Mr. Oren testified to a reasonable degree of scientific certainty that the

Permittee's failure to install a gas management system by the permit deadline increased the potential for gas migration. (N.T. 265)

50. He further testified to a reasonable degree of scientific certainty that if the potential for gas migration is reduced, the potential for harm to nearby residents and structures also is reduced. (N.T. 265-66)

51. The trailer home park adjacent to the landfill, called the Smith property, has some refuse buried underneath it. Both the Department's expert witness, Mr. Oren, and the Permittee's expert witness, Mr. Brown, agreed that the Pioneer Crossing Landfill is far greater in size than the Smith property, so the Pioneer Crossing Landfill would be a much greater source of methane gas. (Oren N.T. 236; Brown, N.T. 731)

52. The Department's expert witness provided unrebutted testimony that the gas levels described in the November 13, 1996 gas study presented a potential danger to the adjacent structures and occupants of adjacent property. (Oren, N.T. 233-34)

53. Elevated gas levels at the boundary of the landfill were decreased as a result of the installation of the forced gas ventilation system. This indicates that the landfill was indeed the source of the gas migration. (Oren, N.T. 354)

54. There was a significant volume of testimony concerning odors emanating from the landfill. Several nearby residents testified that during the period of December 1996 to May 1997 smells described as that of fresh garbage and human waste were so strong that they could not comfortably be outside their homes. (See generally testimony of Betty Hampton, N.T. 442-44; Gene Hampton, N.T. 448-50; Mary Hoover, N.T. 454-55)

55. John W. Burd, an air quality specialist for the Department, also testified that he

issued three notices of violation to the Permittee for violating malodor regulations in September and October 1996. (N.T. 379-91; Ex. C-36, C-37, C-39)

56. John Oren testified to a reasonable degree of scientific certainty that an effective gas management system would have greatly reduced odors detected off site. (Oren, N.T. 261)

C. Civil Penalty Calculation

57. Section 271.411(d)(2) of the Solid Waste Management Act regulations provides that the Department will issue a civil penalty against a person who fails to cap its landfill within the time required by applicable regulations and the approved operation plan. (25 Pa. Code § 271.411(d)(2))

58. Melissa Gross is a compliance specialist with the Department. Included in her responsibilities is the calculation and issuance of civil penalty assessments. (Gross, N.T. 547-49)

59. Ms. Gross performed the initial calculation of the civil penalty for the Permittee's failure to meet its capping deadline.

a. She assessed a moderate degree of severity. She based this judgment on information she had concerning odors from the landfill which included a letter from Exeter Township dated September 24, 1996, and three Orders that the Department had issued for the installation of a gas management system. (N.T. 564)

b. She assessed $5,000 for this aspect of the penalty. (N.T. 565)

60. In considering the willfulness factor, she took into account the permit modification which gave the Permittee an extension, two letters the Department sent to the Permittee

expressing concern that the capping had not been completed and three Orders issued by the Department.

a. Ms. Gross assigned negligence for the willfulness category in order to lower the amount of the penalty assessment. However, she did not consider the Permittee's conduct to actually be negligent.

b. She assessed $5,000 for this aspect of the penalty.

(Gross, N.T. 565-67)

61. She also considered the duration of the violation which she calculated as 131 days. (January 1, 1997 through May 11, 1997). (N.T. 566)

62. She added $5,000 for moderate severity plus $5,000 for negligence and multiplied that number by 131 days to arrive at the initial penalty calculation of $1,310,000. (Gross, N.T. 568)

63. Ms. Gross reviewed the penalty assessment with the Department's Regional Solid Waste Manager, Francis P. Fair. (Gross, N.T. 568)

64. Mr. Fair has held that position since 1990. (N.T. 467-69)

65. In addition to the factors considered by Ms. Gross, Mr. Fair also considered the combustible gas levels at the landfill. (Fair, N.T. 498)

66. They decided that based on the information, the violation fit into the reckless category. (Gross, N.T. 570)

67. Michael R. Steiner is the Director of the Southcentral Regional Office. (N.T. 574)

68. He was involved with some of the discussion concerning the civil penalty for the failure to cap the landfill by the deadline. (N.T. 577-78)

69. Through discussions with his staff he agreed that the initial assessment was too high and was involved in determining how the Department could assess a penalty that would be more "intuitively reasonable" and appropriate to the violation. (N.T. 579)

70. Mr. Steiner believed it was intellectually dishonest to call the Permittee's conduct something less than reckless. He believed the Permittee was reckless because of the number of communications and reminders which had been directed to the Permittee concerning the December 31st deadline. (Steiner, N.T. 580-81)

71. Ultimately it was determined to assess $8,750 for the moderate degree of severity and $8,750 for a reckless degree of willfulness. (Gross, N.T. 570)

72. Because the civil penalty was assessed on a daily basis which was determined to be too high, it was decided to assess the penalty on a weekly basis. It was determined that 131 days of violation resulted in 18 weeks. (Gross, N.T. 571)

73. The Department assessed a penalty of $315,000 against the Permittee for its failure to meet its permit deadline for installation of the gas management system and placement of the cap. (J.S. 21; Fair, N.T. 526; Gross, N.T. 571; Ex. C-56)

II. ELEVATED LEVELS OF COMBUSTIBLE GAS[5]

74. Before June 1996, Mr. Rivera observed employees of the Permittee taking samples from gas monitoring wells. He discovered that they were not properly sampling methane gas levels. He observed that when they sampled the wells, they drew ambient air and not gas from the well. (Rivera, N.T. 88)

75. On June 4, 1996, Mr. Singla advised Mr. Oren of the Department that only Well Nos. 1, 2, 3 and 7 of the ten gas monitoring wells at the facility were functioning because of water in the wells. (Ex. PCL-4) There is no evidence in the record as to whether or not this report was entirely volunteered by Mr. Singla or was the result of Mr. Rivera's prior observation of improper sampling of the wells by the Permittee's personnel.

76. After this condition was confirmed by Mr. Rivera's inspection on June 10, 1996, Mr. Oren advised the Permittee that all wells must be functioning within 60 days of the receipt of his June 14th letter and before the geomembrane cap is placed on the landfill. (Ex. PCL-4; N.T. 85-86)

77. On June 20, 1996, Mr. Rivera performed a regular inspection of the landfill. At that time, six of the landfill's ten gas monitoring wells were not functioning properly because of

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[5] We note that although the Department provided exhaustive findings of fact to support the civil penalty for elevated levels of combustible gas, it failed to include a discussion of the law on this point as part of its post-hearing brief. Recent decisions of the Board have held that issues ordinarily must be discussed in post-hearing briefs in order to be preserved. *See County Commissioners v. DEP*, 1996 EHB 351, 367; *Heasley v. DER*, 1994 EHB 624; *Concerned Citizens of Earl Township v. DEP*, 1994 EHB 1525, 1593. However, in order to fully dispose of all issues in this appeal and because the Department fully outlined its position on this issue in its requests for findings of fact, we granted the Department leave to address the penalty in its reply brief and granted Appellant leave to file an answering brief on this issue.

water in the wells. The Department, by letter, directed the landfill to repair its wells. (Rivera, N.T. 85-86; Ex. C-5)

78. On July 22, 1996, Mr. Rivera performed a regular inspection of the landfill. At that time, the Permittee had repaired only one gas monitoring well. (Rivera, N.T. 101)

79. The gas wells in question were repaired on July 24, 1996. (Ex. C-11, Inspection Report Comment No. 7)

80. On August 9, 1996, Mr. Rivera, accompanied by John Oren, returned to the landfill to check the gas monitoring wells. (Rivera, N.T. 102)

81. They measured combustible gas levels in the gas monitoring wells at the boundaries of the landfill. The Permittee also collected samples. Both the Department's and the Permittee's samples showed that some of the wells (Nos. 4, 5, 8 and 9) had levels of combustible gas above the lower explosive limit. (Rivera, N.T. 102-05)

a. The lower explosive limit for methane is a 5% concentration. Concentrations between 5% and 15% is highly combustible. (Rivera, N.T. 104-105; Oren, N.T. 198-200)

b. Methane concentrations above 15% are still dangerous because it is impossible to predict when the concentration of methane in air will drop and become explosive. (Oren, N.T. 198-99)

82. On August 28, 1996, Elias Rivera, a solid waste specialist employed by the Department, tested the gas monitoring wells located at the perimeter of the landfill. (J.S. 8; Rivera, N.T. 79, 106-07)

83. The August 28th sampling showed combustible gas levels in excess of the lower

explosive limit in monitoring Well No. 8 at the boundary of the landfill. Excess levels were also found at Well No. 4 which is in the site interior rather than at the boundary level. Gas levels below the lower explosive limit were found in Well Nos. 1, 5, 7 and 10 and Well Nos. 2 and 3 had no gas level readings. The Permittee took contemporaneous samples which showed the same results. (Rivera, N.T. 107; Oren, N.T. 254-55)

84. On September 13, 1996, the Department issued a Notice of Violation (NOV) to the Permittee. (J.S. 9; Rivera, N.T. 109; Ex. C-12)

85. In the NOV, the Department notified the Permittee that it had combustible gas levels equaling or exceeding the lower explosive limit at the boundaries of the site, but did not designate the well at which this exceedence occurred. (N.T. 109; Ex. C-12)

86. The Department's regulations provide that: "Combustible gas levels may not equal or exceed. . .the lower explosive limit at the boundaries of the site." 25 Pa. Code § 273.292(e)(2).

87. Elevated gas levels at the boundary of the facility were of concern to the Department because of the potential for explosion, especially near the occupied trailers on the Smith property. (Rivera, N.T. 188)

88. Three occupied dwellings are near the eastern boundary with Pioneer Crossing Landfill. An occupied trailer park is located immediately adjacent to the landfill's southeastern boundary. (J.S. 7; Oren, N.T. 208; Ex. C-4)

89. The Department assessed civil penalties for a violation of 25 Pa. Code § 273.292(e)(2), which occurred on August 28, 1996.

a. The Department found the violation to be of low severity and charged $5,000 for this aspect of the violation.

b. In addition, the Department found the Permittee's conduct to be reckless and charged $12,500.

c. The total civil penalty assessed for elevated gas levels at the site was $17,500. (Ex. C-55; Gross, N.T. 553-55)

90. The Department determined that the Permittee's conduct was reckless because of the NOV and because it did not complete the delineation of the gas migration until the Department issued an Administrative Order in October, 1996.[6] (Gross, N.T. 555)

III. LEACHATE COLLECTION SYSTEM

91. On October 23 through 25, 1996, the Department conducted inspections of Pioneer Crossing Landfill. When the Department inspected the facility on October 23, 1996, it found that the power to the sump pump for the leachate collection system for Cell #1 was turned off. (J.S. 24; Rivera, N.T. 123-25)

92. Gian Singla, the manager of the landfill, told Mr. Rivera that the pumps were turned off when there was heavy rain because the system would overload. (Rivera, N.T. 126-27; Ex. C-13 at 10)

93. In his inspection report Mr. Rivera noted that the Permittee had been warned in a 1995 inspection report that turning off the leachate collection pumps was a violation of Department regulations. (Ex. C-13 at 10)

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[6] See Findings of Fact Nos. 37-39.

94. It is important to continuously pump leachate to reduce the potential of leaks from the liner. (Oren, N.T. 267)

95. On November 15, 1996, the Department issued a NOV to the Permittee. (J.S. 25; Rivera, N.T. 127; Ex. C-15)

96. By letter dated December 13, 1996, Mr. Singla explained that the sump pumps may be overloaded if there was too much rain, so the landfill normally turns off one of the pumps. (Ex. C-16)

97. The Department assessed a civil penalty for failing to assure that free flowing liquids and leachate would drain continuously from the protective cover to the leachate treatment system without ponding or accumulating on the liner. This violation occurred on October 23, 1996 when the Permittee turned off the power to the sump pumps for the leachate collection system of Cell #1 in violation of 25 Pa. Code § 273.258(a)(1). Turning off the sump pumps also violated 25 Pa. Code § 273.258(b)(1), because it failed to provide for automatic and continuous functioning of the leachate collection system.

a. The Department found the violation to be of low severity and charged $1,000 for this aspect of the penalty.

b. However, the Department determined that the Permittee's conduct was willful because Mr. Gian Singla, the manager of the landfill, was aware of the violation and had been so warned in writing. The amount assessed for this aspect of the penalty was $12,500.

c. The total civil penalty assessed for violations relating to the leachate collection system was $13,500.

(Gross, N.T. 556-59; Exs. C-55, C-56)

IV. FAILURE TO PROVIDE INTERMEDIATE COVER

98. During the inspection on October 23-25, 1996, Mr. Rivera noted that a section of intermediate cover in the old fill area had collapsed, exposing an area of waste measuring about 10 feet high and 40 feet wide. (Rivera, N.T. 130; Exs. C-13, C-15)

99. Mr. Rivera testified that he did not believe that the area was covered to withstand a heavy storm as required by the regulations. (N.T. 139)

100. On November 15, 1996, the Department issued a NOV alleging that the Permittee did not provide intermediate cover which would cover solid waste without regard to weather at the north slope of the old fill.

a. The notice stated that the failure to provide proper cover constituted a violation of the Department's regulations.

b. The NOV requested that the Permittee apply within 14 days intermediate cover which would meet Department standards.

(J.S. 27; Rivera, N.T. 130; Ex. C-15)

101. The Department again inspected the landfill on November 22, 1996. Mr. Rivera noted that the area of exposed waste had not only not been repaired, but had grown. (Rivera, N.T. 138-39; Ex. C-20)

102. The Permittee repaired the area of exposed waste sometime between the November inspection and December, 1996. On December 13, 1996, Mr. Rivera inspected the landfill and verified that the area had been repaired. (Rivera, N.T. 140)

103. This area, known as the "North Slope," is an old area of the landfill that had

been completed for quite some time before Mr. Rivera became the facility inspector. (Rivera, N.T. 180-81)

104. Between February 1996 and October 1996, generally, intermediate cover on the North Slope was in place and was functioning adequately. (Rivera, N.T. 181)

105. David Brown testified that the condition on the North Slope was caused by unusually wet weather and by new liner construction on an adjacent area. (Brown, N.T. 709, 734-37)

106. Mr. Brown testified that the six to eight foot area between the North Slope and the construction area was an "anchor bench" that was required for construction of the new liner. To construct the anchor bench for the new liner, a cut was made into a small portion of the North Slope area. Temporary cover was placed over this area, but because of the cut, the face of this area was unusually steep. (Brown, N.T. 736-37; Exs. C-17, C-18)

107. Mr. Brown testified that the area was not repaired because it was impossible to get heavy equipment into the area without damaging the new liner of an adjacent cell. (Brown, N.T. 737)

108. The only way to get heavy equipment into the area was to build a road, which Mr. Brown felt was a lot of work for the size of the area that was uncovered. (Brown, N.T. 737)

109. He noted that it would have been possible to repair the displaced cover with manual labor. (Brown, N.T. 741)

110. The Department assessed a civil penalty for violation of 25 Pa. Code § 273.233(b)(2), for failing to provide intermediate cover which would cover solid waste without regard to weather.

a. The Department found the violation to be of low severity and charged $1,000.

b. The Department determined that the Permittee's conduct was reckless because the failure to provide cover had not been corrected between the October inspection and the November inspection and had, in fact, worsened. The Department assessed $5,000 for this aspect of the penalty.

c. The total civil penalty assessed for failure to provide proper cover was $6,000. (Gross, N.T. 559-62; Exs. C-55, C-56)

DISCUSSION

In an appeal from a civil penalty assessment, the Department bears the burden of proof. 25 Pa. Code § 1021.101(b). The assessment of a civil penalty is an exercise of the Department's discretion. *Goetz v. DER*, 1993 EHB 1401, *affirmed,* 2612 C.D. 1993 (Pa. Cmwlth. filed October 17, 1994). Thus it must prove by a preponderance of the evidence that the Permittee violated the applicable statutes and regulations, and the amount of the penalty assessed for the violations reflects an appropriate exercise of discretion. *Shay v. DEP*, 1996 EHB 1583, *affirmed*, 175 C.D. 1997 (Pa. Cmwlth. filed November 17, 1997). We will not consider whether we would assess the same penalty in the same amount as the Department did, but will only determine whether the penalty is reasonable and appropriate for each violation. Only where we find that the Department abused its discretion will we substitute our own to modify an assessment. *Id.*

Capping and Gas Management

The Permittee does not contest that it was required to cap the old portion of the landfill by

December 31, 1996, and that it failed to do so. There is also no question that the Department was required by 25 Pa. Code § 271.411(d)(2), to assess a civil penalty.[7] The only question before us is whether or not it was reasonable to assess a penalty of $315,000 for the failure to complete the capping project by the permit deadline.

The civil penalty assessment for this violation was ultimately based on the Department's determination that the violation was of moderate severity and the recklessness of the Permittee's conduct. The severity of the penalty was considered to be moderate because of the hazards created by the elevated levels of combustible gas and odor complaints received from area residents and Exeter Township, the host municipality.

Section 605 of the Solid Waste Management Act, 35 P.S. § 6018.605, details factors the Department should consider when assessing a civil penalty.

