Environmental Hearing Board

Adjudications
and
Opinions

1989

Volume III

PAGES 899-1367

COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1989

Chairman.....MAXINE WOELFLING

Member .....WILLIAM A. ROTH
(Resigned March 31, 1989)

Member .....ROBERT D. MYERS

Member .....TERRANCE J. FITZPATRICK

Member .....RICHARD S. EHMANN

Member .....JOSEPH N. MACK

Secretary.....M. DIANE SMITH

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1989 EHB 1

FORWARD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1989.

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

1989

ADJUDICATIONS

OPINIONS AND ORDERS

1989 DECISIONS

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

M. DIANE SMITH
SECRETARY TO THE BOA

COLUMBIA PARK CITIZENS ASSOCIATION	:	
	:	
V.	:	EHB Docket No. 88-449-F
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and ALTOONA CITY AUTHORITY, Permittee	: : :	Issued: August 7, 1989

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss filed by the Department of Environmental Resources (DER) is granted in part and denied in part. DER's motion is granted to the extent that it seeks dismissal of the appeal from a water quality management permit. Adequate notice of the issuance of this permit was published in the Pennsylvania Bulletin, and the Appellant failed to file an appeal within 30 days. DER's motion is denied to the extent that it seeks dismissal of the appeal from other permits and approvals which the Appellant alleges DER has granted. DER has not come forward with information regarding these other permits and approvals; therefore, the Appellants' allegation that DER took these actions without public notice must be accepted as true.

OPINION

This proceeding involves an appeal filed on November 1, 1988 by Columbia Park Citizens' Association; John Hunter Orr and Bernard M. Shapiro (citizens' association) from "permits and approvals" (permits) granted by the Department of Environmental Resources (DER). The permits involve the

construction of a sewage treatment plant and combined sewer overflow storage facility by the Altoona City Authority. In its Notice of Appeal, the citizens' association stated that it had been advised that various permits had been issued by DER, but that it had not received written notice of this, and that it did not have specific knowledge of the date the permits had been issued or of the terms and conditions of the permits. The citizens' association also asserted that there had not been adequate public notice of the permits; therefore, the appeal period had not expired.

On November 14, 1988, in response to a request by the Board for additional information, the citizens' association submitted a copy of a "Water Quality Management Permit" (issued February 23, 1988) which it stated it had obtained from DER's files. In its letter, the association specified that its appeal was also from "other approvals which may have been issued by the Department for this project, including, without limitation, any Sewage Facility Plan Approval, NPDES Permit, Dams and Waterway Management Permit or Air Quality Permit.[1]

DER filed a Motion to Dismiss on December 2, 1988.[2] In its motion, DER asserts that it granted a "Water Quality Management Part II Permit" for this project on February 23, 1988, and that notice of the issuance of this permit was published in the Pennsylvania Bulletin on March 19, 1988. DER

---

[1] Subsequently, the association filed a separate appeal when it discovered that DER decided not to require an air quality permit for this project (EHB Docket No. 88-509-F). Therefore, any issue regarding an air quality permit has been removed from this appeal.

[2] The Altoona City Authority, the recipient of the permit (or permits) issued by DER, has filed a motion joining in DER's motion to dismiss.

argues that since the citizens' association did not file an appeal within 30 days of the publication of the notice, the Board lacks jurisdiction over this appeal. See 25 Pa. Code §21.52(a).

The citizens' association filed a response to DER's motion to dismiss. It asserts that the notice published in the Pennsylvania Bulletin on March 19, 1988 was inadequate in that it referred to the "Tuckahoe Park CSO Storage Facility" without explaining that "CSO" meant "combined sewer overflow." The association further asserts that its appeal was not only from the water quality permit, but also from other permits and approvals granted by DER for the project, and that notice of these other actions was not provided. Finally, it asserts that it made several requests to DER for copies of the permits granted for this project, but that DER--after orally agreeing to comply with these requests--failed to provide these documents in time for the citizens' association to perfect the instant appeal.

It is settled law that the Board lacks jurisdiction over appeals which are filed more than thirty days after notice of DER's action. 25 Pa. Code §21.52(a), Borough of Bellefonte, et al v. DER, EHB Docket No. 88-458-F (Opinion and Order issued May 3, 1989), Rostosky v. Commonwealth, DER, 26 Pa. Commw. 478, 364 A.2d 761 (1976). The question here is whether the notice provided by DER was sufficient to trigger the 30-day appeal period. If the notice was insufficient, then we may not reject the appeal as untimely.

We will grant DER's motion to the extent that it seeks dismissal of the appeal from the water quality permit, and deny it in all other respects. We disagree with the association's assertion that the notice published in the Pennsylvania Bulletin was inadequate. Read in its entirety, the notice provided:

ACTIONS - OFFICE OF
ENVIRONMENTAL PROTECTION

Actions under The Clean Streams Law (35 P.S. §§691.1-691.1001).

Permits Issued:

* * * *

Permit No. 0787402. Sewerage, Altoona City Authority, 20 Greenwood Road, Altoona, PA. 16602. Construction of sewage treatment plant, outfall and headwall, stream crossing and Tuckahoe Park CSO Storage Facility located in Allegheny Township, Blair County to serve Westerly Altoona Treatment Facility.

While it might have been preferable to write out "combined sewer overflow" instead of using the abbreviation "CSO," we do not believe that this renders the notice inadequate. The notice conveys the idea that construction of facilities for treatment and storage of sewage are involved. It also gives a general idea of where the facilities will be located. We believe that anyone who did not know what "CSO" stood for, and who felt that this was critical in deciding whether to appeal the permit, had a duty to either inquire with DER or to file an appeal to assure its rights were protected. Notices such as this can only give a general description of what is involved. Where a notice is sufficient to put a person on inquiry, the person is charged with the knowledge he might have gained through an inquiry. Quigley v. Breyer Corp. et al, 362 Pa. 139, 66 A.2d 286 (1949), Borough of Bridgewater v. Pa. PUC, 181 Pa. Super. 84, 124 A.2d 165 (1956). The citizens' association does not allege that it inquired regarding this notice. In fact, although the association contends that the notice was legally inadequate to toll the appeal period, it does not assert that it or any of its members were actually misled by

the notice. Therefore, we conclude that the notice was adequate and we will grant DER's motion to dismiss to the extent that the citizens' association's appeal was filed from the water quality permit.

We will, however, deny DER's motion to the extent that it seeks dismissal of the entire appeal. The citizens' association's appeal also alleges that DER has granted other permits and approvals (beyond the water quality permit) for this project, and that DER did not provide notice of these actions. At this point, DER has not come forward with any information regarding whether it issued these other permits and approvals, when it issued them, and whether public notice of these actions was provided. Since the citizens' association is the non-moving party, we must resolve ambiguities in the record in its favor in ruling upon DER's motion to dismiss. Del-AWARE Unlimited, Inc. v. DER, 1988 EHB 158, 160; Herskovitz v. Vespicco, 238 Pa. Super. 529, 362 A.2d 394 (1976). Thus, accepting the citizens' association's allegations regarding these other permits as true, DER's motion must be denied to the extent that it seeks dismissal of the entire appeal.

ORDER

AND NOW, this 7th day of August, 1989, it is ordered that:

1. The motion to dismiss filed by the Department of Environmental Resources is granted to the extent that the instant appeal seeks to contest the Water Quality Management Part II Permit issued by DER to Altoona City Authority.