> In determining the amount of the penalty, the department shall consider the willfulness of the violation, damage to air, water, land or other natural resources of the Commonwealth or their uses, cost of restoration and abatement savings resulting to the person in consequence of such violation, and other relevant factors. . . .

35 P.S. § 6018.605. The Permittee argues that the penalty is unreasonable because the Department failed to correctly consider certain "relevant factors." We do not believe that the Department abused

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[7] That section provides:

> (d) . . . [T]he Department will assess a civil penalty if a person or municipality operates a municipal waste landfill or construction/demolition waste landfill in the following manner:
>
> . . . .
>
> (2) Fails to apply, grade or revegetate final cover in a manner and within the time required by applicable regulations and the approved operation plan.

25 Pa. Code § 271.411(d)(2)

its discretion in assessing this penalty.[8]

The Permittee first argues that there is insufficient evidence to support the Department's conclusion that the severity of the violation was "moderate." Specifically, the Permittee contends that the Department improperly considered the complaints of odors from area residents and Exeter Township. We disagree.

We find that the evidence of odors emanating from the landfill are relevant to the determination that the capping violation was of moderate severity. It is true as the Permittee contends that the NOVs for odors were issued prior to the December 31 permit deadline. However, it is uncontested that it was necessary to install the gas management system prior to application of the cap itself. Had the Permittee acted promptly in seeking approval for, and installation of the gas management system, at least some of the odor problem would have been alleviated. John Oren testified to a reasonable degree of scientific certainty that an effective gas management system would have greatly reduced odors detected off-site. Therefore, the Department did not abuse its discretion by considering this evidence.

The Permittee argues that we should not consider the testimony of the residents because the Department did not consider this evidence when it assessed the penalty. This argument is based on our decision in *Gemstar Corp. v. DEP,* 1998 EHB 53, *vacated on other grounds,*___ A.2d ___ (No. 723 C.D. 1998, Pa. Cmwlth. filed March 16, 1999). In *Gemstar* a civil penalty was assessed for the permittee's failure to provide alternate waste disposal when a facility is shut down and exceeds its

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[8] The Department suggests that "other relevant factors" only refers to factors which would potentially increase a penalty, not decrease it. We find there is nothing in the text of Section 605 which so limits the Department's discretion. Clearly facts relating to any of the factors which the Department should consider in assessing a penalty could weigh in favor of either increasing or decreasing a penalty amount.

permitted storage capacity. At hearing the Department presented evidence to support its position that the permittee violated the regulation because it had exceeded its storage capacity. In its post-hearing brief, however, the Department argued for the first time that the regulation was violated because the permittee failed to dispose of tires in accordance with the disposal ratio in its permit. We held that the Department could not provide a basis for a civil penalty for the first time in its post-hearing brief after the record had been closed because the permittee did not have notice and an opportunity to defend itself.

In contrast, the Permittee in this case had plenty of notice that odors emanating from the landfill were at issue in the assessment of the capping penalty. Even though Ms. Gross did not consider the exact resident testimony which was presented at hearing, she was aware that there had been complaints concerning odors at the landfill. (N.T. 690-91) Further, the Permittee had an opportunity to cross-examine the witnesses at hearing and provide evidence in rebuttal. Finally, the factual basis for the violation never changed. Therefore, the testimony of the residents is not excludable simply because it was not available to the Department at the time the penalty was assessed. *Pequa Township v. Herr,* 716 A.2d 678 (Pa. Cmwlth. 1998); *Warren Sand & Gravel Co. v. Department of Environmental Resources,* 341 A.2d 586 (Pa. Cmwlth. 1975) (the Board is not limited to considering the evidence the Department actually had before it at the time it acted).

Nevertheless, there is ample relevant information which supports the penalty assessment even if the evidence of odors is disregarded. It is clear that gas migration was a significant problem at the border of the landfill which would have been ameliorated with an appropriate gas management system as required by the permit modification.

Mr. Oren testified that the migration of combustible gas through the soil was a significant

problem at the landfill. The gas migration study submitted by the Permittee in November 1996, showed that methane gas levels exceeded the lower explosive limited at or near the boundary of the landfill and that high levels were detected near the neighboring trailer park, known as the Smith property. These elevated gas levels presented a potential danger to the structures and occupants of the trailer park. The Permittee even acknowledged that gas migration was a significant safety issue. Mr. Oren further testified that had a proper gas management system been installed, the potential for gas migration would have been reduced and the Permittee's failure to do so increased the potential for gas migration. Completion of the capping project would have created an area of negative pressure creating a "path of least resistance" which in turn would act to draw the methane away from the landfill boundary.

The Permittee contends that this evidence should not have been used by the Department because (1) it had already been penalized for the elevated gas readings on August 28; (2) the Department failed to take into account the contribution of the methane generated by the Smith property; (3) even if the capping project had been completed on time there still would be some migration of gas; (4) there was no *actual* danger posed to residents of the Smith property; (5) the Permittee did not unreasonably delay in dealing with the gas migration issue. In the alternative, the Permittee argues that since the gas management system was in place by January that the portion of the penalty attributable to gas migration should be discounted from January through May. We will address each argument in order.

First, we do not believe the civil penalty which was assessed for the elevated gas readings on August 28[9] precludes the Department from taking gas migration into account when assessing the

[9] See discussion below.

civil penalty for the Permittee's failure to complete the capping project. The elevated readings were taken from the Permittee's gas monitoring wells on numerous occasions both before and after the August 28th violation. See Findings of Fact Nos. 37-52 and 74-81. A penalty was assessed because those readings exceeded the regulatory limit for methane, not because at that time the Department knew methane was escaping the landfill boundaries. In contrast, the Department's main concern with gas migration was the migration of methane through the soil beyond the boundaries of the landfill. Moreover, the failure to install the cap on time contributed to the scope of the problem. While the two things are related, we do not believe the Permittee is being unfairly penalized twice for identical offenses.

Second, even the Permittee's expert agreed that any contribution which the methane generated by the Smith property contributed to the gas migration problem at the landfill was negligible at best. Mr. Brown specifically testified that the waste on the Smith property had already generated nearly all the methane it was going to generate. (N.T. 728-30)[10] Moreover, its contribution would be proportional, therefore the vast majority of methane generation was the larger source, namely the landfill. (N.T. 731) Accordingly, we do not believe that the Department abused its discretion by not mitigating the penalty because of methane generation on the Smith property.

Third, it is true that even if the capping project had been completed on time there would still be some migration of gas. However, Mr. Oren clearly stated that the Permittee's failure to install

[10] Mr. Oren also testified that the Smith property did not make a significant contribution to the gas problem. (N.T. 351)

a gas management system by the permit deadline increased the potential for gas migration. Moreover, the installation of the forced gas ventilation system decreased gas levels at the boundary of the landfill.

In sum, the Department never took the position that the completion of the capping project would have completely prevented the problem. However, the evidence clearly supports the conclusion that the delay in the completion of the capping project was a major contributor to the scope and duration of gas migration at the boundary of the landfill.

Fourth, we do not believe that the fact that the danger posed to the residents of the Smith property was potential rather than *actual* danger mitigates the penalty assessed by the Department. It is sufficient that there was a threat of danger and that the dilatory conduct of the Permittee in completing the project contributed to the threat.

Fifth, we disagree that the Permittee did not unreasonably delay in dealing with the gas migration issue. The gas management system was part of the capping project which was required to be completed by December 31, 1996. The Permittee did not even submit an application for the gas management system until October. Additionally, the Permittee was required to install an active forced gas ventilation system which required several letters and orders from the Department before the system was properly designed and installed. See Findings of Fact Nos. 37-45. Therefore, we do not believe that the Permittee acted diligently in addressing gas migration at the landfill.

Finally, the Permittee contends that the severity of the penalty should have been discounted after the gas management system was in place. Again we disagree, because it is the delay in the

completion of the project which contributed to the threat posed by the elevated gas levels and to the scope of the gas migration. We believe that the Department's penalty assessment was reasonable and appropriate for the seriousness of the violation.

The Permittee next contends that its conduct should not be considered "reckless." We disagree.

We have defined the various levels of culpability in the context of civil penalty assessments:

> An intentional or deliberate violation of law constitutes the highest degree of wilfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result. Recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.

Phillips v. DER, 1994 EHB 1266, *affirmed*, 2651 C.D. 1994 (filed June 16, 1995 Pa. Cmwlth.) (quoting *Southwest Equipment Rental, Inc. v. DER*, 1986 EHB 465, 475). It is very clear from the evidence adduced at hearing that the Permittee was aware of its capping deadline, yet failed to meet it without adequate excuse. Its conduct in this regard was at the very least "reckless." In fact, there are many cases where a violator was similarly informed of a regulatory requirement and nevertheless chose not to act, and was found by the Board to be *willful*. *See, e.g., Shay v. DEP,* 1996 EHB 1583, *affirmed*, 175 C.D. 1997 (Pa. Cmwlth. filed November 17, 1997); *DER v. U.S. Wrecking, Inc.*, 1992 EHB 829; *Zorger v. DER*, 1992 EHB 141; *DER v. Canada-Pa Ltd.*, 1989 EHB 319. However, our role is not to determine what penalty the Board would assess, and we cannot say that the Department's judgment in determining that the Permittee's conduct was reckless rather than willful was patently unreasonable.

The Permittee argues that the Department should have taken into consideration as a "relevant factor" that the capping deadline would have been missed even if the Permittee had "done everything right." Specifically it contends that the Department witness testified that it *generally* takes one year from the time an application for a plan approval is submitted to the completion of a project. (Fitterling, N.T. 29) Therefore, if the Permittee had completed the application when it was mailed in April of 1996, it could not have completed the project until April 1997.

While it may very well be true that it can take one year to complete a capping project, this fact does not mitigate the Permittee's behavior in this case. The Department witness was speaking in generalities. He did not say that it was *impossible* to complete a project in less than a year. In fact, the Permittee submitted its first application in October 1996,[11] and completed construction in May 1997, seven months later. This time frame included processing and review time by the Department. Therefore, speculation concerning the amount of time it *could have* taken to complete the project is irrelevant and was properly excluded from the Department's consideration of the civil penalty.

The Permittee also argues that the Department should have taken into account the new regulations which became effective in March 1996, and seems to suggest that these new regulations were the reason for its delay in submitting its application. We do not find the argument persuasive. First, the Permittee presented no evidence that these new regulations were in fact a cause of the delay. The regulations as an excuse for delaying the project were not mentioned in any of the conversations or correspondence the Permittee had with the Department between March and October. Although the requirements had been in place since March 1996, the Permittee did not

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[11] This application for air plan approval was not satisfactory to the Department. (Fitterling, N.T. 35) Evidently, the Permittee was able to begin some construction in the fall of 1996. (Brown, N.T. 741) It received final air plan approval in March 1997. (Fitterling, N.T. 37).

request a further extension for completion of the project until November 1996. Certainly if the Permittee had been diligently managing its project and really thought the regulations were an impediment to completing the application in a timely fashion it would have requested an extension much sooner. Hence, this factor is also irrelevant to the propriety of the civil penalty assessment.

The Permittee next argues that the Department should have considered the efforts it made to complete the capping project after it missed its capping deadline. These efforts included hiring extra manpower, working sixteen hour days, seven days a week.

We do not believe that these efforts, though commendable, mandate mitigation of the civil penalty. The Permittee knew what was required of it to complete the capping project well in advance of the permit deadline. Thus the efforts it had to expend from January until May were simply a byproduct of its obdurate conduct in the preceding months. We see no reason to reward it because it was finally motivated to complete the work, doubtless realizing that it was going to be faced with enforcement action by the Department. *See Pickelner Fuel Oil, Inc. v. DEP,* 1996 EHB 602, 611 (numerous attempts to submit site characterization reports which were found by the Department to be inadequate did not mitigate the scienter portion of a civil penalty because the Permittee clearly knew what was required).

Finally, the Permittee once again asserts that the Department should have considered civil penalties assessed against other landfills which missed capping deadlines. We have dealt with this question in two earlier opinions and again at the hearing in this appeal. *F.R. & S., Inc. v. DEP,* 1998 EHB 1288; *F.R. & S., Inc. v. DEP,* 1998 EHB 947. The Board's position has consistently been that civil penalties assessed against other persons are only relevant if the Department took other similar penalty assessments into consideration when assessing the penalty against the Permittee or if the

Department's enforcement program resulted in a violation of equal protection or due process. The Department witnesses testified that other specific landfills were *not* considered in assessing the penalty against the Permittee. (*See, e.g.,* Steiner, N.T. 587). This is unlike the testimony presented by the Department in *Gemstar v. DEP,* 1998 EHB 53, *vacated on other grounds*, __ A.2d __ (No. 723 C.D. 1998, Pa. Cmwlth. filed March 16, 1999), where Department witnesses testified that other landfills were considered as a relevant factor in assessing the civil penalty.

Since other landfills were not considered and there is nothing which required the Department to consider what enforcement action it took against other landfills in different circumstances, the presiding Administrative Law Judge properly limited testimony on this point on the basis of relevance. *See F.R. & S., Inc. v. DEP,* 1998 EHB 947, 951-52 (Permittee's evidence only showed that under different facts the Department acted differently in prosecuting two other landfills). In doing so the requirement of Section 605 of the Solid Waste Management Act (that the Department consider other "relevant factors" in assessing a penalty) was interpreted in the same sense as relevant evidence under the Pennsylvania Rules of Evidence. Under Rule 403 relevant evidence may be excluded if its probative value is outweighed by confusion of the issues or by consideration of undue delay or waste of time. Pa. R.E. 403. The fact that the Department imposed no penalty on one municipal landfill for delay of capping has no probative value as to the reasonableness of this penalty since the Department's failure to impose such a penalty was likely a violation of the Department's regulations which require the imposition of a penalty in this situation. See footnote 6 above. The fact that a lesser penalty was imposed on another municipal landfill for a failure to meet a capping deadline is of slight probative value. The Board believes a requirement that it take evidence relating to penalties imposed at other landfills in the absence of evidence that other landfills were considered

by the Department in assessing a penalty or that the Department acted with an improper motive would involve it in undue delay and constitute a waste of time. It would require taking evidence of comparability of other landfill penalty assessments and the factual circumstances under which those penalties were imposed. This would be a time consuming activity which is not justified by the very slight probative value that actions by the Department in other cases might have. Compare *American Auto Wash, Inc.*, __ A.2d __ (No. 3394 C.D. 1997, Pa. Cmwlth. filed April 30, 1999) slip. op. at 6.

Accordingly, we affirm the Department's penalty assessment of $315,000 for failing to cap a portion of the landfill by the permit deadline.

Elevated Levels of Combustible Gas

Before June 1996, Mr. Rivera observed employees of the Permittee taking samples from gas monitoring wells. He discovered that they were not properly sampling methane gas levels. He observed that when they sampled the wells, they drew ambient air and not gas from the well. On June 20, 1996, Mr. Rivera performed a regular inspection of the landfill. At that time, six of the landfill's ten gas monitoring wells were not functioning properly because of water in the wells. The Department, by letter, directed the landfill to repair its wells. On July 22, 1996, Mr. Rivera performed a regular inspection of the landfill. At that time, the Permittee had repaired only one gas monitoring well.

On August 9, 1996, Mr. Rivera, accompanied by John Oren, returned to the landfill to check the gas monitoring wells. They measured combustible gas levels in the gas monitoring wells at the boundaries of the landfill. The Permittee also collected samples. Both the Department and the Permittee samples showed that some of the wells had levels of combustible gas above the lower explosive limit.

On August 28, 1996, Elias Rivera, a solid waste specialist employed by the Department, tested the gas monitoring wells located at the perimeter of the landfill. Three occupied dwellings are near the eastern boundary with Pioneer Crossing Landfill. An occupied trailer park is located immediately adjacent to the landfill's southeastern boundary. The August 28th sampling showed elevated combustible gas levels in the monitoring wells at the boundary of the landfill. The Permittee took contemporaneous samples which showed the same results.

On September 13, 1996, the Department issued a NOV to the Permittee. In the NOV, the Department notified the Permittee that on August 28th it had combustible gas levels equaling or exceeding the lower explosive limit at the boundaries of the site. The notice did not specify that only Well No. 8 had excess gas levels on that date. The Department's regulations provide that: "Combustible gas levels may not equal or exceed. . .the lower explosive limit at the boundaries of the site." 25 Pa. Code § 273.292(e)(2). The elevated gas levels were of concern to the Department because of the potential for explosion, especially near the occupied trailers on the Smith property.

The Department assessed civil penalties for a violation of 25 Pa. Code § 273.292(e)(2). This violation occurred on August 28, 1996. The Department found the violation to be of low severity and charged $5,000 for this aspect of the violation. In addition, the Department found the Permittee's conduct to be reckless and charged $12,500. The total civil penalty assessed for elevated gas levels at the site was $17,500. The Department determined that the Permittee's conduct was reckless because of the NOV and because it did not complete the delineation of the gas migration until the Department issued an Administrative Order in October, 1996.

We agree with the Department's assessment of a penalty of $5,000 for the seriousness of the violation even though on August 28, 1996 only gas monitoring Well No. 8 at the border of the

facility demonstrated a violation of the Department's regulation. Any violation of the regulation of a well near the border of this facility is serious in view of the close proximity of the occupied trailers on the Smith property. However, we think this single violation of the regulation on August 28, 1996 was not reckless. The Department's NOV only referred to gas levels in excess of regulatory requirements on that date. This followed the Permittee's repair of the wells. While the first test after those repairs were made on August 9th did not demonstrate compliance at a number of wells, it is impossible to predict whether such a system will have elevated gas readings in its monitoring wells the first time after repairs have been made. (Oren, N.T. 319) Accordingly, we believe that the Permittee's violation at only one border well on August 28th was only negligent. We assess a negligent penalty component of $2,500 as called for by the Department's penalty matrix and reduce the total penalty for this violation to $7,500.

Leachate Collection System

On October 23 through 25, 1996, the Department conducted inspections of Pioneer Crossing Landfill. When the Department inspected the facility on October 23, 1996, it found that the power to the sump pump for the leachate collection system for Cell #1 was turned off. Gian Singla, the manager of the landfill, told Mr. Rivera that the pumps were turned off when there was heavy rain because the system would overload. In his inspection report Mr. Rivera noted that the Permittee had been warned in a 1995 inspection report that turning off the leachate collection pumps was a violation of Department regulations.

On November 15, 1996, the Department issued a NOV to the Permittee. By letter dated December 13, 1996, Mr. Singla explained that the sump pumps may be overloaded if there was too much rain, so the landfill normally turns off one of the pumps. The Department assessed a civil

penalty for failing to assure that free flowing liquids and leachate would drain continuously from the protective cover to the leachate treatment system without ponding or accumulating on the liner. Turning off the power to the sump pumps for the leachate collection system of Cell #1 violates 25 Pa. Code § 273.258(a)(1). According to the Department, turning off the sump pumps also violated 25 Pa. Code § 273.258(b)(1), because the system design failed to provide for automatic and continuous functioning of the leachate collection system.

The Permittee argues that simply turning off the leachate pumps does not constitute a violation of 25 Pa. Code § 273.258(a). Specifically, Permittee claims that there was no evidence that there was an excess of one foot of leachate on or above the primary liner as described in 25 Pa. Code § 273.258(a)(2).

Section 273.258(a) of the Department's regulations describes the performance requirements of a leachate collection system:

> The leachate collection system within the protective cover shall meet the following performance standards. The leachate collection system shall:
>
> > (1) Ensure that free flowing liquids and leachate will drain continuously from the protective cover to the leachate treatment system without ponding or accumulating on the liner.
> >
> > (2) Ensure that the depth of leachate on or above the primary liner does not exceed 1 foot.
> >
> > . . . .

We agree with the Permittee that there is not a violation of the regulation simply if there is less than one foot of leachate on or above the primary liner. 25 Pa. Code § 273.258(a)(2). However, we disagree that turning off the sump is not a violation. The regulation clearly calls for *continuous* drainage from the cover to the leachate treatment system. 25 Pa. Code § 273.258(a)(1). If the sump

is turned off, there is no continuous drainage even if the system is not malfunctioning to the point that excess leachate is collecting on the liner.

The Department found the violation to be of low severity and charged $1,000 for this aspect of the penalty. However, the Department determined that the Permittee's conduct was willful because Mr. Gian Singla, the manager of the landfill, was aware of the violation and had been so warned in writing. The amount assessed for this aspect of the penalty was $12,500. The total civil penalty assessed for violations relating to the leachate collection system was $13,500.

We do not believe that the evidence supports the entire amount of this penalty. The Department's culpability assignment was based largely upon the fact that the landfill had been previously warned that turning off the pumps was a violation of the Department's regulations. The fact of the prior warning in November 1995 was noted in the October 1996 inspection report. However, Mr. Rivera was not the inspector in November 1995 and therefore did not have first hand knowledge of the prior warning. Further, the November 1995 inspection report noting the violation was not introduced into evidence. Finally, the prior warning occurred nearly a year before the October 1996 violation. Accordingly, we believe this violation falls into a category of "reckless" rather than "willful" conduct. We will reduce this aspect of the penalty to $5,000 for a total penalty of $6,000.

Failure to Provide Proper Cover

During the inspection on October 23-25, 1996, Mr. Rivera noted that a section of intermediate cover in the old fill area had collapsed exposing an area of waste measuring about ten feet high and 40 feet wide. On November 15, 1996, the Department issued a NOV alleging that the Permittee did not provide intermediate cover which would cover solid waste without regard to

weather at the North Slope of the old fill. The notice stated that the failure to provide proper cover constituted a violation of the Department's regulation. The NOV requested that the Permittee apply within 14 days for intermediate cover which would meet Department standards.

The Department again inspected the landfill on November 22, 1996. Mr. Rivera noted that the area of exposed waste had not only not been repaired, but had grown. The Permittee repaired the area of exposed waste sometime between the November inspection and December 1996. On December 13, 1996, Mr. Rivera inspected the landfill and verified that the area had been repaired.

David Brown testified that the condition on the North Slope was caused by unusually wet weather and by new liner construction on an adjacent area. He further testified that the six to eight foot area between the North Slope and the construction area was an "anchor bench" that was required for construction of the new liner. To construct the anchor bench for the new liner, a cut was made into a small portion of the North Slope area. Temporary cover was placed over this area, but because of the cut, the face of this area was steep.

The Permittee argues the slope where the cover gave way was a "construction" slope and not an "intermediate" slope as defined by the Department's regulations. We disagree.

First, there is no definition of a "construction" slope in the Department's regulations. The regulations do provide that an "intermediate" slope must be covered for each partial lift on which no additional waste will be placed for six months, each partial or completed life that represents final permitted elevations for that part of a landfill, and each completed lift. 25 Pa. Code § 273.233(a). The regulation also provides that cover must be able to withstand the weather and be capable of allowing loaded vehicles to successfully maneuver over it. 25 Pa. Code § 273.233(b). Our review of the regulations did not reveal any exception in the regulations for use of an intermediate slope

which would allow a permittee to disturb cover that had been placed there, nor has the Permittee brought any to our attention. The Permittee admits that the area was covered for a long time. More importantly, the Permittee admits that it *chose* to utilize the area in the construction of the adjacent cell. Accordingly, it must accept the consequences for its choice and live with the consequences of the decision. *A.C.N., Inc. v. DER*, 1991 EHB 1587.

The Department assessed a civil penalty for violation of 25 Pa. Code § 273.233(b)(2), for failing to provide intermediate cover which would cover solid waste without regard to weather. The Department found the violation to be of low severity and charged $1,000. The Department determined that the Permittee's conduct was reckless because the failure to provide cover had not been corrected between the October inspection and the November inspection and had, in fact, worsened. The Department assessed $5,000 for this aspect of the penalty.

The Permittee argues that this penalty is unreasonable because it was not possible to get the proper equipment into the area to repair the damaged cover. Mr. Brown testified that the area was not repaired because it was impossible to get heavy equipment into the area without damaging the new liner of an adjacent cell or building some sort of road which he felt was a lot of work given the size of the uncovered area. He conceded, however, that it would have been possible to repair the displaced cover with manual labor.

While we are sympathetic to the Permittee's position that it would not have been cost-effective to repair the area of displaced cover, this fact does not mitigate the penalty assessed by the Department. The regulation is clear that the Permittee is required to cover solid waste with materials that can withstand the elements. 25 Pa. Code § 273.233(b)(2). The Permittee must now take responsibility for its conscious decision not to repair the damaged cover before the November

inspection. *A.C.N., Inc. v. DER*, 1991 EHB 1587. *See also American Auto Wash, Inc. v. DEP*, 1997 EHB 1029, *penalty modified on other grounds*, ___ A.2d ___ (No. 3394 C.D. 1999, Pa. Cmwlth. filed April 30, 1999) (a Permittee's decision to wait for a specific type of vapor control equipment which contributed to his failure to meet the regulatory deadline did not mitigate the civil penalty).

CONCLUSIONS OF LAW

1. The Department has the burden of proof in this matter and must prove by a preponderance of the evidence that the Permittee violated the applicable statutes and regulations and the amount of the penalty assessed for the violations reflect an appropriate exercise of discretion.

2. The Permittee failed to comply with the condition of its permit which required it to cap 15 acres of the Pioneer Crossing Landfill by December 31, 1996. A civil penalty of $315,000 is reasonable for this offense.

3. On August 28, 1996, there were methane gas readings which exceeded the lower explosive limit in gas monitoring wells of the landfill in violation of 25 Pa. Code § 273.292(e)(2). A civil penalty of $7,500 is reasonable for this offense.

4. On October 23, 1996, the Permittee turned off the power to the sump pump for the leachate collection system for Cell #1 in violation of 25 Pa. Code § 273.258. The Department failed to prove that $13,500 was an appropriate penalty. A civil penalty of $6,000 is reasonable for this offense.

5. From October 1996 until December 1996 the Permittee failed to provide adequate intermediate cover in an area known as the North Slope in violation of 25 Pa. Code § 273.233. A civil penalty of $6,000 is reasonable for this offense.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

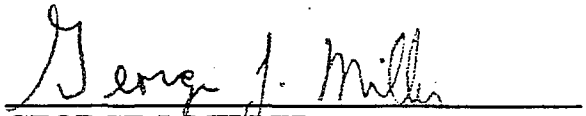
F.R.& S., INC. d/b/a PIONEER CROSSING LANDFILL	:	
v.	:	**EHB Docket No. 97-247-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of May, 1999, IT IS HEREBY ORDERED that F.R.& S., Inc.'s appeal of the Department's October 14, 1997 civil penalty assessment is sustained in part with respect to violation of 25 Pa. Code § 273.258 and 25 Pa. Code § 273.292, consistent with the foregoing opinion. F.R.& S., Inc.'s appeal is dismissed in all other respects.

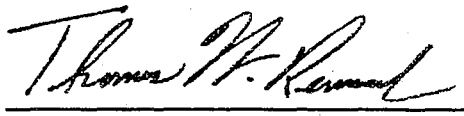
F.R. & S., Inc. shall pay civil penalties in the amount of $334,500. The amount is due and payable immediately to the Solid Waste Abatement Fund. The Prothonotary of Berks County is ordered to enter the full amount of the civil penalty as a lien against any property of F.R. & S., Inc. together with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

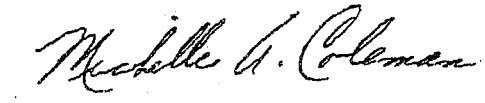


GEORGE J. MILLER
Administrative Law Judge
Chairman

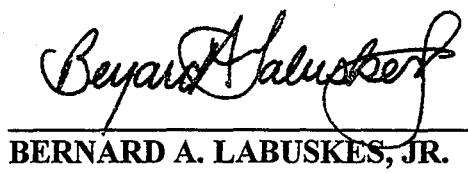
EHB Docket No. 97-247-MG



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 19, 1999

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

For the Commonwealth, DEP:
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Southcentral Regional Counsel

For Appellant:
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717-787-3483
TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

MOUNTAIN VALLEY MANAGEMENT	:	
	:	
v.	:	**EHB Docket No. 98-194-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 25, 1999**

OPINION AND ORDER
ON RULE TO SHOW CAUSE

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

Synopsis:

A corporation's appeal is dismissed for failing to obtain counsel in accordance with the Environmental Hearing Board's Rule of Practice and Procedure at 25 Pa. Code § 1021.22(a).

OPINION

On or about August 24, 1998, the Department of Environmental Protection (the "Department") forfeited bonds posted by Mountain Valley Management ("Mountain Valley") for its mining operation in Foster Township, Schuylkill County. Mountain Valley appealed from the forfeiture on October 1, 1998. The notice of appeal was signed by Andrew J. Drebitko, Jr. Mr. Drebitko identified himself as the appellant, as opposed to the appellant's counsel.

The Board sent a letter to Mountain Valley on March 16, 1999, which read as follows:

> A review of the records in the above appeals indicates that Mountain Valley Management and Bucket Coal Company, which appear to be corporations, are not represented by legal counsel. The Environmental Hearing Board Rules of Practice and Procedure found at 25 Pa. Code Chapter 1021 require corporations to be represented by an attorney. See 25 Pa. Code § 1021.22(a). Please have legal counsel enter an appearance with the Environmental Hearing Board on behalf of these corporations in compliance with that rule no later than **April 9, 1999**.

On April 9, Mr. Drebitko responded with the following handwritten note:

> Due to a delay in arranging an attorney to represent the companies, please extend the deadline for 60 days to arrange an attorney to appear before the EHB. Thank you for your attention to this matter. Regards, Andrew J. Drebitko Jr.

On April 14, we issued a rule to show cause granting a 30-day extension but warning Mountain Valley that its appeal would be dismissed if it did not obtain counsel in accordance with 25 Pa. Code § 1021.22(a) on or before May 10. Mountain Valley has not responded to the rule, and no counsel has entered an appearance on behalf of the company.

Section 1025.125 of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.125, grants this Board the authority to impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include the dismissal of an appeal. 25 Pa. Code § 1021.125.

In *Keystone Carbon and Oil, Inc. v. Department of Environmental Resources*, 1993 EHB 765, this Board invalidated its former rule of procedure at 25 Pa. Code §21.21(a) to the extent that it authorized corporations to be represented by their non-lawyer officers in proceedings before the Board. In doing so, the Board noted that allowing a corporation to be represented by a non-lawyer

officer in an adversarial proceeding was inconsistent with the General Rules of Administrative Practice and Procedure, specifically 1 Pa. Code §§31.21 and 31.22, which require corporations to be represented by counsel in adversarial proceedings. The Board eventually codified its holding by promulgation of 25 Pa. Code § 1021.22(a), which states that "[a] corporation shall be represented by an attorney admitted to practice before the Supreme Court of Pennsylvania." The rule by its own terms is mandatory.

Here, Mountain Valley has failed to obtain counsel and has ignored a rule to show cause issued by the Board directing it to secure legal representation. Mountain Valley's violation of 25 Pa. Code § 1021.22(a) compels us to dismiss its appeal. *See Westmark Diversified, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Protection*, 1997 EHB 295, 298.

Accordingly, we issue the following order:

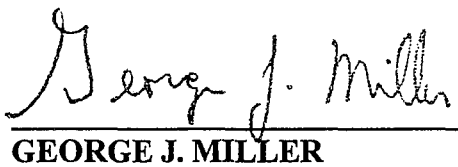
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MOUNTAIN VALLEY MANAGEMENT	:	
	:	
v.	:	**EHB Docket No. 98-194-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

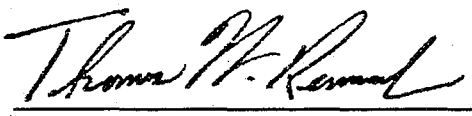
ORDER

AND NOW, this 25th day of May, 1999, Mountain Valley Management's appeal is DISMISSED.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 25, 1999

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

For the Commonwealth, DEP:
Thomas M. Crowley, Esquire
Southcentral Regional Counsel

For Appellant:
Andrew J. Drebitko, Jr.
Mountain Valley Management
344 Jones Street
Minersville, PA 17954

bap

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717-787-3483
TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BUCKET COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 98-195-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 25, 1999**

OPINION AND ORDER
ON RULE TO SHOW CAUSE

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

Synopsis:

A corporation's appeal is dismissed for failing to obtain counsel in accordance with the Environmental Hearing Board's Rule of Practice and Procedure at 25 Pa. Code § 1021.22(a).

OPINION

On or about September 1, 1998, the Department of Environmental Protection (the "Department") forfeited bonds posted by Bucket Coal Company ("Bucket Coal") for its mining operation in Foster Township, Schuylkill County. Bucket Coal appealed from the forfeiture on October 1, 1998. The notice of appeal was signed by Andrew J. Drebitko, Jr. Mr. Drebitko identified himself as the appellant, as opposed to the appellant's counsel.

The Board sent a letter to Bucket Coal on March 16, 1999, which read as follows:

> A review of the records in the above appeals indicates that Mountain Valley Management and Bucket Coal Company, which appear to be corporations, are not represented by legal counsel. The Environmental Hearing Board Rules of Practice and Procedure found at 25 Pa. Code Chapter 1021 require corporations to be represented by an attorney. See 25 Pa. Code § 1021.22(a). Please have legal counsel enter an appearance with the Environmental Hearing Board on behalf of these corporations in compliance with that rule no later than **April 9, 1999**.

On April 9, Mr. Drebitko responded with the following handwritten note:

> Due to a delay in arranging an attorney to represent the companies, please extend the deadline for 60 days to arrange an attorney to appear before the EHB. Thank you for your attention to this matter. Regards, Andrew J. Drebitko Jr.

On April 14, we issued a rule to show cause granting a 30-day extension but warning Bucket Coal that its appeal would be dismissed if it did not obtain counsel in accordance with 25 Pa. Code § 1021.22(a) on or before May 10. Bucket Coal has not responded to the rule, and no counsel has entered an appearance on behalf of the company.

Section 1025.125 of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.125, grants this Board the authority to impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include the dismissal of an appeal. 25 Pa. Code § 1021.125.