2. DER's motion is denied to the extent that it seeks dismissal of the appeal from other permits and approvals issued by DER.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

Robert D. Myers
ROBERT D. MYERS, MEMBER

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK, MEMBER

DATED: August 7, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Robert K. Abdullah, Esq.
Michael J. Heilman, Esq.
Central Region
For Appellant:
Eugene E. Dice, Esq.
Harrisburg, PA
For Permittee:
M. David Halpern, Esq.
Altoona, PA
nb

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

M. DIANE SMI
SECRETARY TO THE E

COLUMBIA PARK CITIZENS' ASSOCIATION	:	
	:	
v.	:	EHB Docket No. 88-509-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 7, 1989

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss filed by the Department of Environmental Resources (DER) is granted. The indication on an internal DER permit coordination form that an air quality permit was not required for a sewage construction project does not constitute an "action" which may be appealed to this Board.

OPINION

This proceeding involves an appeal from an internal permit coordination form of the Department of Environmental Resources (DER) which indicated that an air quality permit was not required in connection with the construction of sewage facilities by the Altoona City Authority. The Appellants are the Columbia Park Citizens' Association,[1] John Hunter Orr, and Bernard M. Shapiro (citizens' association). The project involved here is

[1] The notice of appeal states that this is a non-profit, unincorporated, association of approximately 150 residents of Altoona, who live in the areas of Columbia Park and Tuckahoe Park.

the construction of a sewage treatment plant and combined sewer overflow storage facility. The Appellants allege that the decision not to require an air quality permit constituted an abuse of DER's discretion.

DER filed a motion to dismiss the appeal on December 30, 1988. The Altoona City Authority joined in this motion. The Department alleges that its decision not to require an air quality permit is not an appealable "action," because it had no effect on the citizens' rights, duties, privileges or immunities. See 25 Pa. Code §21.2(a). DER further argues that the citizens' association was affected, if at all, by the water quality permit which the Department issued for this project.[2]

The citizens' association filed a response to DER's motion to dismiss. The citizens' association argues that DER's decision not to require an air quality permit for construction of these facilities will change the status quo by allowing construction to go forward, which may cause irreversible damage to air quality. The association further contends that an action which affects the status quo rather than merely perpetuating a legal and factual situation constitutes an appealable final action, citing Delaware Unlimited, et al. v. DER, 1983 EHB 259,and Consolidation Coal Co. v. DER, 1985 EHB 768.

To be appealable to this Board, a DER decision must constitute an "action" which affects the appellant's "personal or property rights, immunities, duties, liabilities, or obligations." 25 Pa. Code §21.2(a), Delta Excavating and Trucking Co., Inc. v. DER, 1987 EHB 319, 323. The instant motion to dismiss raises the thorny issue of when is a DER decision not to do something, or to require something, an appealable "action?" The citizens' association's argument that DER has acted illegally by not requiring an air

---

[2] The issuance of the water quality permit is one of the issues in a separate appeal by the citizens' association at EHB Docket No. 88-449-F.

quality permit for this project is tantamount to an argument that DER should be required to enforce the law against a third party. In this respect, this case is analogous to cases in which a party seeks to compel DER to take action against a third party. See e.g. Eremic v. DER, 1976 EHB 249, affirmed on reconsideration, 1976 EHB 324, Consolidation Coal Co. v. DER, 1985 EHB 768.

In Eremic, the Board decided that a DER letter stating that it would not revoke a landfill operator's permit was not appealable. The Board reasoned that this letter did not affect the personal or property rights of the person seeking the revocation, because he remained free to bring a nuisance action against the landfill operator. 1976 EHB at 256. In Consolidation Coal, however, Board Member Gerjuoy decided that a DER letter stating that certain permits had not expired, and implying that DER would allow the holder of those permits to continue operating, was an appealable action. Board Member Gerjuoy relied upon public policy considerations in reaching this result.[3] Mr. Gerjuoy's opinion criticized Eremic's reasoning, although he attempted to reconcile the results of the two cases by stating that Consolidation involved a legal issue (which he believed involved more of a judicial function) while Eremic turned on factual issues.

In the instant case, we find that the complained-of action of DER is not appealable. DER's decision and decision-making process did not exhibit judicial characteristics; therefore, the decision does not meet the first of the three criteria for determining appealability set forth in Bethlehem

---

[3] Analysis of public policy considerations was one of three criteria set out for determining whether a decision was appealable in Bethlehem Steel Corp. v. Commonwealth, DER, 37 Pa. Commw. 479, 390 A.2d 1383 (1978). The other two criteria were whether the agency's decision-making power and the manner in which it functions indicates judicial characteristics, and whether the agency's action substantially affects property rights. 390 A.2d at 1388. See also, Man O'War Racing Association v. State Horse Racing Commission, 433 Pa. 432, 250 A.2d 172 (1969), Martin v. DER, 1984 EHB 736, 742.

Steel (see footnote 3). The subject of this appeal is an internal form used by DER to coordinate the permits which were required for this project. The "decision" complained of here is nothing more than some unidentified person's initials scrawled in a box to indicate that an air quality permit was not required. We do not know this person's title, or what his decision was based upon. This can hardly be characterized as a decision of a judicial nature. There is nothing in the record to indicate that anyone had ever suggested to DER that an air quality permit might be necessary for this project. Judicial-type decisions involve choosing between conflicting interpretations of the facts and the law, but there is nothing to indicate that DER intended to make such a choice in this case. In addition, since there was no public notice of the decision, DER could not argue at a later point that its decision was binding upon anyone.

We recognize that the citizens could be affected if this project is allowed to go forward without an air quality permit. However, they remain free to pursue some other avenue to press their argument--such as requesting a more formal ruling from DER, or bringing an action in the Commonwealth Court's original jurisdiction.

Because DER's decision and decision-making process did not exhibit judicial characteristics, DER's motion to dismiss will be granted.

ORDER

AND NOW, this 7th day of August, 1989, it is ordered that the motion to dismiss filed by the Department of Environmental Resources is granted, and that this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Robert D. Myers

ROBERT D. MYERS, MEMBER

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK, MEMBER

DATED: August 7, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Central Region
For Appellant:
Eugene E. Dice, Esq.
Harrisburg, PA

nb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

SCRANTON SEWER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 88-056-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 8, 1989**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A Motion for Summary Judgment is denied where there is a genuine issue as to material facts.

OPINION

Scranton Sewer Authority (Appellant) filed this appeal on February 29, 1988, challenging a January 29, 1988, Order of the Department of Environmental Resources (DER), directing Appellant (1) to cease and desist from attempts to interfere with the flow of sewage from a sewer in Dickson City, and (2) to continue to accept sewage from said sewer until DER gives its approval for some other disposition. On February 21, 1989, DER filed a Motion for Summary Judgment. Appellant answered the Motion on February 28, 1989.

The Board may grant a Motion for Summary Judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa. Rules of Civil Procedure No. 1035(b). The evidence is to be viewed in a

light most favorable to the non-moving party: Penoyer v. DER, 1987 EHB 131. No affidavits, depositions or answers to interrogatories have been presented; we have only the Notice of Appeal and the pre-hearing memoranda. While these documents technically are not pleadings, they may be considered "admissions on file."

DER's Cease and Desist Order of January 29, 1988, contained, inter alia, the following "findings of fact":

(1) Appellant, a municipal authority of the City of Scranton, currently accepts sewage for treatment from a Dickson City sewer, running along Route 6 in Dickson City;

(2) Appellant's workmen were observed attempting to plug this sewer on January 29, 1988;

(3) Inserting a plug in this sewer will result in overflow of sewage into the streets and eventually into the waters of the Commonwealth; and

(4) Appellant's attempted plugging of this sewer is a violation of Section 202 of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.202; a violation of Section 7 of the Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.7; constitutes a public nuisance; and is an imminent and substantial threat to the public health.