In *Keystone Carbon and Oil, Inc. v. Department of Environmental Resources*, 1993 EHB 765, this Board invalidated its former rule of procedure at 25 Pa. Code §21.21(a) to the extent that it authorized corporations to be represented by their non-lawyer officers in proceedings before the Board. In doing so, the Board noted that allowing a corporation to be represented by a non-lawyer

officer in an adversarial proceeding was inconsistent with the General Rules of Administrative Practice and Procedure, specifically 1 Pa. Code §§31.21 and 31.22, which require corporations to be represented by counsel in adversarial proceedings. The Board eventually codified its holding by promulgation of 25 Pa. Code § 1021.22(a), which states that "[a] corporation shall be represented by an attorney admitted to practice before the Supreme Court of Pennsylvania." The rule by its own terms is mandatory.

Here, Bucket Coal has failed to obtain counsel and has ignored a rule to show cause issued by the Board directing it to secure legal representation. Bucket Coal's violation of 25 Pa. Code § 1021.22(a) compels us to dismiss its appeal. *See Westmark Diversified, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Protection*, 1997 EHB 295, 298.

Accordingly, we issue the following order:

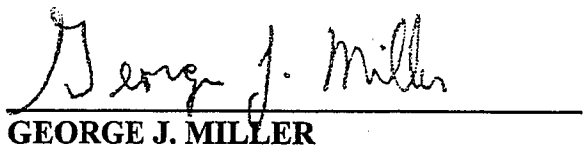
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BUCKET COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 98-195-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 25th day of May, 1999, Bucket Coal Company's appeal is DISMISSED.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 98-195-L

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 25, 1999

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

For the Commonwealth, DEP:
Thomas M. Crowley, Esquire
Southcentral Regional Counsel

For Appellant:
Andrew J. Drebitko, Jr.
Mountain Valley Management
344 Jones Street
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25th ANNIVERSARY 1972-1997

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WHEELING & LAKE ERIE RAILWAY	:	
	:	
v.	:	**EHB Docket No. 97-252-R**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING COMPANY, Permittee	:	**Issued: May 26, 1999**

OPINION AND ORDER ON THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Mine Subsidence Act does not authorize the Department of Environmental Protection to order a coal mining company to reimburse a railroad for mine subsidence damages to its railroad tracks. The Department of Environmental Protection's regulations also confer no such authority.

Factual Background

Wheeling and Lake Erie Railroad (Wheeling and Lake Erie or the Railroad) owns and operates a railroad and maintains railroad tracks, in part, from Pittsburgh to Connellsville, Pennsylvania (the Connellsville Main Line). A portion of this railroad track crosses over an underground mine operated by the Maple Creek Mining Company (Maple Creek). On or about March 30, 1997, at Maple Creek Mining Milepost 31.1 on the Connellsville Main Line and west of Hazel Kirk, Pennsylvania, mine subsidence evidently resulting from Maple Creek's

underground mining operations occurred. The subsidence caused damage to the railroad tracks and railroad bed.

The subsidence trough spanned roughly 700 feet of Wheeling & Lake Erie's railroad tracks. The lowest point of the subsidence resulted in a drop of approximately 3 ½ feet. Wheeling and Lake Erie initiated emergency repairs in order to continue the safe operation of its trains and to avoid any derailments. The Railroad was required to install approximately 300 new railroad ties, haul in approximately 30 carloads of ballast (approximately 3,000 tons of material) and tamp the ballast back under the track to support and level it. Twenty-two employees of the Railroad were involved in the repairs which were completed on April 12, 1997.

During the period when the repairs were performed the trains were forced to travel through this 700 foot area at a speed of only one or two miles per hour instead of their usual speed of twenty-five miles per hour. Wheeling and Lake Erie's costs to repair the mine subsidence damage to its line, including labor, material, equipment and expert consulting fees, was $85,683.39.

Following the completion of repairs, Wheeling and Lake Erie tried unsuccessfully to obtain voluntary reimbursement from Maple Creek. After the mining company's refusal to pay these costs, Wheeling and Lake Erie requested the Department of Environmental Protection (Department) to order Maple Creek to reimburse it in the amount of $85,683.39 pursuant to the provisions of the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. Section 1406.1-1406.21, (Mine Subsidence Act) and the Department's regulations. After an investigation and review, the Department refused to order Maple Creek to compensate the Railroad for the costs incurred in repairing the subsidence damage.

Wheeling and Lake Erie appealed the Department's decision to the Environmental Hearing Board (Board). The Board, over the objection of the Railroad, allowed the Pennsylvania Coal Association to participate as *amicus curiae* based on its claim that "as the voice of Pennsylvania's bituminous mining industry, it is vitally interested in the implementation of Pennsylvania's program for regulating the surface impacts of bituminous underground coal mining" and because the issues raised in this Appeal are of vital importance to the Pennsylvania Coal Association and its member companies

Department's Motion to Dismiss

Presently before the Board is the Department's Motion to Dismiss the Railroad's Appeal. In ruling on a motion to dismiss, we must view it in the light most favorable to the non-moving party. *Tinicum Township v. DEP*, 1996 EHB 816. As pointed out by Judge Coleman in *Smedley v. DEP*, 1998 EHB 1281, the Board treats motions to dismiss the same way as motions for judgment on the pleadings: "we will dismiss the appeal only where there are no material factual disputes and the law is clear so that the moving party is clearly entitled to judgment as a matter of law." *Id.* at 1282.

The Department advances two arguments in support of its Motion. First, the Department has no authority under Section 5.5 of the Mine Subsidence Act, 52 P.S. Section 1406.5e, to order a mining company to reimburse a railroad for damage caused by mine subsidence to its railroad structures. Secondly, the Department's decision not to order the mining company to reimburse the railroad is not an appealable action of the Department because it involves the Department's exercise of prosecutorial discretion. The parties have filed memoranda of law and the Board conducted oral argument.

Brief History of Mining Regulation in Pennsylvania

It is necessary to first briefly review the history of mining regulation in Pennsylvania before moving to a discussion of the issues raised by the Department in its Motion. Moreover, a knowledge of the technical differences between longwall mining and traditional mining is helpful in understanding how the General Assembly has addressed the regulation of coal mining in the Commonwealth.

During most of the past fifty years, coal was mined using the traditional room and pillar method which left various pillars of coal in the mine for support of the surface. This method of mining involves mining "rooms" off the main entries which are supported during the first phase of the mining by pillars of coal and artificial roof supports. However, in recent years it became increasingly apparent within the coal mining industry in southwestern Pennsylvania that the most productive way to mine coal, and sometimes the only economically viable method, was by the longwall method of mining.[1] Longwall mining involves the development of panels of coal which may be several thousand feet long and a thousand feet wide. Longwall mining machines move back and forth across the face of the coal and shear the coal directly onto conveyor belts which transport the coal to the surface. As the longwall equipment shears the coal it is protected by moving shields. The equipment slowly moves forward across the face of the coal. As the equipment moves forward the roof of the already mined area collapses into the void. This results in the lowering of the ground over the panel in a planned, controlled and somewhat predictable manner. The resulting subsidence usually occurs within weeks or months of the mining as opposed to room and pillar mining where the subsidence can occur years later. However, the

[1] Longwall mines can be extremely productive. Indeed, mine statistics on productivity and injuries show an astounding increase in worker productivity and a great drop in mining injuries.

mine subsidence associated with longwall mining is often more pronounced on the surface than with traditional mining where the surface effects are often more subtle.

Longwall mining allows the mining company to mine much greater quantities of coal in a much more cost effective manner than traditional mining. However, to be most cost effective, the mining company needs to mine a panel in its entirety. It is technically very difficult, if not impossible, to leave coal support in panels or stop and start the mining operations in the same panel of coal. These stops can be extremely expensive. It is also not usually possible to "bend" a panel to leave coal support. Moreover, if the mining is stopped short of the projected end of a panel, downward roof pressures can result in the collapse of the roof of the mine.

There are currently nine longwall mines operating in Pennsylvania. They are all located in either Washington or Greene counties in the southwestern corner of the Commonwealth. Each of these operations mine the very rich Pittsburgh seam of coal.

Pennsylvania recognizes three separate estates in land: 1) surface; 2) underlying minerals (including coal) (sometimes referred to as "mineral rights"); and 3) the right to support. *Machipongo Land v. Department of Environmental Resources*, 719 A.2d 19, 28 (Pa. Cmwlth. 1998). The common law of Pennsylvania has long recognized that title to the surface land and title to the mineral rights can be severed and thus owned by different people. In Pennsylvania, many of these estates were severed long ago. This is reflected through deeds which relieved the mineral owners, in this case coal companies, from the obligation to leave support allowing them to remove all the coal beneath the surface without incurring liability for mine subsidence damage to the surface land owner. When a coal mining company owned or controlled title to both the mineral estate and the support estate the mining company had no obligation to prevent subsidence damage or repair subsidence damage. *Klein v. Republic Steel Corp.*, 435 F.2d 762

(3rd Cir. 1970) (applying Pennsylvania law). This principle was recognized by the Pennsylvania Supreme Court in 1962 as follows:

> Where, however, the surface is granted to one and the underlying coal to another, the surface includes whatever earth, soil or land which lie above and is superincumbent upon the coal [citation omitted]. It would follow, therefore, that what the parties intended by the removal of "surface support" was the removal of that subterranean geological matter which supports the "earth, soil and land," to wit, the removal of the coal and the rocky or sand strata which lies between the coal measures.... To reiterate, the release for damage done to the Company's pipelines was for damages caused by the weakening of the surface strata upon which the pipelines rested by the removal of the lower supporting strata of coal and other mineral matter... Surface support, known in Pennsylvania as the "third estate" of land ownership, is simply the support of the surface strata during the course of or following the removal of the lower strata.

Merrill v. Manufacturer Light & Heat Co., 185 A.2d 573, 576-577 (Pa. 1962).

Over the years, the interests of coal mining companies and surface owners collided as mining took place and mine subsidence damaged surface structures. Often, the mineral rights had been sold years earlier by previous land owners. Although this information was contained in the surface owners' deeds many land owners never realized that a mining company might actually mine beneath their property.

1966 Act

The first state law to comprehensively regulate the surface impacts of underground coal mining and ameliorate its sometimes harsh results was the Mine Subsidence Act (or Act) passed in 1966. After the passage of the Mine Subsidence Act, coal companies, regardless of their common law rights, were required to prevent subsidence damage to a limited class of surface structures and features described in Section 4 of the Act. This class included structures in place on April 27, 1966 including: 1) any public building or noncommercial structure customarily used by the public, including but not limited to churches, schools, hospitals, and municipal utilities or

municipal public service operations; 2) any homes; and 3) cemeteries. Those structures not in this limited class, such as railroads (or homes built after April 27, 1966), pursuant to Section 15 of the Act, were free to purchase the coal beneath their property so as to provide support and protect against mine subsidence.

The Mine Subsidence Act of 1966 also required the coal companies to repair or compensate the owners of any Section 4 structures for mine subsidence damage. Those structures not listed under Section 4, such as a railroad, were not entitled to compensation or repair but instead were left to their common law rights. In many, if not most instances, under the common law, based on their deeds, the landowners were not entitled to compensation for mine subsidence damage.

1980 Amendments

In 1980, the General Assembly amended the Mine Subsidence Act in order to obtain primary jurisdiction over the regulation of the underground mining of coal in the Commonwealth pursuant to the provisions of the Federal Surface Coal Mining Control and Reclamation Act of 1977[2] (SMCRA).[3] These amendments did not add to the class of structures and features described in Section 4 of the Mine Subsidence Act. In order to ensure that Pennsylvania obtained primacy, the Commonwealth also amended many of its regulations. In most cases, the language in these regulations closely tracked the language in the federal regulations implementing SMCRA.

[2] SMCRA regulates both surface mining and underground mining. States wishing to retain the primary right to regulate coal mining within their borders ("Primacy") were required to enact a series of laws and regulations which were consistent with SMCRA and any federal regulations implementing the provisions of SMCRA. 30 U.S.C. § 1253 and 30 C.F.R. Part 730.
[3] 30 U.S.C. 1201-1328(1994).

The regulation dealing with utilities was first found at 25 Pa. Code § 89.143(c) (but is now located at 25 Pa. Code § 89.142a(g) entitled "Protection of Utilities"). The section seeks to encourage mining companies to plan their operations to minimize subsidence damage to railroads. However, and most importantly, neither the amendments nor the regulations affected the respective common law property rights of mining companies and railroads.

ACT 54

The Mine Subsidence Act was further amended in 1994 by what is now commonly referred to as Act 54. Act 54 represented a compromise. In exchange for repeal of Sections 4 and 15 of the 1966 Act,[4] Act 54 expanded the statutory obligation of coal mine companies to repair and compensate for mine subsidence caused to all dwellings and some agricultural structures. It also sought to prevent material damage caused by mine subsidence by prohibiting underground mining beneath or adjacent to: 1) public buildings; 2) churches, schools, and hospitals; 3) impoundments of water in excess of twenty acre feet; or 4) bodies of water with a volume in excess of twenty acre feet. 52 P.S. § 1406.9a(c). It further provided for the replacement of private water supplies. 52 P.S. § 1406.5a. In addition, the regulations approved in June 1998 did not expand a coal mining company's obligations to repair or compensate for mine subsidence damage to investor owned utilities including railroads. The new regulations also made clear that the mining company may, but is not required to, take measures in the mine as part of its program to minimize damage to utilities including railroads.

[4] The Railroad, has had, and continues to have, the right of eminent domain which would allow it to condemn a right to surface support for the Connellsville Line. See 15 Pa. C.S.A. § 1522(a)(1).

Wheeling and Lake Erie's Argument

Wheeling and Lake Erie claims entitlement to reimbursement of the damages caused by mine subsidence pursuant to the provisions of the Mine Subsidence Act and the Department's regulations. The Department and Pennsylvania Coal Association both contend that Wheeling and Lake Erie enjoys no such right to reimbursement for mine subsidence damage to its railroad tracks under either the Mine Subsidence Act or the regulations. Section 5.4 of the Act, 52 P.S. Section 1406.5d, sets forth those structures that coal mining companies are required to either repair or otherwise compensate the owners for damages caused by mine subsidence. These structures include buildings accessible to the public; buildings such as hospitals, schools, and churches; homes and permanently affixed appurtenant structures; and certain agricultural structures. If the coal mining company refuses to repair or compensate the landowner, the Department, after conducting an investigation, is authorized to order the coal mining company to "compensate or to cause repairs to be made. . . ." 52 P.S. Section 1406.5e(c). The legislature recognized in the next section that the creation of such a duty to repair or compensate might conflict with earlier deed provisions.

> The duty created by section 1406.5e to repair or compensate for subsidence damage to the buildings enumerated in section 1406.5d(a) shall be the sole and exclusive remedy for such damage and shall not be diminished by the existence of contrary provisions in deeds, leases or agreements which relieved mine operators from such duty. 52 P.S. § 1406.5f(c).

Section 1406.5(e) requires mining companies to adopt measures to prevent subsidence causing material damage to surface lands.

> (e) An operator of a coal mine subject to the provisions of this act shall adopt measures and shall describe to the department in his permit application measures that he will adopt to prevent subsidence causing material damage to the extent technologically and economically feasible, to maximize mine stability, and to maintain the

> value and reasonable foreseeable use of such surface land: Provided, however, That nothing in this subsection shall be construed to prohibit planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining. 52 P.S. 1406.5(e).

Conspicuous by its absence is any requirement to repair or compensate railroads for damages to their structures.

Wheeling and Lake Erie is unable to point to any provision of the Mine Subsidence Act that grants them such rights to repair or compensation. At oral argument the Railroad fashioned an argument that the protected structures-such as buildings, churches, schools, homes, and hospitals-are protected because they are frequented by the public. Therefore, since people travel on its trains the railroads should also enjoy such protections. According to Wheeling and Lake Erie, railroads are unique among utilities in that people actually ride the railroad tracks as opposed to water pipes, gas lines, and electric lines.

After a careful review of the clear language of the applicable sections of the Mine Subsidence Act, we disagree that railroads are included in the provisions requiring repair or compensation. The arguments advanced by the Railroad should be addressed to the legislature rather than to this Board.

Although Act 54 was passed in 1994 many of the Department's implementing regulations were not enacted until June 1998. Therefore, some of the earlier regulations which arguably might not have been consistent with the changes made by Act 54 to the Mine Subsidence Act were still in effect (even though the Department did update some of its mining regulations following the enactment of Act 54). Nevertheless, a close reading of these regulations does not inure to the Railroad's benefit. The Department's regulations attempt to set forth a comprehensive framework to accomplish the legislative goals of advancing and promoting the coal industry in a safe and environmentally prudent manner.

25 Pa. Code Section 89.145(a) read as follows:

> (a) the operator shall correct material damage resulting from subsidence caused to surface lands including perennial streams as protected under Section 89.145(d) (relating to performance standards), to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence.

Wheeling and Lake Erie relies on the provisions of 25 Pa. Code § 89.145(a) to support its argument that the Department was obligated to order Maple Creek to either repair the damage caused by mine subsidence or reimburse the Railroad for the costs it incurred in repairing its tracks.[5] This section was based on the federal regulations found at 30 C.F.R. § 817.121(c).