In its Notice of Appeal, Appellant challenged all of these findings except number (2), the attempt to plug the sewer on January 29, 1988. Appellant alleged that the sewage flowing from this sewer (referred to as the Sinawa Line) does not meet DER and Environmental Protection Agency (EPA) standards and adversely affects Appellant's treatment process. DER refused to respond to this allegation. In its pre-hearing memorandum, Appellant represented that the Sinawa Line is a privately-owned line and is not

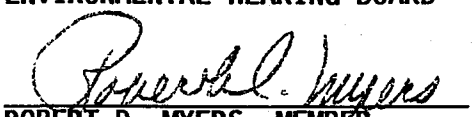
connected to Dickson City's sewers or owned by Dickson City even though it is located entirely within Dickson City. Appellant has accepted the sewage (apparently commercial and industrial waste) from the Sinawa Line for a long period of time under an oral agreement terminable at will. Prior to the attempted plugging of the Sinawa Line at the point where it connects to Appellant's sewers, Appellant made numerous requests of the owner to prohibit the discharge of non-pretreated wastes that were adversely affecting Appellant's treatment process. The owner refused to do so. In its pre-hearing memorandum, DER acknowledges that the Sinawa Line was constructed by a private developer but maintains that Dickson City is the permittee.

A recitation of these factual averments, only a few of which have been expressly admitted, makes it plain that the appeal is not ripe for summary judgment. We are not prepared to accept at this point DER's argument that Appellant must get prior approval from DER before plugging a sewer line, regardless of the circumstances.

ORDER

AND NOW, this 8th day of August, 1989, it is ordered that the Motion for Summary Judgment, filed by the Department of Environmental Resources on February 21, 1989, is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: August 8, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Norman Matlock, Esq.
Eastern Region
For Appellant:
Arthur Rinaldi, Esq.
Scranton, PA

nb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES KACER	:	
	:	
v.	:	**EHB Docket No. 88-331-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 8, 1989
and JOSEPH CICCONE & SONS, INC.,	:	
Permittee	:	

OPINION AND ORDER
SUR
MOTION TO QUASH A PORTION OF APPEAL

Synopsis

A Motion to Quash a Portion of Appeal, treated as a Motion to Limit Issues, will be granted when an appellant seeks to litigate issues not specified in his Notice of Appeal and which he is precluded from raising under the doctrine of administrative finality.

OPINION

This appeal was initiated by James Kacer (Appellant) on August 26, 1988. In his Notice of Appeal, Appellant specified that he was challenging the August 10, 1988, action of the Department of Environmental Resources (DER) extending the Plan Approval of Joseph Ciccone and Sons, Inc. (Permittee) to June 30, 1989. On January 13, 1989, after Appellant and Permittee had filed pre-hearing memoranda, Permittee filed a Motion to Quash a Portion of Appeal. Appellant filed an Answer to this Motion on January 23, 1989.

Permittee's Motion seeks to prevent Appellant from presenting evidence in this appeal relating to any alleged potential public health risks and the public health risk assessment report dated May 16, 1988, and revised May 23, 1988. The Motion is in the nature of a Motion to Limit Issues and we will treat it as such.

The original Plan Approval, issued by DER pursuant to the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001 et seq., was dated January 7, 1988, and applied to a bituminous concrete drum mix plant and fabric collector which Permittee proposed to construct in the City of Allentown, Lehigh County. The Plan Approval was to expire either on September 8, 1988 or September 30, 1988.[1] On or about June 9, 1988, Permittee sent a letter to DER requesting an extension of the Plan Approval to June 30, 1989. The reason given was as follows:

> Due to delays experienced in retaining (sic) all necessary approvals from the local municipality, we have been unable to construct the proposed asphalt plant, thus far. We anticipate all necessary approvals and subsequent construction of the proposed asphalt plant to be completed by the Spring of 1989.

On August 10, 1988, DER granted the requested extension.

In his Notice of Appeal, Appellant stated two objections to DER's action: (1) since the Allentown Planning Commission denied approval of the project on August 9, 1988, the reasons given in the extension request were no longer applicable; and (2) DER should have limited the extension to such shorter period as may be necessary for obtaining necessary approvals from the local municipality. In his pre-hearing memorandum, however, Appellant raises issues concerning a potential public health risk and a public health risk

---

[1] Permittee alleges the earlier date and Appellant alleges the later date. The exact date is not material to our disposition of Permittee's Motion.

assessment report of May 1988 that was allegedly submitted to DER on June 28, 1988.

Appellant is prohibited from raising these issues. The Board's procedural rule as 25 Pa. Code §21.51 (e) provides as follows:

> The appeal shall set forth in separate numbered paragraphs the specific objections to the action of [DER]. Such objections may be factual or legal. Any objection not raised by the appeal shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear such objection or objections....

Appellant gives no reason for his failure to include these issues in his Notice of Appeal. We will not presume "good cause" where none is shown.

Even if Appellant had properly specified in his Notice of Appeal his objections based on public health considerations, Permittee's Motion still would have to be granted. The public health concerns that Appellant wishes to present to the Board were relevant to the original Plan Approval dated January 7, 1988. Appellant had the opportunity to litigate those issues by filing a timely appeal from that DER action. He failed to do so, and his attempt to appeal nunc pro tunc was denied by the Board in an Opinion and Order dated September 26, 1988 (1988 EHB 830). Accordingly, Appellant is precluded from raising those issues in the current proceedings: Del-AWARE Unlimited, Inc. v. Commonwealth, Department of Environmental Resources, ___ Pa. Cmwlth. ___, 551 A.2d 1117 (1988).

ORDER

AND NOW, this 8th day of August, 1989, it is ordered as follows:

1. The Motion to Quash a Portion of Appeal, filed by Joseph Ciccone and Sons, Inc. on January 13, 1989, is treated as a Motion to Limit Issues and is granted.
2. James Kacer will be permitted to present evidence at the hearing on this appeal only on the two issues specified in his Notice of Appeal.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS, MEMBER

DATED: August 8, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Louise Thompson, Esq.
Eastern Region
For Appellant:
Samuel R. Kasick, Esq.
Allentown, PA
For Permittee:
Wesley M. Wasylik, Esq.
Bethlehem, PA

mjf

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

M. DIANE SMITH
SECRETARY TO THE BOARD

COUNTY OF SCHUYLKILL	:	
and	:	
F. A. POTTS & CO., INC. and	:	
SCHUYLDEL ASSOCIATES, Intervenors	:	
v.	:	**EHB Docket No. 89-082-W**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
CITY OF LEBANON AUTHORITY, Permittee	:	**Issued:** August 8, 1989

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis:

A motion for summary judgment is denied where affidavits filed by the opposing parties present conflicting allegations of material fact which cannot be resolved without a hearing.

OPINION

The procedural history of this matter is set forth in the Board's July 28, 1989, opinion and order denying the City of Lebanon Authority's (Lebanon) motion to dismiss. Presently before us is Lebanon's June 5, 1989, motion for summary judgment, which contends that the eight factual objections in the County of Schuylkill's (Schuylkill) notice of appeal do not raise any genuine issue of material fact concerning the Department of Environmental Resources' (Department) review and issuance of a permit to Lebanon under the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.* (DSEA), to construct a dam to replace the ex-

isting High Bridge Dam and Reservoir and, therefore, Lebanon is entitled to judgment as a matter of law. Schuylkill filed a response in opposition to the motion on June 26, 1989, while the Department advised the Board by letter dated June 27, 1989, that it did not oppose Schuylkill's motion.

The Board is empowered to grant summary judgment when there are no genuine disputes over material facts and the moving party is entitled to judgment as a matter of law. Summerhill Bor. v. Com., Dept. of E. R., 34 Pa.Cmwlth 574, 383 A.2d 1320 (1978), and Fidelity and Deposit Company of Maryland v. DER, EHB Docket No. 87-445-F (Opinion issued June 28, 1989). Our review of the affidavits filed by Lebanon and Schuylkill leads us to the conclusion that there are genuine disputes as to material fact which preclude the grant of summary judgment. We will address each one of the allegations in Schuylkill's notice of appeal.

Lebanon argues that Schuylkill's allegation concerning the Department's failure to consider the effect of the proposed project on property or riparian rights is unfounded, since the Department was informed of Schuylkill's interest in the project, specifically with regard to the coal mining potential of lands within the watershed. Lebanon submitted the affidavit of William B. Bingham, P.E., Vice President of Gannett Fleming Water Resources, Inc., to buttress this argument. Mr. Bingham's affidavit states at page four that the issue of the 2200 acres of coal held in trust by Schuylkill for various taxing districts "was raised during the permit application process for consideration by DER...."

Schuylkill offered the affidavit of Arthur Thompson Rhoads, P.E., Director of the Schuylkill County Real Estate Department, in opposition to Lebanon's motion. Regarding this particular issue, Mr. Rhoads states:

> The application still is not complete in that it

> still does not address the affect [sic] of the proposed project on the property or riparian rights of owners above and below the project as required by 25 Pa.Code §105.14(b)(8).

and

> Nowhere do these application(s)...address impacts of the project on owners of lands above, below or adjacent to the project or the development of energy resources within the watershed.

These portions of the affidavits evidence disputes as to material facts, namely to what extent the permit application addressed effects on riparian and property rights and the nature of the Department's consideration of the effect of the High Bridge Reservoir on riparian lands.

Lebanon argues that Schuylkill's allegation that the Department failed to consider the impact on recreational areas as required by 25 Pa.Code §105.14(b)(5) is unfounded. It claims that access to state game lands was addressed in detail in the permit application and was considered by the Department. Mr. Bingham's affidavit states:

> In the Authority's application, consideration was given to nearby recreation areas, specifically, the state game lands adjoining the Project... The existing access road is in poor condition and will be upgraded by the Project, thereby improving access to the Project area. An existing road ends at the High Bridge Dam, therefore, the Project should not alter access to the state game lands.

The affidavit of Mr. Rhoads does not mention access to state game lands or other recreational areas. However, we must view the facts in the light most favorable to the non-moving party, Robert C. Penoyer v. DER, 1987 EHB 131, and Schuylkill's response to the motion claims that the application does not address the fact that access to an abandoned railroad bed used as a walking

trail will be inundated with the construction of the new dam. Because of this dispute as to material fact, we must deny Lebanon's motion with respect to this issue.

Lebanon alleges, contrary to Schuylkill's assertion in its notice of appeal, that the Department did consider the reasonably foreseeable future development of the area, especially the 2200 acres of coal-bearing land, as required by 25 Pa.Code §105.14(b)(8). The affidavit of Mr. Bingham states:

> As shown in the Authority's application, consideration was given to the future development within the watershed. The specific matter concerning the development of the watershed for the strip mining of coal was considered as the result of Schuylkill County's participation in the permit process...

and

> The Project will have no impact on future development of coal mining within the watershed since the existing High Bridge Reservoir's watershed above the existing dam will not be changed. Water quality concerns that currently exist will not change as the result of construction of the Project.

However, Mr. Rhoads declares in his affidavit:

> The application still is not complete in that it still does not address...the reasonably foreseeable development above and below the Project as required by Pa.Code §105.14(b)(8).

Since such conflicting statements raise a dispute over material fact, we must deny the motion with regard to this issue as well.

Lebanon asserts that Schuylkill is incorrect in alleging that the Department's environmental evaluation did not address the project's potential impacts on areas and structures of historic significance. In support of this allegation, Mr. Bingham's affidavit notes:

> The application included an evaluation of the area for structures of historic significance, including the abutments from the former High Bridge, which

> was a railroad bridge destroyed approximately in 1948. ... The structures have been addressed by the Pennsylvania Historical and Museum Commission in their letter dated March 3, 1989, to Mr. Gilbert E. Kyle, Pennsylvania DER.[1] The Pennsylvania Historical and Museum Commission has not found the bridge abutments to be of critical historical significance and has not objected to the Project's impact on the abutments.

In contrast, Mr. Rhoads' affidavit states:

> The Phase I archaeological study conducted by Cultural Heritage Research Services, Inc. ('CHRS') did not include an evaluation of the abutments from the High Bridge. This report is William B. Bingham's Exhibit I. Mr. Bingham's Exhibit J is a letter dated 3 March 1989 to Gilbert E. Kyle, DER, from Brenda Barrett, Director of the PHMC. This letter clearly states that the High Bridge 'is a significant feature of this property and should have been described in the survey.' The evaluation was conducted by CHRS under Gannett Fleming's supervision, not under the supervision of the Pennsylvania Historical and Museum Commission. The DER failed to require C.O.L.A. to amend its archaeological study to address the High Bridge.

There is a substantial disagreement between the parties concerning who should have addressed this issue and how much information was provided to the Department. In light of this, we will deny Lebanon's motion with respect to this issue.

Another issue in contention is whether public safety required the construction of a new dam. Lebanon's motion claims that Schuylkill's allegation concerning the necessity for a new dam is meritless. Lebanon's affidavit in support of its motion contends:

---

[1] The letter states: "Even though the bridge has been determined not to be eligible for listing on the National Register of Historic Places, it is a significant feature of this property and should have been described in this survey. Mr. Bingham indicated that there are pictures available of the abutments. Copies of theses [sic], plus any other information that is available on the bridge should be forwarded to this office for inclusion in the file of this Project." This letter mreely shows that the Department was aware of the issue, not that it gave it consideration.

> The existing dam does not adequately comply with DER recommended design flood criteria. The dam is an intermediate size, high hazard class structure. A high hazard structure is a structure that due to the physical characteristics and degree of actual and projected development of the dam site and downstream areas, would result in substantial loss of lives, should the structure fail... As noted earlier, the U.S. Army Corps of Engineers Phase I inspection established that the existing dam's spillway was seriously inadequate. Pennsylvania DER required that the hazard be eliminated by either breaching, repairing or replacing the existing dam.

But, this is contradicted by Schuylkill's affidavit:

> The existing High Bridge Dam should therefore meet all the design flood criteria of section 105.98 of the Dam Safety and Waterway Management Law Rules and Regulations. ... The dam is not a dam in the highest risk category according to Exhibit A.

These affidavits indicate a dispute over whether the existing dam meets design flood criteria, and, therefore, we must deny summary judgment on the issue of whether public safety requires the construction of a new dam.

Lebanon characterizes Schuylkill's allegation in its notice of appeal that the Department failed to balance the environmental, social, and economic values of the project as required by 25 Pa.Code §105.16 as groundless. Regarding this issue, the Lebanon affidavit states:

> This contention is contrary to the facts. Gannett Fleming and the Authority were aware of Schuylkill County's claims regarding the coal bearing land, however, such claims were not realistic and were not included in the application. DER was made aware of the claimed presence of coal bearing lands within the watershed as the result of Schuylkill County's participation in the permit process.

On the other hand, Schuylkill's affidavit emphasizes:

> The application still is not complete in that it still does not...address the development of energy resources in the watershed as required by 105.16...