This regulation reads as follows:

> 817.121 Subsidence Control
>
> (c) Repair of damage.
>
> (1) Repair of damage to surface lands. The permittee must correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses that it was capable of supporting before subsidence damage.
>
> (2) Repair or compensation for damage to non-commerical buildings and dwellings and related structures. The permittee must promptly repair, or compensate the owner for, material damage resulting from the subsidence caused to any non-commercial building or occupied residential dwelling or structure related thereto that existed at the time of mining. If repair option is selected, the permittee must fully rehabilitate, restore or replace the damaged structure. If compensation is selected, the permittee must compensate the owner of the damaged structure for the full amount of the decrease in value resulting from the subsidence-related damage. The permittee may provide compensation by the purchase,

[5] This section was deleted by the Environmental Quality Board in June 1997. See new regulation set forth at 25 Pa. Code § 89.142a(e)(f), and (g). The new regulation closely tracks the federal regulation.

> before mining, of a non-cancelable premium-prepaid insurance policy. The requirements of this paragraph apply only to subsidence-related damage caused by underground mining activities conducted after October 24, 1992.
>
> (3) Repair or compensation for damage to other structures. The permittee must, to the extent required under applicable provisions of State law, either correct material damage resulting from subsidence caused to any structures or facilities not protected by paragraph (c) (2) of this section by repairing the damage or compensate the owner of the structures or facilities for the full amount of the decrease in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may be accomplished by the purchase before mining of a non-cancelable premium-prepaid insurance policy.

Section 817.121 (c) thus contemplates three possible situations: (1) material subsidence damage to unimproved land which makes the land less valuable for future uses, which damage must be "corrected," thus addressing "environmental concerns;" (2) material subsidence damage to improved land provided it contains certain structures and features of special concern, such as non-commercial buildings and dwellings, which damage must be "repaired or compensated for;" thus recognizing the need to protect the investments of individual homeowners, and not-for-profit groups; and (3) material subsidence damage to improved land which contains other structures and features which must be "repaired or compensated for" only if state law imposes such a requirement. Therefore, the federal section only imposes an obligation to repair or compensate for mine subsidence damage to lands containing railroad tracks to the extent required by state law. Pennsylvania law does not contain such a requirement.

In *National Wildlife Federation v. Lujan*, 928 F.2d 453 (D.C. Cir. 1991) the D.C. Circuit Court of Appeals was called upon to interpret this regulation. The Court of Appeals held that the regulation distinguishing between repair of land and repair of structures after mine subsidence

damage and requiring the latter only if required by state law was a permissible interpretation of SMCRA.

The Court explained its holding as follows:

> There is no similar explicit mandate from Congress to require restoration of structures materially damaged by subsidence. The word "land" as it is used in SMCRA is interpreted to refer to land in its unimproved or natural state...
>
> In policy, as well as law, there is clear reason to distinguish the protection provided for land and structures. Where an underground mine operator purchases from the surface owner the right to subside the land, or in conveying surface property reserves the right to subside the surface, the individual's property rights are protected. Thus, Section 817.121(c)(1) functions to prevent this injury to the land by assuring that in all cases, irrespective of private contract, this valuable natural resource will be restored to its premining condition, to the extent technologically and economically feasible. On the other hand, no environmental or public interest exists in protecting a building or structure where its present or past owner has either conveyed or waived a right to subjacent support. For example, in some instances an operator may purchase the right to subside a structure owned by a surface owner. In such an instance the parties have worked out a mutually agreeable solution to account for private damage. The operator should not have to compensate the surface owner. This final rule leaves this determination of the relative rights and liabilities to state law. 928 F.2d at 459-460.

The Pennsylvania regulation, in effect at the time of the mine subsidence to the Railroad's tracks, Section 89.145, was derived from this federal regulation to help ensure that Pennsylvania maintained primacy over the regulation of coal mining in Pennsylvania. This regulation simply provides that the coal company was required to correct material damage resulting from mine subsidence caused to surface lands. If it is read to require the repair of all surface structures it would nullify the specific limitations set forth in Section 5.4, 52 P.S. 1406.5d, of the Mine Subsidence Act. In other words, since railroad tracks are not specifically in this section they do not enjoy these protections. Pennsylvania has never required coal mining

companies to repair or compensate railroads for damages to their tracks unless the railroads held a common law right to surface support. This provision does not mandate a different result.

The Railroad next supports its argument for repair or compensation by citing 25 Pa. Code Section 89.67(b). This regulation simply requires that coal mining companies conduct their mining activities in such a manner to minimize damage, destruction or disruption of services provided by utilities including railroads. A similar requirement was contained in former Section 89.143 (which was still in effect at the time of the damage in this matter). However, these goals to minimize damage to railroads do not require the Department to order coal mining companies to compensate or repair damage to railroad tracks caused by mine subsidence.

Wheeling and Lake Erie Railroad has not cited any language in the regulations or case law that indicate any change in the long established law governing the relationship between railroads and mining companies regarding their respective rights concerning either repair or reimbursement for mine subsidence damages. The Department's authority to require coal mining companies in their planning of mining operations to attempt to minimize damage, destruction, or disruption of services provided by utilities does not impose on the coal mining companies a duty to repair or compensate for subsidence damage. This is affirmed by comments of the Environmental Quality Board when they recently promulgated 25 Pa. Code Section 89.142a(g):

> Subsection (g) is a revised version of the current regulation [25 Pa. Code Section 89.143(c)] regarding protection of utilities. Subsection (g) includes the basic requirement to minimize damage, destruction or disruption in services provided by utilities, which is derived from the federal regulation 30 C.F.R. Section 817.180. Paragraph (2) describes various measures a mine operator may take in complying with the performance standard, including a program for detecting subsidence damage and minimizing disruption in service; providing support in accordance with the utility owner's support rights; providing temporary or alternative utility service to customers; and

> demonstrating that mine subsidence will not materially damage the utility. This represents a change from the proposed rulemaking in that it will allow notification to suffice for meeting the requirement to minimize damage, destruction or disruption in service provided by utilities. It will then be up to the investor owned utility to protect the utility line.

The Railroad further contends that the mining company in module 18 of its application, which was approved by the Department, agreed to repair or compensate land owners for damages to surface structures. However, this module, even when read in the light most favorable to the Railroad, only shows that Maple Creek agreed to repair and compensate land owners as required by the Mine Subsidence Act and the Department regulations.

There are specific requirements in Act 54 and the implementing Department regulations obligating mining companies to repair or compensate land owners for mine subsidence damages caused to homes, churches, schools, hospitals, and other specific structures. *See* 52 P.S. Section 1406.5d. Railroads are simply not included in this protected class. Neither the Mine Subsidence Act nor the Department's regulations require Maple Creek to repair or reimburse Wheeling and Lake Erie for mine subsidence damages to its railroad tracks.

In this case the Railroad could have protected its tracks from mine subsidence through eminent domain by purchasing the underlying coal. It also evidently took no action prior to the mine subsidence event even though it was notified of the company's mining operations. It could have contacted the coal mining company, reviewed mining maps, consulted with Department experts or took measures on the surface to protect its tracks. It neglected to do so.

Three judges of this Board are in favor of dismissing the Railroad's Appeal as set forth above for its failure to state a claim for relief under the Mine Subsidence Act. Two judges would dismiss based on the contention that the Board does not have jurisdiction over this Appeal. We, therefore, enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHEELING & LAKE ERIE RAILWAY	:	
	:	
v.	:	**EHB Docket No. 97-252-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING COMPANY, Permittee	:	

ORDER

AND NOW, this 26th day of May, 1999, the Appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 26, 1999

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

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Southwestern Region

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHEELING & LAKE ERIE RAILWAY	:	
	:	
v.	:	**EHB Docket No. 97-252-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING COMPANY, Permittee	:	

CONCURRING OPINION OF ADMINISTRATIVE LAW JUDGE
MICHELLE A. COLEMAN

I concur in the opinion on the merits. However, I believe the issue of jurisdiction should have been addressed.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 26, 1999

MAC/med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHEELING & LAKE ERIE RAILWAY	:	
	:	
v.	:	**EHB Docket No. 97-252-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING COMPANY, Permittee	:	

CONCURRING OPINION OF ADMINISTRATIVE LAW JUDGE
BERNARD A. LABUSKES, JR.

I concur in the result because I believe that this Board does not have jurisdiction over this appeal. I express no opinion on the merits of the case.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 26, 1999

BAL/med

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ENVIRONMENTAL HEARING BOARD
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARI

EASTERN CONSOLIDATION and DISTRIBUTION SERVICES INC., HUGO'S SERVICES, INC., EASTERN REPAIR, INC. and BARON ENTERPRISES, et al	:	
v.	:	**EHB Docket No. 94-200-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT of PENNSYLVANIA, INC., Permittee	:	**Issued: May 27, 1999**

ADJUDICATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board dismisses Permittee's contentions that Appellants lack standing to raise traffic/traffic safety, odors, birds, vector controls and flooding issues.

The Board dismisses Appellants' appeal on the grounds that the Department of Environmental Protection abused its discretion when it reinstated a permit for a proposed transfer station without adequately considering the 100 year floodplain, environmental assessment Form D, and wetlands because Appellants failed to sustain their burden of proof that the Department either violated the regulations or abused its discretion.

The doctrines of *res judicata* and collateral estoppel are inapplicable when previous suits did not involve the same parties or same essential issues as the current case.

The Board finds that Appellants sustained their burden of proof that the Department abused its discretion by not requiring Waste Management's plan to specifically state that the doors will be closed during the transfer of waste; 2) by not giving adequate consideration to the issue of the amount of time that loaded trucks remain at the facility; and 3) by issuing the permit without requiring the submitted plan include a routine vector infestation assessment program.

INTRODUCTION

Eastern Consolidation and Distribution Services, Inc. (ECD), Hugo's Services, Inc. (Hugo), Eastern Repair Center, Inc. (Eastern), Baron Enterprises (Baron), Arnold Industries, Inc. (Arnold), New Penn Motor Express, Inc. (New Penn) and Lebarnold, Inc. (Lebarnold) (collectively, Appellants) filed notices of appeal seeking review of the Department's June 1994 issuance of a permit under the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 - 6018.1003, for the construction and operation of a waste transfer station on 1.94 acres of land in Hampden Township, Cumberland County.

BACKGROUND

Before addressing the legal issues and accompanying arguments raised by the parties in this appeal we will set forth general background information for all of the Appellants and the history leading to the appeals.

Appellants

Appellants are seven businesses, some of whom are located in an industrial park adjacent to the proposed location of Waste Management of Pennsylvania's (Waste Management) transfer station. The seven businesses consist of the following:

> ECD is a Pennsylvania corporation which operates facilities located at 405 Sterling Road, 460 Industrial Park Road, and 470 Terminal Road,

Hampden Township, Cumberland County, Pennsylvania. ECD conducts trucking, warehousing, consolidation and related activities involving various products and commodities;

Hugo, a Pennsylvania corporation, is the parent corporation of ECD;

Baron is a partnership which owns property located at 460 Industrial Park Road, Hampden Township - the land upon which ECD maintains its trucking and warehousing operations;

Eastern is a Pennsylvania corporation located at 460 Industrial Park Road, Hampden Township. Eastern repairs trucks;

New Penn is a Pennsylvania corporation with business facilities located at 451 Freight Street, Camp Hill, Pennsylvania and 475 Terminal Road, Camp Hill, Pennsylvania. New Penn owns and operates a trucking business at these facilities;

Lebarnold is a Pennsylvania corporation with a business facility located at 4410 Industrial Park Road, Camp Hill, Pennsylvania. Lebarnold owns and operates a trucking and warehousing business at this location;

Arnold, a Pennsylvania corporation, is the parent corporation of both New Penn Motor Express and Lebarnold.

History

The permitted area consists of approximately 1.94 acres of a 16 acre parcel purchased on December 17, 1991 by Waste Management from Roadway Services, Inc. and is presently utilized by Waste Management's hauling division. When Roadway Services occupied the property it performed, among other things, service and maintenance of its truck fleet at the site. Tests performed prior to Waste Management's purchase confirmed the presence of pre-existing soil and groundwater contamination on the property. On or about March 2, 1992, Waste Management submitted an application to the Department to construct a solid waste transfer facility on the 1.94 acres. Around July 23, 1992, the Department determined that the permit application was administratively complete.

By letter dated September 20, 1993 the Department sent Waste Management a pre-denial letter that raised additional technical issues concerning its application. Waste Management responded to the Department's correspondence by submitting additional information on November 5, 1993. Subsequently, on November 29, 1993, the Department sent a letter of inquiry to the Pennsylvania Department of Transportation (PennDOT) concerning possible traffic and safety problems. In a response dated December 8, 1993, PennDOT stated that it was the responsibility of Waste Management to obtain the services of an engineering firm to perform traffic studies. This response was misfiled by the Department and not uncovered until after the discovery period in this appeal had closed. By letter dated November 9, 1995, the Department informed the Board of this misfiling. Also on that day, the Department sent Waste Management a letter notifying it of the suspension of the waste transfer permit pending a resolution of the matters raised in PennDOT's December 8, 1993 letter. Subsequently, Waste Management submitted traffic analysis reports from two engineering firms. On February 20, 1996, the Department submitted to PennDOT two traffic impact analysis, one prepared by TriLine Associates, Inc. and Rettew Associates, Inc. on behalf of Waste Management, and the other by Acer Engineers and Consultants, Inc. on behalf of Appellants' behalf, and requested review of these reports. On March 11, 1996, PennDOT transmitted its response to the Department's request for review. In that response PennDOT stated that "both studies are consistent in concluding that existing levels of service are less than ideal" but, that "[I]n this case, the developer would not be responsible for addressing the intersection." On April 2, 1996, the Department notified Waste Management by letter that it had reinstated the waste transfer permit. In that letter, the Department noted that several changes were made to the reinstated permit - Condition No. 7 was amended and new conditions, Conditions 15 and 16, were added.

Procedural History

Based on the issuance of the permit on July 19, 1994, ECD, Hugo, Eastern and Baron filed an appeal (Docket No. 94-200-MR) and on July 20, 1994, Arnold, New Penn, and Lebarnold filed their appeal (Docket No. 94-201-MR). On August 8, 1994, ECD, Hugo, Eastern and Baron filed a motion to consolidate these appeals. By the Board's August 30, 1994 order these appeals were consolidated at Board Docket No. 94-200-C.

Appellants filed a supplemental appeal on May 1, 1996 based on the Department's April 2, 1996 reinstatement of the permit.

A hearing was held on March 4, 5 and 6, 1997 before Administrative Law Judge Michelle A. Coleman. The parties were represented by legal counsel and presented evidence in support of their positions. On the morning of the hearing Waste Management filed a motion in limine. Appellants moved to strike the motion as untimely. Judge Coleman granted the request to strike the motion and had the hearing proceed on the merits. Appellants filed their post-hearing brief on May 19, 1997. The Department and Waste Management filed their post-hearing briefs on July 25, 1997 and July 28, 1997, respectively. On August 14, 1997 Appellants filed a reply brief.

The record consists of the pleadings, a joint stipulation, a hearing transcript of 492 pages and 53 exhibits. After a full and complete review of the record we make the following findings:

FINDINGS OF FACT

1. Appellant ECD is a Pennsylvania corporation which operates facilities located at 405 Sterling Road, 460 Industrial Park Road, and 470 Terminal Road, Hampden Township, Cumberland County, Pennsylvania. At these facilities, ECD conducts trucking, warehousing, consolidation and related activities involving various products and commodities. The 460 Industrial Park Road site is

a food distribution facility as well as a general freight operation. (J.S. No. 1[1]; N.T. 320-321)

2. Appellant Hugo is a Pennsylvania corporation which is the parent corporation of ECD. (J.S. No. 2)

3. Appellant Baron is a partnership which owns property located at 460 Industrial Park Road, Hampden Township. (J.S. No. 3)

4. Appellant Eastern is a Pennsylvania corporation located at 460 Industrial Park Road, Hampden Township. Eastern repairs trucks at this facility. (J.S. No. 4)

5. Appellant New Penn is a Pennsylvania corporation with business facilities located at 451 Freight Street, Camp Hill, Pennsylvania and 475 Terminal Road, Camp Hill, Pennsylvania. New Penn at its business facilities owns and operates a trucking business. It is an Arnold Industries company which handles general commodities including food stuffs for distribution. (J.S. No. 5; N.T. 111)

6. Appellant Lebarnold is a Pennsylvania corporation with a business facility located at 4410 Industrial Park Road, Camp Hill, Pennsylvania. Lebarnold at its business facility owns and operates a trucking and warehousing business. Lebarnold is also an Arnold company, a truck carrier who hauls general commodities including food stuffs. (J.S. No. 6; N.T. 111)

7. Appellant Arnold is a Pennsylvania corporation which is the parent corporation of both New Penn Motor Express and Lebarnold. (J.S. No. 7)

8. Appellee, the Commonwealth of Pennsylvania, Department of Environmental Protection is the agency authorized to administer and enforce the Municipal Waste Planning,

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[1] Reference to the Joint Stipulation is denoted by "J.S. No.___." The Joint Exhibits are referenced as "J.E. ___." The transcript of the hearing is referred to as "N.T. __."