We will not grant summary judgment on this issue, for the affidavits dispute whether Lebanon was required in its permit application to supply information to enable the Department to undertake this balancing and whether the Department properly balanced environmental, social, and economic values in reaching its decision to issue the permit.

Schuylkill claims the Department failed to consider the criteria in 25 Pa.Code §105.14(b). Lebanon's motion alleges this is contrary to the facts and the supporting affidavit indicates:

> ... The application submitted contained the same type information as an application that did not involve an existing dam. The application was accepted for review by DER and addressed the requirements of DER's regulations and standard permit review process.

While Mr. Rhoads' affidavit made no mention of this issue, we must still deny the motion as it relates to this issue. We must view the facts in the light most favorable to Schuylkill, and, since we have no indication from the Department about what factors it did consider and for what reasons it did or did not consider those factors, we cannot grant summary judgment on this issue.

Schuylkill claims that the Department refused to hold a public meeting to give Schuylkill and residents near the project area an opportunity to express concerns over the proposed project. Lebanon contends that it is entitled to summary judgment on this issue, since the Department is not required to hold a public meeting on a permit application. Section 8(c) of the DSEA provides that "the department may, at its discretion, hold a public hearing on any application for the purposes of gathering information." While the decision to hold a public meeting is purely a discretionary one, issues of fact remain concerning whether the Department abused this discretion in deciding not to hold a public meeting. Thus, we cannot grant summary judgment on this issue.

Lebanon moves for summary judgment regarding Schuylkill's allegation that the Department's publication of notice of the permit application in the Pennsylvania Bulletin occurred prior to receipt of a complete permit application from Lebanon. Mr. Bingham's affidavit contends:

> The application materials, which are voluminous was filed with DER in stages, beginning in early 1988. The application was complete for purposes of allowing DER's administrative review pursuant to DER's regulations, as set forth at 25 Pa.Code 105.11 et seq. when the DER permit application form was submitted. See Exhibit C accompanying this affidavit. The application materials included an environmental evaluation as required by 105.15.

But, Mr. Rhoads' affidavit states:

> The DER, in response to written comments submitted on the permit application, addressed the status of the application as preliminary on November 30, 1988 and December 19, 1988. (Ref. Ex.C). The permit issued by DER references submission of maps, plans, profiles and specifications filed with and made part of the application on January 11, 1989 and March 8, 1989. The permit application was incomplete and preliminary when notice was published in the Pennsylvania Bulletin on November 26, 1988. County was never given an opportunity to comment on the March 8, 1989 submissions by Authority. The application still is not complete in that it still does not address the affect of the proposed project on the property or riparian rights of owners above and below the project as required by 105.14(b)(3), does not address the development of energy resources in the watershed as required by 105.16 and does not address the impact of the project on the historical structures, i.e., the high bridge abutments in the project area.

The relevant regulation, 25 Pa.Code §105.19, states:

> (a) The Department will publish a notice in the Pennsylvania Bulletin upon receipt of a complete application for a permit and again upon the issuance of a permit by the Department.
>
> (b) No application for a permit is complete until all necessary information and requirements

> under the act and this chapter, including proof of financial responsibility, have been satisfied by the applicant.
>
> * * * * *

Whether or not the application was complete at the time of publication of notification in the Pennsylvania Bulletin is a question of fact which cannot be decided summarily. Thus, we will deny the motion with regard to the issue of publication.

O R D E R

AND NOW, this 8th day of August, 1989, it is ordered that the City of Lebanon Authority's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

DATED: August 8, 1989

cc: **For the Commonwealth, DER:**
Michael J. Bedrin, Esq.
Northeastern Region
John McKinstry, Esq.
Central Region
For Appellant:
Joseph J. O'Rourke, Esq.
Pottsville, PA
For Permittee:
Robert P. Haynes III, Esq.
C. Peter Carlucci, Jr., Esq.
SHEARER, METTE, EVANS & WOODSIDE
Harrisburg, PA
For Schuylkel Co.:
Kenneth C. Gold, Esq.
WOLF, BLOCK, SCHORR & SOLIS-COHEN
Philadelphia, PA
For F. A. Potts and GMP Land:
James P. Wallibillich, Esq.
Abraham H. Frumkin, Esq.
FRUMKIN, SCHRALOW & CERULLO
Pottsville, PA

bl

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

M. DIANE SMITH
SECRETARY TO THE BOARD

DWIGHT L. MOYER, JR., ELIZABETH H. STEELE and FRANCIS L. LAGAN	:	
V.	:	EHB Docket No. 86-641-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	Issued: August 10, 1989
HORSHAM TOWNSHIP	:	

ADJUDICATION

By Maxine Woelfling, Chairman

Synopsis

Appellants failed to meet their burden of proof in an appeal of the Department of Environmental Resources' approval of a revision to the Official Sewage Facilities Plan of Horsham Township which authorized the relocation of a sewage treatment plant. Despite Appellants' contentions that the relocation of the plant was inconsistent with comprehensive water quality management, would pose a crash hazard to military aircraft at the Willow Grove Naval Air Station, and would impact Graeme Park, a historical site, they failed to prove by a preponderance of the evidence that the Department committed an abuse of discretion or acted arbitrarily.

INTRODUCTION

This matter was initiated by the November 24, 1986, filing of a notice of appeal by Dwight L. Moyer, Jr., Elizabeth H. Steele, and Francis L. Lagan (Appellants) seeking review of the Department of Environmental Resources' (Department) October 24, 1986, approval of a revision to the Official Sewage Facilities Plan (Official Plan) for Horsham Township, Montgomery County, which authorized the relocation of the Park Creek Sewage Treatment Plant on Keith Valley Road in Horsham Township.[1] Appellants had also sought review at Docket No. 85-384-R of the Department's approval of the revision to the Horsham Township Official Plan which originally authorized the location of the Park Sewage Treatment Plant on Keith Valley Road, but that appeal was dismissed as moot at 1988 EHB 155 when the Department approved the plan revision presently at issue.

Appellants alleged that the Department's approval of the revision to Horsham Township's Official Plan was inconsistent with the recommendations of the Montgomery County Planning Commission (MCPC) and inconsistent with the recommendations of the U. S. Environmental Protection Agency's Final Environmental Impact Statement for wastewater treatment facilities in the Warrington-Warminster-Horsham Township area (FEIS), violating 25 Pa. Code §§71.16 and 91.31 and 35 P.S. §750.5(d); that the Park Creek Sewage Treatment Plant would be a crash hazard for military aircraft at the Willow Grove Naval Air Station; that the revision to the Horsham Township Official Plan would

---

[1] This is the latest in a number of appeals relating to sewage facilities planning and construction in Horsham Township by Messrs. Moyer and Lagan, Mrs. Steele, and other individuals. See, e.g. E. Arthur Thompson, et al. v. DER, 1980 EHB 224; Albert M. Comly and Elizabeth H. Steele v. DER, 1981 EHB 446; Francis Lagan et al. v. DER, 1985 EHB 139; Dwight L. Moyer et al. v. DER and Horsham Township, 1985 EHB 155; and Joseph D. Hill et al. v. DER and Horsham Township, 1988 EHB 228.

allow a point source discharge into a small stream with insufficient dilution capacity; and that the Park Creek Sewage Treatment Plant would be located near the historic resource of Graeme Park, in violation of the Historic Preservation Act, the Act of November 22, 1978, P.L. 1160, 71 P.S. §1047 et seq. (Historic Preservation Act).[2]

A hearing on this matter was held on October 19 and 20, 1987. Appellants filed their post-hearing brief on December 21, 1987, reiterating the allegations in their notice of appeal and arguing that they had proven that the Department's approval of the plan revision was an abuse of discretion because the requirements for sewage facilities planning were ignored and the Department violated the Historic Preservation Act.