Recycling and Waste Reduction Act, the Act of July 26, 1988, P.L. 556, 53 P.S. § 4000.101, ("Municipal Waste Act); the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, *as amended*, 35 P.S. § 6018.101 *et seq* (SWMA) ; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1921, P.L. 177, *as amended*, 71 P.S. § 510.17; and the rules and regulations promulgated thereunder. (J.S. No. 8)

9. Permittee, Waste Management, is a corporation incorporated under the laws of the Commonwealth of Pennsylvania with a business address of 3329 Street Road, Bensalem, Bucks County, Pennsylvania 19020. (J.S. No. 9)

10. The property involved in this appeal is 1.94 acres of land in Hampden Township, Cumberland County. (Notice of Appeal; J.S. No. 13)

11. The 1.94 acres is a portion of a 16 acre parcel purchased on December 17, 1991 by Waste Management from Roadway Services, Inc. and is presently utilized by Waste Management's hauling division. (J.S. Nos. 12 & 15)

12. Roadway was the former owner and occupier of the property and performed, among other things, service and maintenance of its truck fleet at the site. (J.S. No. 14)

13. Prior to purchasing the property Waste Management engaged Golder Associates, an engineering firm, to perform a Phase I site assessment. (J.S. No. 15)

14. On April 11, 1991, Golder Associates submitted to Waste Management a Draft Executive Summary Phase I for the property. (J.S. No. 16)

15. The Draft Executive Summary confirmed the presence of pre-existing soil and groundwater contamination on the property. (J.S. No. 17)

16. On or about March 2, 1992, Waste Management submitted an application for a solid

waste transfer facility to the Department. (J.S. No. 18)

17. On or about July 23, 1992, the Department determined that the permit application was administratively complete. (J.S. No. 21)

18. On or about December 21, 1992 the Department issued a comment letter to Waste Management. (J.S. No. 27)

19. On or about January 25, 1993, the Department issued an additional comment letter to Waste Management. (J.S. No. 28)

20. On or about April 13, 1993, Waste Management responded to the Department's December 21, 1992 and January 25, 1993 comment letters. (J.S. No. 29)

21. On or about September 20, 1993, the Department transmitted a pre-denial letter to Waste Management that raised additional technical issues. (J.S. No. 30)

22. On or about November 5, 1993, Waste Management responded to the Department's September 20, 1993 letter. (J.S. No. 31)

23. By a November 29, 1993 letter Donald Korzeniewski, Environmental Protection Specialist for the Department, requested PennDOT review and comment regarding the proposed facility's impact on traffic flows, safety or any other concerns. (J.E. No. 26)

24. PennDOT responded in a December 8, 1993 letter that it was Waste Management's responsibility to hire an engineering firm to collect traffic information. (J.E. No. 41)

25. This response was misfiled by the Department and not uncovered until the discovery period in the current case had closed. (EHB's February 28, 1997 Opinion and Order)

26. The Department issued the permit, No. 101620, on June 14, 1994. (J.S. No. 53)

27. By a November 9, 1995 letter the Department informed the Board of the misfiling of

PennDOT's December 8, 1993 letter. (EHB's February 28, 1997 Opinion and Order)

28. On November 9, 1995, the Department sent Waste Management a letter notifying it of the suspension of Permit No. 101620 pending resolution of traffic issues raised in the December 8, 1993 letter from PennDOT to the Department. (J.E. Nos. 43 & 57)

29. Waste Management submitted traffic analysis reports from two engineering firms, TriLine Associates, Inc. and Rettew Associates, Inc.. (J.E. Nos. 45 & 47)

30. On February 20, 1996, the Department requested PennDOT's assistance in reviewing copies of traffic impact analysis prepared by TriLine Associates, Inc. and Rettew Associates, Inc. submitted on behalf of Waste Management, and a copy of a traffic impact analysis prepared by Acer Engineers and Consultants, Inc. submitted on behalf of Appellants.(J.E. No. 44)

31. PennDOT stated in its March 11, 1996 response that "both studies (Acer and TriLine Associates) are consistent in concluding that existing levels of service are less than ideal. The difference is a matter of interpretation. Acer concludes that any impacts on an intersection with an existing poor level of service should be addressed. TriLine's position is that the intersection with an existing poor level of service and the Waste Management's extra traffic wouldn't affect the overall levels of service and therefore shouldn't be responsible for correcting an existing problem. TriLine's position is consistent with the Department's in reviewing highway occupancy permits. In this case, the developer would not be responsible for addressing the intersection...." (J.E. No. 48)

32. On April 2, 1996, the Department reinstated Permit No. 101620 with the amendment of one condition (Condition 7) and the addition of two conditions (Conditions 15 and 16). (J.S. No. 58)

Access Road

33. A pre-existing road at the entrance to the facility leads 150 feet into the facility from Industrial Park Road and is used as an access road. (J.E. No. 3)

Culvert

34. There is a culvert under the access road through which storm water runoff flows. (N.T. 310)

35. The parties have stipulated that no permit is required under Chapter 105 (relating to Dam Safety & Enforcement) for this culvert. (J.S. No. 57)

Enclosed Building

36. The permit does not contain conditions allowing for the loading and unloading of trash with the doors open. (Notice of Appeal - Department's June 14, 1994 letter)

37. The Department included provisions allowing for waste to be stored in truck-trailers parked on site. (Permit)

Application/Conditions

38. Waste Management's operating plan stated it was their intent that, "putrescible waste will not be stored in transfer trailers for more than 24 hours... Since resource recovery facilities or landfills do not receive solid waste after midday on Saturdays, it is possible that putrescible waste may remain in tarped or enclosed transfer trailers from Saturday evenings through early Monday mornings. And on holidays, it is possible that wastes will remain in tarped containers from Saturday evenings to early Tuesday mornings. Inclement weather may also preclude the facility from meeting the 24 hour storage requirements." (J.E. No. 2, Form 32, Attachment 3)

39. Condition 7 of the original permit provided, "The operator may not allow putrescible waste to remain on the floor of that facility following the end of the working day or for more than 24

hours. (Notice of Appeal; J.E. No. 1)

40. Amended Condition 7 of the reinstated permit states,

> The operator may not allow putrescible waste to remain at the transfer facility at the end of the working day or more than 24 hours. Prior to acceptance of waste, the operator must amend the operations plan for this facility to reflect this condition. A copy of the amended operations plan must be submitted to the Department prior to operation of the facility. (J.E. No. 53)

41. Condition 15 of the reinstated permit states,

> The transfer facility may not receive waste for transfer until the loading and unloading areas are equipped with drains or sumps connected to a sanitary sewer system or treatment facility. Prior to acceptance of waste, the operator must amend the operations plan for this facility to reflect this condition. A copy of the amended plan operations must be submitted to the Department prior to operation of the facility. (J.E. No. 53)

42. Condition 16 of the reinstated permit states,

> All vehicles waiting to be weighed at the facility must be staged on property owned or leased by Waste Management. No vehicles may be parked along Industrial Park Road. (J.E. No. 53)

Environmental assessment - Form D

43. The Department's permit application includes a Form D. (J.E. No. 2)

44. Form D is titled Exclusionary Area Criteria/Environmental Assessment Process for Municipal Waste Management Facilities and requests information regarding exclusionary area criteria, environmental assessment criteria, and economic and social consideration. (J.E. No. 2)

45. Waste Management submitted a completed Form D, wetland investigation photographs, wetland data sheets, the landowner's written consent and excerpts from Perry County's Solid Waste Plan. (J.E. No. 2, Section 3.4)

46. The Department reviewed the entire permit application. (Notice of Appeal)

Vector control

47. Waste Management submitted a nuisance control plan as part of its application. (J.E. No. 2)

48. The proposed plan included provisions to address odor, dust, noise and vectors. (J.E. No. 2)

49. The Department reviewed the permit application, concluded the plans met the statutory and regulatory requirements and issued the permit. (Notice of Appeal)

100 Year Floodplain

50. Linda Houseal, facilities supervisor in the Department's Waste Management Program, stated on cross examination that the proposed transfer facility is "at least 300 feet" from the floodplain. (N.T. 387)

51. A map submitted as part of Joint Exhibit 2 shows that the closest boundary of the proposed permitted facility is over 300 feet from the 100 year floodplain set forth on the FEMA (Federal Emergency Management Agency) map. (J.E. No. 2)

Flooding

52. David Richard, a Department engineer, testified on direct examination that he did not specifically review the construction of the culvert. (N.T. 42-43)

53. Mr. Richard also testified that he did not review the application to determine whether the culvert complied with Chapter 105 requirements. (N.T. 46)

54. Michael Nawrocki, a professional engineer, testified that permit application does not in any way acknowledge or evaluate the potential flooding situation at that culvert. (N.T. 48)

Wetlands

55. Wetlands are located within 300 feet of the transfer station, however, these wetlands are not exceptional value wetlands. (J.S. No. 39)

Pre-existing contamination

56. There was contamination on the site when the Department issued the permit. (N.T. 56; 176; 197-198; J.S. No. 17)

57. Michael A. Nawrocki testified that in his opinion there were on-site sources of contamination, there was no evidence of any remediation, and that contamination still exists. (N.T. 205-207)

58. Francis P. Fair, solid waste manager in Southcentral Region for the Department, testified that the Department did not have a problem with issuing the permit in light of the fact of pre-existing contamination because Waste Management had no role in the pre-existing contamination, the contamination is fairly widespread, and it was nothing relative to the current proposal that involved excavating and contaminated soil. (N.T. 403)

59. Through an April 11, 1991 submission Golder Associates, Inc., the engineering firm hired by Waste Management, informed Waste Management of its findings in what was titled a Draft Executive Summary for the facility. (J.S. No. 6)

60. Waste Management did not cause the pre-existing contamination. It existed on site in part as a result of the operation of the prior owners of the site. (Findings of Fact Nos. 57-64)

61. Appellants presented no evidence that Waste Management's operations authorized in the permit would adversely affect the pre-existing contamination.

DISCUSSION

Appellants have the burden of proof and the burden of proceeding since this is an appeal of an action of the Department where Appellants are parties who are not the applicants or holders of a license or permit from the Department and are protesting the permit's issuance or continuation. 25 Pa. Code § 1021.101(c)(2). To sustain their burden Appellants must prove by a preponderance of the evidence that the Department committed an error of law or abused its discretion when it issued the permit for the construction and operation of a waste transfer station in Hampden Township, Cumberland County. 25 Pa. Code § 1021.101(a).

Standing

Where standing is not conferred by statute, a private party has standing to maintain an action so long as he has a direct, immediate and substantial interest in an appeal. *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). A party has a "direct" interest within the meaning of the *William Penn* standing test so long as he was harmed by the challenged action or order. *Empire Coal Mining & Development, Inc. v. DER*, 623 A.2d 897, *appeal denied* 629 A.2d 1384 (Pa. Cmwlth. 1993). A party has a "substantial" interest within the meaning of the *William Penn* standing test so long as he has an interest which surpasses the common interest of all citizens in seeking compliance with the law. *Id.* A party has an "immediate" interest within the meaning of the *William Penn* standing test so long as there is a causal connection between the action or order complained of and the injury suffered by the party asserting standing. *Id.*

In a case involving a citizen suit brought by ranchers and irrigation districts under the citizen-suit provision of the Endangered Species Act (ESA), the Supreme Court held that the ranchers and districts had standing. *Bennett v. Spear*, 520 U.S. 154, 117 Sup. Ct. 1154, 137 L.Ed.2d. 281 (1997). The court noted that although the Secretary of the Interior's ultimate decision is reviewable only for

abuse of discretion, it does not alter the categorical requirement that, in arriving at his decision, he take into consideration the economic impact, and any other relevant impact. *Id.* at 1166. Further, the court stated, "Whether a plaintiff's interest is 'arguably ... protected by the statute' within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question..., but by reference to the particular provision of law upon which the plaintiff relies." *Id.* at 1167.

Testimony supports Appellants' contentions that if vectors contaminated their sites, they will suffer harm financially in order to rid the premises of the contamination. Appellants conduct trucking, warehousing, consolidation and other related activities involving various food products and commodities from their facilities. The specific activities at Appellants' warehouses include: repackaging of pet food, storing and distributing general commodities, storing and distributing food and beverage commodities/products and storing non-food products. (N.T. 110-112; 319-322; 440; 447)

The warehouses are in close proximity (one mile or less) to the proposed facility. (N.T. 320; 449) The sanitary conditions of the warehouse could be directly and immediately affected by vectors and odors. Any flying pests and rodents, which may be attracted to the transfer station, can migrate to Appellants' warehouses. (N.T. 158) Furthermore, the warehouses' ventilation systems could draw in airborne contaminants and odors from the proposed facility. (N.T. 160-61) Food products stored in the warehouse(s) would be adversely affected by the odors because the cardboard storage containers and food products, like chocolate which is stored at one of the facilities, draw and retain environmental odors. (N.T. 116-17; 328-29)

As a result of the vectors and odors Appellants will potentially sustain economic harm. Mr.

Richard J. Linsenbach, President and CEO of Hugo Services and Eastern Consolidation and Distribution Services, testified that his organization would suffer substantial economic harm.

> Q. Would you summarize for the Judge the reasons why you're opposed to the transfer station operation going in at that proposed location?
>
> A. Basically, we feel that there is both economic and environmental harm by putting a transfer station in this vicinity. We ourselves would have substantial economic harm done by this operation.
>
> Even if we had to fumigate one more time or one additional time, assuming that would solve our problem -- and, again, because of potential insects and so forth, and we don't know all that would be brought in -- we don't even know if we could contain the problem. We don't know that we could stop the problem before it got to a potential customer. The cost for fumigation of a facility like at 405, for example, is $30,000 to $50,000 per fumigation.
>
> Here again, we're entering chemicals now into food products. We're not sure what impact that will have on the food and food products that we're trying to get to the customers.
>
> We are just part of a system of quality control for the products, and we are very, very much concerned with the economic impacts that this will have potentially; and, like I said, environmental impacts that this transfer station would have on our industry and on the actual community itself.
>
> Q. What is the investment that your companies have in this area?
>
> A. We would estimate the buildings at probably around fifteen million dollars. We probably have an additional four or five million dollars in equipment.
>
> In addition to that, there's probably sixty to seventy million dollars worth of food and various products, and so forth, in the facilities themselves.

(N.T. 333-335).

For the reasons stated above we find the Appellants have a direct, substantial and immediate interest and therefore have standing in this matter.

Access Road

Appellants contend that the Department violated its own regulations by failing to include the access road, truck parking areas, the office and other support facilities within the transfer facility permit. Appellants argued that the permit violates several regulations, specifically Sections 271.1 (Municipal Waste Management-General Provisions) and 279.104 (Transfer facilities), because it does not include the access road.

Waste Management contends the Department has done nothing wrong. Waste Management states that the Department raised the access road issue with Waste Management, that Waste Management responded and that the Department determined not to include the pre-existing dual use access road in the permitted area. Waste Management also argues that the regulations do not expressly address a dual use access road and that the Department's interpretation of its regulations controls unless they are plainly erroneous or inconsistent with the SWMA. Furthermore, Waste Management argues the Department's interpretation is supported by the recent amendment to the regulations in which "transfer facility" no longer requires the inclusion of the access road in the permitted area.

The Board must use the regulations which are in effect at the time of the issuance. *Kwalwasser v. DER*, 1986 EHB 24, 55, *aff'd* 569 A.2d 422 (Pa. Cmwlth. 1990). The Department issued an operating permit to Waste Management for a transfer, solid waste disposal and/or processing facility on or about June 14, 1994. At the time of the issuance of this permit Section 271.1 defined a "transfer facility" as follows:

> A facility which receives and temporarily stores solid waste at a location other than the generations site, and which facilitates the bulk transfer of accumulated solid waste to a facility for further processing or disposal. The <u>term includes</u> land affected during the lifetime of the operations, including, but not limited to, areas where storage or transfer actually occurs, support facilities, borrow areas, offices,

> equipment sheds, air and water pollution control and treatment systems, access roads, associated onsite or contiguous collection and transportation facilities, ...[2]

Access road is defined as,

> A roadway or course providing access to a municipal waste processing or disposal facility, or area within the facility, from a road that is under Federal, Commonwealth or local control.

25 Pa. Code §271.1. Processing is defined as,

> Technology used for the purpose of reducing the volume or bulk of municipal or residual waste or technology used to convert part or all of the waste material for offsite reuse. Processing facilities include, but are not limited to, transfer facilities, composting facilities and resource recovery facilities. (emphasis added)

25 Pa. Code § 271.1. The Department noted the lack of the access road in the permitted area in its December 21, 1992 initial technical review comment letter. In Paragraph 19 of the letter the Department stated:

> The access drive and scale house should be part of the permitted area of the site. Please include the scale house area and access drive in the area proposed for a permit and reassess all isolation distances.

In Waste Management's April 13, 1993 response regarding Paragraph 19 it noted:

> The proposed permit boundary has been revised to include the scalehouse area. The proposed permit boundary extends 10 feet south of the proposed scales and encompasses the transfer station and transfer storage area. The access drive has not been included in the

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[2] The Municipal Waste Regulations were revised beginning in October 1994. The regulations were promulgated on January 25, 1997 in Vol. 27 Pa. Bulletin No. 4, pp.521-574. Since the permit was issued prior to the implementation of the new regulations, we must use the preceding definition.

> permit boundary area due to the fact that it serves a dual function as access drive for both the hauling company and proposed facility....

The Department has the power to interpret its own regulation and, once it does so, that interpretation is entitled to controlling authority unless it is plainly erroneous or inconsistent with the applicable statute. *Hatchard v. DER*, 612 A.2d 621 (Pa.Cmwlth. 1992), *petition for allowance of appeal denied*, 622 A.2d 1378 (1993); *Morton Kise v. DER*, 1992 EHB 1580, 1616. However, the Board has held that "an agency cannot, under the guise of interpretation, ignore the language of its regulations, for the agency as well as the regulated public is bound by the regulation." *People United to Save Homes v. DEP*, 1996 EHB 1411 (citing *Delaney v. State Horse Racing Commission*, 535 A.2d 719 (Pa. Cmwlth. 1988). So we must look to the language of the regulation. The definition of "access road" is clear that the permitted area includes roads leading to a processing or disposal facility or areas within the facility from a local, state or federal controlled road. 25 Pa. Code § 271.1. "Processing facility" includes, but is not limited to, transfer facilities. 25 Pa. Code § 271.1 Definition of "Processing". The road at issue is the entrance to the facility from Industrial Park Road and leads 150 feet into the facility. The evidence shows only that the access road is under dual use and serves areas closer to Industrial park Road than the proposed facility. The majority of the road in question is well beyond the limits of the proposed areas where transfer and processing will occur. Accordingly, we hold that the Department did not abuse its discretion by interpreting its regulations to mean that this portion of the road under dual use is not an access road under the Department's regulations.

Waste Processing and Storage

Appellants contend the Department abused its discretion in granting the permit because Section 279.215(a) of the solid waste regulations require that the trash transfers be conducted in an enclosed building and that the permit, as written, does not meet this requirement. Appellants allege:

1) that the evidence presented at the hearing shows that the doors will be open during all aspects of the transfer; 2) that filled trailer trucks will be stored for up to 24 hours in an unenclosed area; 3) that there is no justification given for not enclosing the operation in spite of the facility's location and the vulnerability of the surrounding land use; and 4) that these conditions will generate odors, vectors and insects.

The municipal waste regulations provide:

> Loading, unloading, storage, compaction and related activities shall be conducted in an enclosed building, unless otherwise approved by the Department in the permit.

25 Pa. Code § 279.215(a). The regulation is clear that these activities must be done in an enclosed building unless the Department approves otherwise. The enclosed building requirement is obviously aimed at enabling the operator to meet its obligations to control odor and other nuisances under §§ 279.218 and 279.219 of the regulations. Accordingly, we think the Department would ordinarily require that the building not only have a roof and four sides, but that the doors be closed during unloading, loading and compaction activities. This is particularly true where the facility is to be located in proximity to food processing activities. There is no evidence that the Department considered this issue since there are no conditions allowing for the loading and unloading with the doors open. In the original permit, Condition 5 specifically stated, "All loading, unloading, storage and compaction of solid waste must take place within the transfer building, with the exception of recyclables described in Permit Condition 9 below."[3] Waste Management's operating plan, as

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[3] Permit Condition 9 provides, "The operator must establish at least one drop-off center for the collection and sale of at least three recyclable materials chosen from the following: clear glass, colored glass, aluminum, steel and bimetallic cans, high grade office paper, newsprint, corrugated paper and plastics. The drop-off center must be located at the facility or at a location that is easily accessible to substantial numbers of persons generating municipal waste that is processed at the

submitted with its application, provides for the unloading and loading in the building but says nothing about whether or not the doors will be closed during the transfer process. Specifically, it states,

> All solid waste will be tipped within the transfer building on a reinforced concrete floor. The waste may then be compacted by driving a rubber/track loader over the waste material. When sufficiently compacted, a front-end loader will lift the compacted waste material and deposit it directly into an open-top transfer trailer. The transfer trailer will be positioned in a drive-in bay (lower in elevation than the tipping floor). This lower drive-in bay area where the transfer trailer is positioned will be equipped with a drain to allow for wash down of this area. The transfer trailers will be tarped before leaving the transfer station building. All Waste Management-owned trailers will be equipped with semi-automated tarping systems operated by one person. Loaded transfer trailers will then pass through the scale to be weighed and exit directly onto Industrial Park Road.

Joint Exhibit 2, a blue print for the proposed facility, indicates that the transfer pits are inside the building. (J.E. No. 2 S-4).

In *Tinicum Township v. DEP*, 1997 EHB 1119, 1146, *aff'd, Tri-State Transfer Company, Inc. v. DEP*, 722 A.2d 1129 (Pa. Cmwlth. 1999) we held that the Department abused its discretion in concluding that the requirement that a transfer facility be surrounded by a fence or other suitable barrier to preclude unauthorized access could be met by a natural vegetative barrier. Similarly, in this case, we believe that the Department must consider whether loading, unloading and compaction activities be conducted with the doors to the building closed in assessing the facility's ability to meet its obligations to control odor and other nuisances. Accordingly we remand to the Department to determine whether the doors to the building must be closed during these operations under the particular circumstances of this transfer station.

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facility. The drop-off center shall be operated in compliance with Section 1502(b) of the Municipal Waste Planning, Recycling, and Waste Reduction Act, 53 P.S. Section 4000.1502(b).

Appellants contend that the Department did not fully determine whether the proposed operation had the potential to cause environmental harm, that Waste Management never completed the portion of the Department's Form D (Environmental Assessment Form) regarding the social and economic justification for the project, and that the Department did not require the submittal of a written explanation on how to mitigate the potential harm. This concern is understandable because Appellants are food storage and shipping merchants.

Waste Management contends the Department's form (Form D) is consistent with the regulations. Waste Management alleges the Department did not abuse its discretion when it made its determination that the proposed operation does not have the potential to cause environmental harm and that Appellants failed to meet their burden of proving by a preponderance of the evidence that the proposed operation will have the potential to cause environmental harm despite the mitigation measures. The Department concurs that it conducted a thorough environmental assessment and correctly concluded that the transfer facility would not cause harm.

Section 271.127 (Environmental assessment) of the regulations sets forth the provisions concerning environmental assessment. Subsection (a) states,

> Each environmental assessment in a permit application shall include at a minimum a detailed analysis of the potential impact of the proposed facility on the environment, public health and public safety, including traffic, aesthetics, air quality, water quality, stream flow, fish and wildlife, plants, aquatic habitat, threatened or endangered species, water uses and land use. The applicant shall consider features such as recreational river corridors, State and Federal forests and parks, the Appalachian Trail, historic and archaeological sites, National wildlife refuges, State natural areas, prime farmland, wetland, special protection watersheds designated under Chapter 93 (relating to water quality standards), public water supplies and other features deemed appropriate by the Department or the applicant.

25 Pa. Code § 271.127(a). After the applicant submits the information and the Department consults with the appropriate governmental agencies and potentially affected persons, the Department will evaluate the assessment provided under subsection (a) to determine whether the proposed operation has the potential to cause environmental harm. 25 Pa. Code § 271.127(b). The regulations set forth a variety of factors the Department will consider. Those factors include, "but are not limited to engineering design, construction and operational deviances at comparable facilities; with inherent limitations and imperfections in similar designs and materials employed at comparable facilities; and with the limitations on future productive use of land after closure of the facility. If the Department determines that the proposed operation has this potential, it will notify the applicant in writing." 25 Pa. Code §271.127(b). Form D completed by Waste Management and submitted as part of its permit application conforms to the regulatory provisions set forth above in subsection (a). Waste Management submitted information for such items as the location of the facility to a designated national or state wild, scenic, recreational, or modified recreational river; proximity to a 1-A priority river or national park, Appalachian Trail, natural landmark, national wildlife refuge, fish hatchery or environmental center, historical sites, forests or game lands; and within an area of habitat for rare, threatened or endangered species when it completed Form D.

Appellants' noted that there was no written determination by the Department as to whether or not such potential existed. However, the Board disagrees with Appellants' interpretation. The regulations state that the Department will notify the applicant in writing if it determines that the proposed operation has the potential to cause environmental harm. In this instance, the Department determined that the proposed operation would <u>not</u> cause harm. So there was no need for written determination.

We must also reject Appellants' contention that the remaining aspects of the assessment process, such as consideration of the mitigation measures, the review of the measures by the Department, the study of any social and economic benefit and a needs analysis, were never completed. These matters are only addressed under certain instances, specifically when the Department determined that the proposed operation may cause environmental harm. Those instances are the following:

> - The applicant provides a written explanation of how it plans to mitigate the potential harm, <u>if the Department or the applicant determines that the proposed operation may cause environmental harm</u>. 25 Pa. Code § 271.127(c)
>
> - The applicant shall describe in writing the social and economic benefits of the project to the public <u>if the application is for the proposed operation of a type of facility other than a municipal waste landfill or resource recovery facility and the Department determines that the proposed operation has the potential to cause environmental harm and it remains despite the mitigation measures.</u> 25 Pa. Code § 271.127(e)
>
> - The description required by the social and economic benefits subsection shall include a detailed explanation of the need for the facility and the consistency of the facility with municipal, county, State or regional solid waste plans in effect where the waste is generated. 25 Pa. Code § 271.127(f)

None of these matters were addressed since the Department determined that there was no potential for environmental harm as the result of the proposed operation. However, the potential for environmental harm should be addressed because the possibility for odors to migrate, birds to fly into the facility and other vectors to gain access to the premises if the doors are open creates the potential for contamination of Appellants' goods. Therefore, we remand to the Department to address this issue in conjunction with the requirement that the building be closed during operations.

The plan also addressed the storage of the waste. Waste Management stated in its operating

plan that it will store waste in tarped trailers for more than 24 hours. Specifically, the plan states:

> It is our intent that putrescible waste will not be stored in transfer trailers for more than 24 hours. Normally, the putrescible waste will be transported to the designated processing or disposal facility within 24 hours. Since resource recovery facilities or landfills do not receive solid waste after midday on Saturdays, it is possible that putrescible waste may remain in tarped or enclosed transfer trailers from Saturday evenings through early Monday mornings. And on holidays, it is possible that wastes will remain in tarped containers from Saturday evenings to early Tuesday mornings. Inclement weather may also preclude the facility from meeting the 24-hour storage requirements. (emphasis added)

Joint Exhibit No. 2, 3.9 Form 32, Attachment 3. The Department included a provision, Condition No. 7, in the original permit that "[T]he operator may not allow putrescible waste to remain on the floor of the facility following the end of the working day or for more than 24 hours" but nothing specifically about storage. This issue was challenged in the appeal of the original permit.

The Department subsequently amended Condition 7 when it reinstated the permit.[4] The amendment states, "[T]he operator may not allow putrescible waste to remain at the transfer facility at the end of the working day or for more than 24 hours. (emphasis added) Prior to acceptance of waste, the operator must amend the operations plan for this facility to reflect this condition. A copy of the amended operations plan must be submitted to the Department prior to operation of the facility." (Amended Permit Condition 7)

Section § 279.217 at the time this permit was issued provided that waste was not to remain at the facility at the end of the day or for more than 24 hours. The amended regulation permits waste to remain there for up to 72 hours over a weekend if the permit so provides. Permitting the trailers to

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[4] The provisions of Section 279.217 were amended effective January 25, 1997, Vol. 27 *Pa. Bulletin* No. 4, p. 561. That section was one of numerous revisions made to the Sewage Sludge, Municipal Waste and Residual Waste regulations in 1997.

stay at the facility over night under the original § 279.217 violated the regulation. On remand, however, the Department can choose to either permit amended condition 7 to remain as it is or expand it to cover the three-day weekend under the present regulation.

The Department amended another condition when it reinstated the permit. Condition 15 was amended to reflect the changes made in § 279.216 of the regulations which state:

> The loading areas and unloading areas shall be constructed of impervious material which is capable of being cleaned by high pressure water spray and shall be equipped with drains or sumps connected to a sanitary sewer system or treatment facility to facilitate the removal of water.

25 Pa. Code § 279.216.

In the reinstatement letter the Department included another new condition, Condition 16, which states:

> All vehicles waiting to be weighed at the facility must be staged on property owned or leased by Waste Management. No vehicles may be parked along Industrial Park Road.

The Department has discretion to add other conditions that it deems appropriate. In this case, the Department incorporated the language of Condition 16 in response to concerns regarding other vehicles using the roads. The Department can require amendments to the operating plan either before it issues the permit or before it permits operation.

Res Judicata/Collateral Estoppel

On the morning of the hearing Waste Management filed and served a Motion in Limine asserting that Appellants are collaterally estopped from raising certain issues because the Cumberland County Court of Common Pleas previously had entered a judgment against Appellants. The Board granted Appellants' motion to strike on the grounds that the motion was filed too late. So that the

argument is fully understood we will give the history of the suit in Cumberland County.

On August 23, 1995, Waste Management filed an Application for Subdivision or Land Development Approval for a municipal waste transfer station with Hampden Township (Township). On September 14, 1995, the Township Planning Commission voted unanimously to approve the preliminary land development plan, subject to review and approval by the Pennsylvania Department of Environmental Protection and the Cumberland County Planning Commission. On November 2, 1995, the Township Board of Commissioners voted unanimously to approve the plan. Appellants appealed the Commission's decision to the Cumberland County Court of Common Pleas. The trial court affirmed the approval and made the following rulings in its opinion: 1) it concurred with the Board of Commissioners' interpretation that its zoning ordinance includes a transfer station among the uses authorized in a general industrial zoning district was reasonable; 2) it found that the record did not substantiate Appellants' claim that the site is subject to unremediated contamination by petroleum products and no definitive or substantial evidence exists to suggest that such contamination presents a significant threat to "life, safety, health or property;" 3) it found that the record failed to show that the presence of waste on the site will have an adverse impact on the surrounding area regarding vector activity, odors or creation of nuisances; 4) it found that the record did show that the Commissioners incorrectly analyzed the impact that the transfer station would have on traffic safety, rather it held that this issue was adequately addressed by Waste Management; 5) it found that the Township Board properly had addressed Appellants' concerns as to whether the site would be subject to flooding because Waste Management provided satisfactory assurances that the current stormwater system on the site is capable of handling additional stormwater produced by the transfer station; and 6) it found that the record demonstrates that there will not be any problems from leachate. On appeal,

Commonwealth Court affirmed the Court of Common Pleas of Cumberland County.

The Commonwealth Court limited its scope of review and affirmed the trial court on the following issues: 1) did the trial court abuse its discretion; 2) is a municipal waste transfer station a permitted use within the zoning district in which the site is located; and 3) were the trial court's findings of fact supported by additional evidence. In performing its legal interpretation of the main issue of whether the proposed waste transfer facility was a permitted use pursuant to the zoning ordinance, the common pleas court made factual determinations regarding flooding, odors, vectors, traffic, etc. Although these determinations may have set the court's mind at ease, they were not essential/material to its ultimate legal conclusion. On the other hand, the issue before the Board is whether the Department of Environmental Protection abused its discretion or committed an error of law when it issued the solid waste permit to Waste Management. Our analysis will include an examination of relevant statutes and a thorough review of the regulations set forth in 25 Pa. Code §§ 279.1-279.272 concerning transfer facilities and 25 Pa. Code §§ 271.1, 271.126 and 271.127(c), (e) and (f) which relate to municipal waste management and environmental assessments.

Although the parties base their arguments on either *res judicata* or collateral estoppel, the Board finds *res judicata* to be inapplicable to the current proceeding. The nature and purpose of the doctrine of *res judicata* were explained in *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313 (Pa. Super. 1983). There, the court stated:

> The doctrine of *res judicata* has been judicially created. It reflects the refusal of the law to tolerate a multiplicity of litigation. It holds that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal or concurrent jurisdiction. (citation omitted).

464 A.2d at 1316. Therefore, *res judicata* is a principle of law that precludes the relitigation of issues decided in a prior valid judgment in any future suit between the parties on the same cause of action. Before the doctrine of *res judicata* will preclude a claim, four conditions must be satisfied: 1) identity of the subject matter; 2) identity of cause of action; 3) identity of the parties; and 4) identity of the quality or capacity of the parties suing or sued. *Flannigan v. Workmen's Compensation Appeal Board (Colt Industries)* 726 A.2d 424 (Pa. Cmwlth. 1999); *Fiore, d/b/a Municipal and Industrial Disposal Co. v. DER*, 1994 EHB 90. Here, the doctrine of *res judicata* cannot apply, for more than one of the above conditions is absent in the two cases. Before the Board it is Appellants challenging Waste Management and the Department concerning the environmental review of the Department. In the case brought in the court of common pleas it was Appellants versus Waste Management and the Board of Commissioners of Hampden Township concerning zoning and land use.