On January 21, 1988, Horsham Township, the recipient of the Department's approval,[3] filed its post-hearing brief, arguing that Appellants failed to meet their burden of proof to establish that the Department abused its discretion in approving the relocation of the Park Creek Sewage Treatment Plant near the Willow Grove Air Station or near Graeme Park. Horsham Township also contended that the Department considered all relevant comments and recommendations in approving the revision, that the MCPC supported the relocation proposed in the plan revision, and that the FEIS was irrelevant to the relocation of the Park Creek Sewage Treatment Plant.

Consistent with its policy regarding third party appeals, the Department did not file a post-hearing brief.

---

[2] The Historic Preservation Act was repealed by The History Code, 37 Pa C.S.A. §101 et seq. and its subject matter is now contained in the Historic Preservation Act, 37 Pa. C.S.A. §501 et seq.

[3] Horsham Township is a party appellee in this matter by virtue of 25 Pa. Code §21.51(g). For convenience, it will be referred to as Permittee.

We will regard any argument not raised by the parties in their post-hearing briefs as waived, Lucky Strike Coal Company and Louis J. Beltrami v. Department of Environmental Resources, ___ Pa. Cmwlth ___, 546 A.2d 447 (1988).

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

FINDINGS OF FACT

1. Appellants are Dwight L. Moyer, Jr., Elizabeth H. Steele and Francis L. Lagan, residents of Horsham Township (Notice of Appeal; N.T. 14, 98 and 142).

2. Appellee is the Department, the administrative agency empowered to administer the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq. (the Sewage Facilities Act), the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., and the regulations promulgated thereunder.

3. Permittee is Horsham Township, a township of the second class in Montgomery County.

4. On October 24, 1986, the Department approved a revision to the Official Sewage Facilities Plan of Horsham Township which authorized the relocation of the Park Creek Sewage Treatment Plant on Keith Valley Road (Notice of Appeal).

5. The Park Creek Sewage Treatment Plant has a proposed capacity of 0.5 million gallons per day (MGD) (N.T. 123, 193-196; Ex. S-8).[4]

6. The Park Creek Sewage Treatment Plant would be located on a 10-acre parcel in an area north of the intersection of Keith Valley and

[4] Exhibits introduced by the Appellants will be denoted as "Ex. A___." while stipulated exhibits will be denoted as "Ex. S___."

Governor Roads in Horsham Township, approximately 400 feet from Governor Road and 850 feet from Keith Valley Road (Ex. S-8).

7. The pump station would be located along Park Creek on the northern side of Keith Valley Road, approximately 400 feet from its intersection with Governor Road (Ex. S-8).

8. The Park Creek Sewage Treatment Plant will serve an area in Horsham Township known as Area D (N.T. 166; Ex. S-1, S-8).

9. The Park Creek Sewage Treatment Plant was originally proposed to be located on a tract of land on Keith Valley Road owned by Horsham Township; the tract was one and one-half miles downstream from the discharge of the Wichard Sewage Treatment Plant into Park Creek and one-half mile upstream of the new location of the plant along Park Creek (Ex. S-8).

10. The relocation of the Park Creek Sewage Treatment Plant was necessitated by the United States' acquisition of the tract on which the plant was originally proposed to be located (Ex. S-1).

11. Glen Stinson, the Department's Regional Sewage Facilities Consultant, who is responsible for the implementation of the Sewage Facilities Act planning program in the eight county area of Southeastern Pennsylvania, reviewed Horsham Township's plan revision (N.T. 175-181).

12. During the course of his review, Mr. Stinson considered letters from the MCPC and Friends of Graeme Park; the FEIS, including the portions attached to the Air Installation Compatible Use Zone (AICUZ) study; and the so-called Ambler Alternative, which was contained in the FEIS (N.T. 175-181).

13. By letters dated May 22 and August 26, 1986, the MCPC recommended to the Department that it approve the relocation of the Park Creek Sewage Treatment Plant (Ex. S-1 and S-2).

14. As a policy, the MCPC prefers centralized solutions for sewage problems, but it reluctantly accepted the Park Creek Sewage Treatment Plant relocation because of on-lot sewage disposal problems in the area to be served by the plant (N.T. 165, 170).

15. The MCPC was concerned with safety hazards from aircraft at the Willow Grove Naval Air Station (N.T. 165).

16. Various aircraft, including helicopters, fixed wing aircraft, jet and propeller aircraft, and a fighter squadron fly to and from the Willow Grove Naval Air Station (N.T. 39-41).

17. An AICUZ study of the Willow Grove Naval Air Station was conducted by the Department of the Navy to provide guidelines for uses compatible with the operation of the facility (Ex. S-5).

18. The "clear zone" is at the approach end of an active duty runway and is the highest crash hazard area; statistically, most crashes occur in the clear zone (N.T. 43).

19. An "accident potential zone" is less of a hazard than a clear zone, but there is a high probability of accidents; an Accident Potential I-Zone has more potential for a crash than an Accident Potential II-Zone (N.T. 43).

20. Utilities and low labor intensive uses are considered normally acceptable land uses for an Accident Potential I-Zone (S-5).

21. The proposed site for the Park Creek Sewage Treatment Plant is away from the direct approach to the runways at the Willow Grove Naval Air Station, but within the Accident Potential I-Zone (N.T. 53).

22. From 1960 to 1977, there have been two crashes in the clear zone, two crashes in the Accident Potential I-Zone, one crash in the Accident

Potential II-Zone, and two crashes outside either the clear zone or the accident potential zones (N.T. 46-47, 54).

23. No crashes occurred from 1960-1977 in the area of the proposed relocation of the Park Creek Sewage Treatment Plant (Ex. S-5).

24. The U.S. Navy has no objections to the relocation of the Park Creek Sewage Treatment Plant (N.T. 48).

25. The proposed Park Creek Sewage Treatment Plant is approximately 1/2 mile west of Graeme Park (N.T. 68).

26. Graeme Park, on which Keith House is located, is a historic site owned and operated by the Pennsylvania Historical and Museum Commission (Commission) (N.T. 60).

27. The Commission was aware of the proposed Park Creek Sewage Treatment Plant in December, 1985, but did not express any concern about the Park Creek proposal until September 29, 1987 (N.T. 69, Ex. A-1).

28. The Commission did not undertake any documentary or field research on the Park Creek proposal (N.T. 70).

29. Graeme Park is remarkable for its preservation of the rural landscape (N.T. 61-62).

30. Keith House, a mid-18th century example of Georgian architecture, was built by colonial Governor Keith and is one of the notable buildings in the Philadelphia suburbs (N.T. 60-62, 221).

31. Park Creek is somewhat removed from Keith House (N.T. 62).

32. Because of its topographic and physiographic characteristics, Graeme Park has a high potential to yield archeological resources (N.T. 76-77).

33. Prehistoric artifacts in low concentrations were found during minor testing on the Graeme Park site (N.T. 87).

34. There is no particular reason that Graeme Park would be of archeological significance, other than that it is generally likely to be an archeological site (N.T. 94).

35. Most of the time, one to three people will be present to operate the plant (N.T. 126).

36. Mechanisms exist to control odors from sewage treatment plants (N.T. 208).

37. Given current sewage treatment technology, there is no basis for any expectation that odors will emanate from the Park Creek Sewage Treatment Plant (N.T. 75).