The doctrine of collateral estoppel operates to preclude the relitigation of issues of fact or law determined in a prior proceeding. *Mason v. Workmen's Compensation Appeal Board (Hilti Fastening Systems Corp.)* 657 A.2d 1020, 1022-23 (Pa. Cmwlth. 1995). Under that doctrine, factual and legal determinations are conclusive between the parties in a subsequent action involving different causes of action only to issues that 1) are identical; 2) were actually litigated; 3) were essential to the judgment (or decree, as the case may be); and 4) were "material" to the adjudication. *Id.* The key is that the principle of collateral estoppel applies only where facts actually litigated are essential to the judgment and material to the adjudication. *Atterberry v. Smith*, 522 A.2d 683 (Pa. Cmwlth. 1987) citing *McCarthy v. Township of McCandless*, 300 A.2d 815, 820-21 (1973).

The essential issue before the court of common pleas was whether the transfer station was a permitted use in the commercial area where the site is located. In reaching this decision the court

considered several environmental issues but not one of these issues was essential to the decision on zoning. Before this Board, however, all environmental issues considered by the Department are essential to a determination of whether the Department abused its discretion or failed to comply with the law or its regulations when it permitted the facility. The environmental facts are material to this adjudication. Thus, collateral estoppel does not apply.

Vector control - odors, birds, rodents and insects

Section 279.107 (relating to nuisance control plan) of the regulations requires,

> The application shall contain a plan under § 279.219 (relating to nuisance control) to prevent and control hazards or nuisances from vectors, odors, noise, dust and other nuisances not otherwise provided for in the permit application. The plan shall provide for the routine assessment of vector infestation and shall also provide for countermeasures. The plan may include a control program involving a contractual arrangement for services with an exterminator.

25 Pa. Code § 279.107. Section 279.219 sets forth the nuisance control requirements which include:

> (a) The operator may not cause or allow the attraction, harborage or breeding of vectors.
>
> (b) The operator may not cause or allow conditions not otherwise prohibited by this subchapter that are harmful to the environment or public health, or which create safety hazards, odors, dust, noise, unsightliness and other public nuisances.

25 Pa. Code § 279.219. Waste Management submitted a nuisance control plan as part of its application, Attachment No. 9 Form 32. (J. E. No. 2) In its proposed plan Waste Management included provisions to address odor, dust, noise and vectors, but did not include routine assessment of vector infestation or control program. That section of the plan provides the following:

> In order to discourage the development of a suitable habitat for rodents and/or insects, routine cleaning will be implemented within the

> enclosed structure. However, should conditions arise which are favorable to the production of vectors, or if DER or the local health department requires a routine program for the control or elimination of insects and rodents at the facility, then the operation manager will institute control measures. These measures will include, but will not be limited to, the effective use of insecticides and rodenticides. The application of these measures, if required, will be made by a licensed applicator and will be initiated with the assistance or approval of the DER.

As is evident by the plan's provisions set forth above, the plan only addresses countermeasures for vectors, it does not contain a provision which sets forth Waste Management's strategy to perform the required routine assessment to determine if there is any vector infestation. The omission of such a provision means Waste Management's submitted plan fails to comply with the regulations. Since surrounding businesses or food handlers and vectors as well as insecticides will affect their businesses, this omission must be addressed. Therefore, we remand to the Department this issue.

Flooding

Appellants argue against the Department's acceptance of the FEMA mapping of the 100 year floodplain without further review or question.

Waste Management contends that the Department did not abuse its discretion in determining that the facility will not be located in the 100 year floodplain.

Section 279.202 (Areas where transfer facilities are prohibited) states, "Except for areas that were permitted prior to April 9, 1988, no transfer facility may be operated: 1) In the 100 year floodplain of waters in this Commonwealth, unless the Department approves in the permit a method of protecting the facility from a 100 year flood consistent with the Flood Plain Management Act (32 P.S. §§ 679.101 -679.601) and the Dam Safety and Encroachments Act (32 P.S. § 693.1- 693.27)." 25 Pa. Code § 279.202(a)(1). Here, the evidence establishes that the proposed facility is not within

the floodplain. Linda Houseal, a facilities supervisor in the Department's Bureau of Waste Management, stated on cross examination that the proposed transfer facility is "at least 300 feet" from the floodplain. (N.T. 387) A map submitted as a joint exhibit indicates that the closest boundary of the proposed permitted facility is approximately 300 feet from the 100 year floodplain. (J.E. No. 2 S-6) Based on the evidence presented the Department did not abuse its discretion.

Appellants argue the Department abused its discretion by not requiring any kind of hydrologic analysis to study the impact of flooding caused by the inadequacy of a culvert under the road leading to the site. Tthey argue that the flood waters have a potential to carry contaminants off-site and that these contaminants will draw birds, rodents and insects at locations downstream from the facility. However, Appellants do not cite any applicable section of the regulations in support of these statements.

The culvert in question is located under the access road previously discussed. We find no abuse of discretion in the Department's review of surface water runoff from the permit area.

Wetlands

Appellants contend the wetlands involved in this case are "important" wetlands. They allege that the Department violated regulation Section 279.202 (Areas where transfer facilities are prohibited) by permitting the transfer facility to be located within 300 feet of "important" wetlands.

Waste Management contends the Department did not violate Section 279.202 and argues that the Department's interpretation was not an abuse of discretion where the wetlands do not meet the criteria for "exceptional value," do not meet the criteria of the former "important" wetlands category and the impact, if any, of the stormwater runoff to wetlands is environmentally insignificant. The Department concurs with Waste Management's contentions and also contends that the 300 foot

setback requirement was not implicated. The Department argues that it is incorrect to use the term "important" to apply to the wetlands in question since that term was amended at least three years prior to the issuance and subsequent reinstatement of the permit. The amendment resulted in the replacement of "important" with two categories - "exceptional value" and "other."

We agree with Waste Management and the Department that it correctly determined the wetlands were not "exceptional value" under the current criteria and that the 300 foot setback was not applicable. The circumstances present a unique set of facts which must be set forth prior to our analysis.

This Board and the Pennsylvania courts have ruled on numerous occasions that the Department is bound by its regulations, and indeed by the regulations which are effective at the time a permit is issued even if the application had been submitted to the Department before the regulations became effective. *Kwalwasser v. DER*, 1986 EHB 24, 55, *aff'd,* 569 A.2d 422 (Pa. Cmwlth. 1990).

Under Section 273.202 of the 1988 municipal waste regulations "a municipal waste landfill may not be operated...in or within 300 feet of an "important" wetland, as defined in §105.17 (relating to wetlands." Section 105.17 was amended in 1991 to replace "important" and its criteria with 2 categories of wetlands - "exceptional value" and "other." The amended regulations set forth criteria for "exceptional value" wetlands only. The municipal waste regulations however were not amended to reflect the Section 105.17 amendments until 1997. A conflict existed between terms in the solid waste regulations at the time of the issuance of the permit. Specifically, the solid waste regulations stated that a municipal waste landfill[5] may not be "in or within 300 feet of <u>important</u> wetlands, (as

[5] Municipal waste landfill is defined as " a facility using land for disposing of municipal waste. the facility includes land affected during the lifetime of operations including, but not limited to, areas where disposal or processing activities actually occur...." 25 Pa. Code § 271.1

defined in § 105.17)." The 1991 amendments to Section 105.17 deleted the "important" and replaced it with "exceptional value" and "other" as classifications for wetlands. In applying the rule two clauses "important" and "as defined in § 105.17" in the same regulation are in conflict. The rules of statutory construction apply to regulations. *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, 590 A.2d 384 (Pa. Cmwlth. 1991) Under the rules of statutory construction,

> Except as provided in section 1933 of this title (relating to particular controls general), whenever, in the same statute, several clauses are irreconcilable, the clause last in order of date or position shall prevail.

1 Pa. C.S.A. § 1934. Applying the law of statutory construction establishes that the clause "as defined in § 105.17" prevails because it is last in position and order of date (1991) compared to the 1988 solid waste regulations. Consequently, "important" is no longer defined in that section but has been replaced with "exceptional value" and "other." The parties admitted that the wetlands are not "exceptional value" wetlands. (J.S. No. 40) That leaves "other" as the wetland's classification. Under that classification there is no prohibition regarding wetlands. Thus, the 300 feet limitation as set forth in the regulations is inapplicable to these wetlands. Therefore, the Department did not abuse its discretion by allowing the transfer station to be within 300 feet of the wetlands.

Pre-existing contamination

Appellants contend that the Department abused its discretion in issuing the permit without requiring Waste Management to remediate pre-existing contamination on the property. During the excavation by the prior owner of the property, Roadway Services, of underground tanks that formerly stored petroleum products at the proposed site, contaminated soil was observed around the area of the

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Processing is defined as "technology used for the purpose of reducing the volume or bulk of municipal or residual waste or technology used to convert part or all of the waste materials.... Processing facilities include, but are not limited to, transfer facilities,...." 25 Pa. Code § 271.1

excavation. (N.T. 481; Exh. J-8, 9) Priority pollutant materials and petroleum products were also detected in groundwater monitoring wells at the site. (Exh. J-6, N.T. 198) The apparent sources of these contaminants are both on-site and off-site. (Exh. J-8; N.T. 198-206)

Detailed information as to the extent of the contamination was initially developed by Waste Management in its pre-acquisition study of the property from Roadway Services. The property had previously been remediated by Roadway Services by pulling nine underground storage tanks and excavation of at least 50 tons of contaminated soil in areas which are not part of the permitted area for the proposed transfer station. (N.T. 199, 480-483; J.E. Nos. 8, 11 & 12) The subsequent reports by environmental consultants relating to the seriousness of the contamination differed somewhat. While one consultant found that there was contamination of some priority pollutants above the maximum contamination level (MCL), another consultant found that the contaminants were below the applicable MCL except for benzene. (See Findings of Fact Nos. 56-59)

It is uncontested that Waste Management did not cause or contribute to the contamination. (N.T. 403) In the application submitted for the proposed transfer station, Waste Management agreed to remediate areas with stained soil prior to placement of erosion and control structures. (J.E. No. 14, response to comment 41) The Department also determined during its review that there was no concern that the environmental contaminants would impact the adjoining wetlands. (N.T. 177) The Department's Regional Director, Francis Fair, testified that he decided to issue the permit based on his determination that the operation would have no impact on the pre-existing contamination. (N.T. 403) The Appellants presented no evidence that the operation of the transfer station would have an adverse impact on the pre-existing contamination.

Section 503(d) of the Solid Waste Management Act (SWMA), 35 P.S. § 6018.503(d),

provides that the Department must deny a permit if it finds that the applicant has engaged in unlawful conduct under the SWMA which has not been corrected. Section 503(c) of the SWMA states that the Department may deny a permit if the applicant has failed to comply with the Clean Streams Law and other state and federal statutes relating to environmental protection.

Appellants contend that the permit may not be issued because owning and maintaining property on which contaminated solid waste previously has been disposed is tantamount to operating a solid waste disposal facility without a permit and also constitutes the storage and disposal of solid waste without a permit. Appellants also argue that allowing the continued release of pollutants to the groundwater is in violation of Section 307(a) of the Clean Streams Law, 35 P.S. § 691.307, which prohibits a person from discharging or permitting the discharge of industrial wastes in any manner into the waters of the Commonwealth. Appellants also argue that allowing the continued release of hazardous substances into the environment constitutes unlawful conduct under the Hazardous Sites Cleanup Act (HSCA), 35 P.S. § 6020.1108.

We believe that the Department did not abuse its discretion in failing to condition the issuance of the permit on a requirement that Waste Management fully remediate the property. It is uncontested that Waste Management did not cause the contamination so that the mandatory requirements of Section 503(d) of SWMA are not applicable. We reject Appellants' argument that leaving the contamination on site would result in Waste Management's being involved in the unpermitted storage or disposal of the wastes which caused the pre-existing contamination. The Department may at some future time exercise its discretion under the Clean Streams Law, HSCA or SWMA to require either Waste Management or other responsible parties to fully remediate the site, but the continuance of the pre-existing contamination does not require the Department to deny the permit under the mandatory

provisions of Section 503(d) of the SWMA. Since Appellants presented no evidence that Waste Management's proposed use of the property would in any way adversely impact the existing pollution at the site, there is no reason to further address this issue. Indeed, the transfer station facilities will be located in areas other than where the contamination was found. Accordingly, in absence of evidence that Waste Management's operations would adversely impact the existing pollution, we believe that the Department's decision not to require Waste Management to remediate the property as a condition of the issuance of the permit was a proper exercise of its discretion.

CONCLUSIONS OF LAW

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

2. Appellants have a direct and immediate interest in the issuance of the permit, and therefore, have standing to pursue the appeals.

3. Appellants have the burden of proving by a preponderance of the evidence that the Department's issuance of the permit was an abuse of discretion.

4. Appellants have not sustained that burden regarding 1) the 100 year floodplain; 2) the environmental assessment - Form D; and 3) wetlands.

5. Appellants met their burden regarding the issues of 1) whether the doors will be closed during the transfer of waste; 2) the Department's inadequate consideration of the amount of time that loaded trucks will remain at the facility; and 3) issuance of the permit without requiring the submitted plan to include a routine vector infestation assessment program.

Access Road

6. The Board must use the regulations which are in effect at the time of the issuance of a permit.

7. The regulation in affect at the time the permit issuance defined "transfer facility" as including access roads.

8. Access road is defined as the permitted are including roads leading to a processing or disposal facility (processing facility includes but is not limited to transfer facilities) or areas within the facility from a local, state or federal controlled road.

9. The pre-existing road at the entrance to the facilityleads 150 feet into the facility from Industrial Park Road and is used as an access road.

10. Appellant did meet its burden of proof because it did not prove that the road was an access road within the definition of the Department regulations

Enclosed Building

Transfer of waste

11. The regulation states that loading, unloading, storage, compaction and related activities shall be conducted in an enclosed building unless otherwise approved by the Department in the permit. (25 Pa. Code § 279.215(a)).

12. Considering the proximity of the transfer facility to Appellants' food handling facilities, the Department might have interpreted this regulation to mean that the doors to the facility have to be closed during waste processing.

13. On remand, the Department should consider how its regulation on this issue should be integrated under the circumstances of this case and determine whether the doors to the facility must be closed during the operation.

Environmental assessment- Form D

14. Form D of Waste Management's permit application conforms to the regulatory

provisions.

15. The Department incorrectly determined that the proposed facility does not have the potential to cause environmental harm.

16. The potential for environmental harm should be addressed because the possibility for odors to migrate, birds to fly into the facility and other vectors to gain access to the premises if the doors are open creates the potential for contamination of Appellants' goods.

Storage of waste

17. The regulation in place at the time the permit was issued provided that was waste was not to remain at the facility at the end of the day or for more than 24 hours. (25 Pa. Code § 279.217)

18. The Department's decision to approve the plan which permitted the trailers to stay at the facility over night violated the regulation.

19. The amended regulations permit waste to remain for up to 72 hours if the permit provides.

20. On remand, the Department can choose to either allow the amended permit condition to remain as is or to expand it to cover the 72 hour time now permitted by the regulations.

Conditions 15 and 16

21. The Department has discretion to require amendments of the operating plan either before permit issuance or the commencement of operations.

22. Conditions 15 and 16 are reasonable and the Department appropriately exercised its discretion by adding it to the reinstated permit.

Res judicata/collateral estoppel

23. Res judicata or collateral estoppel is inapplicable when previous suits did not involve

the same parties or the same essential issues.

Vector control

24. The Department abused its discretion in issuing the permit because the proposed nuisance control plan did not provide for a routine assessment of vector infestation as required by the regulations. (25 Pa. Code § 279.107)

Flooding

25. The Department did not abuse its discretion in issuing the permit based on Appellants' claims relating to the floodplain because the proposed transfer facility is not within the 100 year floodplain rather it is approximately 300 feet from the 100 year floodplain.

26. The Department did not abuse its discretion when it issued the permit because it adequately considered surface runoff issues.

Wetlands

27. The Department did not abuse its discretion allowing the transfer station to be within 300 feet of the wetlands because the parties admitted that the wetlands are not "exceptional value" wetlands.

Pre-existing on-site contamination

28. Appellants presented no evidence that Waste Management's proposed use of the property would in any way adversely impact the existing pollution at the site.

29. The Department's decision not to require Waste Management to remediate the property as a condition of the issuance of the permit was a proper exercise of discretion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EASTERN CONSOLIDATION and DISTRIBUTION SERVICES, INC., HUGO'S SERVICES, INC., EASTERN REPAIR, INC. and BARON ENTERPRISES, et al	:	
v.	:	**EHB Docket No. 94-200-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT of PENNSYLVANIA, INC., Permittee	:	

ORDER

AND NOW this 27th day of May, 1999 it is hereby ordered that:

1) Appellants have standing.

2) Appellants appeal is DISMISSED as to all issues other than how long may loaded trucks remain at the facility, whether or not the doors should be closed during operation, and the need for a vector assessment program.

3) Regarding the issues of storage of waste in trucks and closed doors during waste processing raised in the appeals, the case is remanded to the Department for further action. The Department is to consider whether the doors must remain closed during waste processing, give further consideration to the amount of time during which loaded trucks may remain at the facility and require a vector assessment program in a manner consistent with this adjudication.

EHB Docket No. 94-200-C

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Member

DATED: May 27, 1999

See following page for service list.

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