38. The approximate height of the Park Creek Sewage Treatment Plant will be 10 feet, although a denitrification unit could be as high as 30 feet (N.T. 126).

39. Trees in the area of Graeme Park are approximately 50 feet in height (N.T. 86).

40. When leaves are on the trees, it will be difficult to see the sewage treatment plant from Graeme Park (N.T. 71-72).

41. Assuming that the buildings at the Park Creek Sewage Treatment Plant will be 15-20 feet high, with a possible 30 feet stack, the sewage treatment plant will not be visible or audible from Graeme Park and will not have any significant impact on facilities at Graeme Park (N.T. 227).

42. The FEIS prepared by U.S. E.P.A. in May, 1980, explored various alternatives for providing public sewer services to areas of Warrington, Warminster, and Horsham Townships, including the area to be serviced by the proposed Park Creek Sewage Treatment Plant (Ex. S-3).

43. Alternatives 2 and 3, which proposed the conveyance of sewage to a regional treatment plant at Ambler, were the preferred alternatives (Ex. S-3).

44. The Ambler sewage treatment plant has a rated capacity of 6.5 MGD (N.T. 201).

45. The average flow to the Ambler plant at the time of the hearing on the merits was 3.8 to 3.9 MGD; the projected flows for 1991 were 4.1 to 4.2 MGD (N.T. 202).

46. Assuming that capacity is not committed to other developers or municipalities, the Ambler plant has ample capacity to treat the 500,000 gallons per day of flow which will be accommodated by the proposed Park Creek Sewage Treatment Plant (N.T. 172-173, 201-202).

47. While the FEIS contains an alternative (Alternative 5) for the location of a treatment plant on Park Creek, it is not the same location as that in the proposed plan revision (Ex. S-3).

48. Although the Ambler plant has ample capacity to serve this area of Horsham Township, it would be more expensive to convey the sewage to the Ambler plant (N.T. 181).

49. The Department considered both existing and projected sewage disposal needs in its review of the plan revision (N.T. 192).

DISCUSSION

Our scope of review is limited to a determination of whether or not the Department's approval of the revision to the Horsham Township Official Plan was an abuse of discretion or an arbitrary exercise of power. Warren Sand & Gravel Co., Inc. v. Commonwealth, Department of Environmental Resources, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). Under 25 Pa. Code §21.101(c)(3), Appellants have the burden to prove by a preponderance of the

evidence that the Department abused its discretion, Maxwell Swartwood et al. v. DER et al, 1979 EHB 248. We conclude that they have failed to meet this burden.

Appellants argue that the Department's approval of the plan revision violated §5 of the Sewage Facilities Act and 25 Pa. Code §§71.16 and 91.31 because it was inconsistent with the recommendations of the MCPC and the FEIS. We will first address §5 of the Sewage Facilities Act and its implementing regulations.

The regulations implementing the Sewage Facilities Act at 25 Pa. Code §71.16(e)[5] provide that:

> In approving or disapproving an official plan or revision, the Department will consider the following:
>
> * * * * *
>
> (2) the comments, if any, of the appropriate area-wide planning agency and the county or joint county Department of Health,
>
> (3) whether the plan or revision is consistent with a comprehensive program of water quality management in the watersheds as a whole, as set forth in §91.31 of Chapter 91 of this title,
>
> * * * * *

The determination of whether a plan revision "is consistent with a comprehensive program of water quality management in the watershed as a whole" is governed by 25 Pa. Code §91.31(b), which states:

> (b) The determination of whether a project is included in and conforms to a comprehensive program of water quality management and pollution control shall be based on the following standards:

---

[5] This regulation was repealed with the adoption of comprehensive sewage facilities planning regulations at 19 Pa. B. 2429 (June 10, 1989). The new regulations, which became effective on the date of publication, do not affect the Board's determination in this appeal.

(1) Appropriate comprehensive water quality management plans approved by the Department.

(2) Official Plans for Sewage Systems which are required by Chapter 71 (relating to administration of Sewage Facilities Act).

(3) In cases where a comprehensive program of water quality management and pollution control is inadequate or nonexistent and a project is necessary to abate existing pollution or health hazards, the best mix of all the following:

(i) Expeditious action to abate pollution and health hazards.

(ii) Consistency with long-range development.

(iii) Economy should be considered in the evaluation of alternatives and in justifying proposals.

(c) In making determinations under the provisions of subsection (b)(3), the Department will consider available and relevant information including, but not limited to, applicable studies and plans prepared by the following:

(1) The applicant.

(2) The Department.

(3) Federal agencies

(4) Approved planning agencies.

(5) Political subdivisions.

See Township of Heidelberg et al. v. DER et al., 1977 EHB 266.

We have previously held in Township of Heidelberg, 1977 EHB at 273, that the Department must exercise independent judgment in reviewing plan revisions. While the Department is not required to follow the recommendations of municipal planning agencies under 25 Pa. Code §71.16(e)(2), it is obligated to carefully consider their comments. And, in evaluating whether a plan revision is consistent with a comprehensive program of water quality

management under 25 Pa. Code §91.31, the existing official plan and the general policies reflected in it must be examined. Township of Heidelberg, 1977 EHB at 278.

Given the manner in which the parties have framed this matter, a discussion of whether the Department complied with 25 Pa. Code §71.16(e)(2) is necessarily intertwined with a discussion of whether it satisfied the requirements of 25 Pa. Code §§71.16(e)(3) and 91.31(b). This is so because the comments of the MCPC in large part related to comprehensive water quality management concerns. Unfortunately, our task in evaluating these issues was complicated by the failure of the parties to introduce as evidence either the existing Horsham Township official plan or the plan revision submittal approved by the Department.

The MCPC reluctantly accepted the Park Creek Sewage Treatment Plant relocation, primarily because Area D of Horsham Township was environmentally sensitive, and it generally favored centralized solutions to sewage disposal problems, such as the Ambler regional plant (N.T. 165-166, 170-172). However, the MCPC also was aware that there were existing problems with on-lot sewage disposal system malfunctioning in Area D and that the cost of collection and conveyance of sewage in Area D to Ambler, assuming that the capacity was available to Horsham Township and not committed elsewhere, was more expensive than the construction of the Park Creek Sewage Treatment Plant (N.T. 181).

Appellants placed much emphasis on the centralized collection and treatment alternatives in the FEIS prepared by the E.P.A. for the Warrington-Warminster-Horsham Township area. However, that study was prepared six years before the Department's approval of the plan revision and evaluated various collection, treatment, and disposal alternatives in the context of requirements for wastewater treatment funding under the Clean Water Act, 33

U.S.C. §1251 et seq. It was not established by the Appellants whether the assumptions of the FEIS were still valid, given the passage of time and inevitably changing circumstances.Without any evidence regarding the FEIS' present viability, we cannot place much credence in it. And without any concrete evidence as to capacity commitments at the Ambler plant, we cannot hold that flow from Area D should be conveyed to Ambler for treatment. Thus, we must conclude that the Department did not abuse its discretion under 25 Pa. Code §§71.16(e) and 91.31(b).

Appellants also contend that the Department's approval of the plan revision was arbitrary and capricious because the plant will be located in a crash hazard area for planes flying in and out of the Willow Grove Naval Air Station. Francis L. Lagan, a retired naval pilot, testified regarding the location of the proposed plant in relation to the Willow Grove Naval Air Station and the potential for crashes in various zones. The site of the Park Creek Sewage Treatment Plant is in an Accident Potential Zone-I, and the crash history for the Naval Air Station from 1960-1977 does not reveal a significant crash hazard danger in the area (Ex. S-5). The AICUZ study performed by the Navy indicates that the sewage treatment plant is a compatible land use for such a zone (Ex. S-5). Furthermore, the Navy has no objection to the location (N. T. 48). Based on the testimony presented, we cannot find that the approved plant site presents any significant danger due to crash hazard potential.

Appellants alleged that the Department's approval of the plan revision was in violation of §13 of the Historic Preservation Act, 71 P.S. §1047.1(n).[6] Specifically, Appellants argue that because the statute

---

[6] The relevant language is now set forth at §508(4) of the Historic Preservation Act, 37 Pa. C.S.A. §508(4).

required state agencies to institute procedures and policies to assure that their programs and regulations contributed to the preservation and enhancement of historic resources and because the Department did not adopt regulations addressing preservation and enhancement of historic resources, the Department's approval of the plan revision was invalid.

While we agree with Appellants that the Department has not adopted any regulations relating to the issue of historic preservation, there is no evidence that the Department has not adopted any policies or implemented any procedures to address the protection of historic resources. Appellants have the burden to produce such evidence, and, having failed to do so, we must presume the regularity of the Department's actions, Anthony J. Agosta et al. v. DER and the City of Easton, 1977 EHB 88, 91. Even if such evidence were produced, we can find no support for invalidating a Department action for this reason alone. Any failure of the Department in this regard was cured by Mr. Stinson's consideration of comments relating to the impact of the plan revision on historic resources which were proffered by the Friends of Graeme Park (N.T. 175-181).

Our consideration of the evidence leads us to the conclusion that the proposed relocation of the Park Creek Sewage Treatment Plant will not adversely affect Graeme Park or archeological resources in the area. Ms. Donna Williams of the Pennsylvania Historical and Museum Commission testified about the historic nature of Graeme Park and its location in relation to Park Creek and the proposed treatment plant. She testified that the area of the proposed plant is archeologically sensitive, that she was concerned with possible offensive odors, and that there would be a noticeable difference in

the environment of Graeme Park from the treatment plant (N.T. 71-73). However, Ms. Williams also testified that with the leaves on the trees, it would probably be difficult to see the plant itself from Graeme Park (N.T. 75). She estimated the height of the trees between Graeme Park and the plant as 50 feet, but she was unsure of the estimated height of the proposed plant (N.T. 86). Ms. Williams opined that there was no particular reason to think the site of the proposed treatment plant would be of historic significance, except that it is generally likely to contain archeological artifacts (N.T. 94).[7]

On the other hand, Horsham Township presented the testimony of Dr. George Thomas, professor of historic preservation at the University of Pennsylvania, and president of a restoration historic preservation planning firm (N.T. 215). After an examination of Graeme Park and the Keith House, Dr. Thomas determined that the sewage treatment plant would not be visible or audible at Graeme Park and would have no significant impact on Graeme Park (N.T. 227). Dr. Thomas reached this conclusion on the assumptions that the plant would be 15 to 20 feet in height,[8] that no offensive odors would be present, and that there is potential for archeological sites along the creek (N.T. 228-229, 236). He also assumed the pump station would not be tall and would only have a modest impact (N.T. 234). We must afford greater weight to Dr. Thomas's testimony regarding the impact of the proposed plant on Graeme Park because Ms. Williams' testimony establishes her relative unfamiliarity with the site and surrounding area.

---

[7] Appellants attempted to introduce alleged archeological artifacts into evidence during the course of the testimony of Mrs. Steele and Mr. Moyer. Neither had any formal education or training in archeology, and neither could attribute any age to the artifacts.

[8] Dr. Thomas testified that his conclusion would be the same even if a 30-foot denitrification tower were added to the plant (N.T. 227).

Finally, Appellants allege that the relocation of the Park Creek Sewage Treatment plant would result in an additional point source discharge into Park Creek,[9] a small stream with insufficient dilution capacity. Since Appellants presented no evidence to substantiate this claim, we cannot conclude that the Department committed an abuse of discretion in this respect. In any event, the issue of the quality of the discharge from the plant and its impact on Park Creek is more appropriately addressed in the course of the Department's consideration of the application for a National Pollutant Discharge Elimination System permit to discharge in accordance with §202 of the Clean Streams Law and 25 Pa. Code §92.1 et seq.

Since Appellants have not proven by a preponderance of the evidence that the Department committed an abuse of discretion in approving the revision to Horsham Township's Official Plan to relocate the Park Creek Sewage Treatment Plan, we must sustain the Department's action.

CONCLUSIONS OF LAW

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

2. Appellants bear the burden of proving by a preponderance of the evidence that the Department abused its discretion in approving the revision to Horsham Township's Official Plan. 25 Pa. Code §21.101(c)(3) and Maxwell Swartwood et al. v. DER et al., 1979 EHB 248.

3. The Department complied with 25 Pa. Code §71.16(e)(2) in considering the comments of the MCPC.

---

[9] The Wichard Sewage Treatment Plant also discharges into Park Creek. See Joseph Hill et al. v. DER and Horsham Township, 1988 EHB 228.

4. The Department properly concluded that the relocation of the Park Creek Sewage Treatment Plant conformed with a comprehensive program of water quality management. 25 Pa. Code §§71.16(c)(3) and 91.31(b).

5. The Department did not abuse its discretion in approving the relocation of the Park Creek Sewage Treatment Plant in close proximity to the Willow Grove Naval Air Station, since the location of the plant was a land use compatible with the crash hazard potential of the site.

6. The Department did not violate the Historic Preservation Act in approving the plan revision.

7. Appellants failed to demonstrate that a discharge from the Park Creek Sewage Treatment Plant would not comply with the Clean Streams Law because of the assimilitative capacity of Park Creek; this issue is better addressed at the discharge permitting stage.

8. The Department did not abuse its discretion or act arbitrarily in approving the revision to the Official Sewage Facilities Plan of Horsham Township.

ORDER

AND NOW, this 10th day of August, 1989, it is ordered that the Department's approval of the revision to the Horsham Township Official Plan is sustained and the appeal of Dwight L. Moyer Jr., Elizabeth H. Steele and Francis L. Lagan is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Robert D. Myers

ROBERT D. MYERS, MEMBER

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK, MEMBER

DATED: August 10, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kenneth A. Gelburd, Esq.
Eastern Region
For Appellant:
Philip R. Detwiler, Esq.
Blue Bell, PA
For Horsham Township:
Carl N. Weiner, Esq.
Lansdale, PA
nb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

JOSEPH BLOSENSKI, JR., et al.	:	
	:	
v.	:	**EHB Docket No. 85-222-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 11, 1989**

OPINION AND ORDER
SUR
MOTION FOR SANCTIONS

Synopsis

A Motion for Sanctions is denied when a discovery dispute arose out of the lack of clarity in a Board Order and neither party presented it to the Board for resolution until just prior to a scheduled hearing.

OPINION

These consolidated appeals from civil penalties assessed by the Department of Environmental Resources (DER) under the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., date from mid-1985. Within a few months after the appeals were filed, a discovery dispute arose over DER's request for the production of financial documents. Sanctions were imposed upon Joseph Blosenski, Jr. (Blosenski) by a Board Opinion and Order, dated August 15, 1986, and he was ordered to produce the documents and to submit himself to deposition concerning them. Blosenski's efforts to obtain appellate review of this Board action ended on June 1, 1987, when the Supreme Court of Pennsylvania denied his Petition for

Allowance of Appeal. Most of the next 18 months were consumed by settlement discussions which proved fruitless.

The Board issued an Order on December 5, 1988, placing the appeals on the hearing list and requiring Board permission for any additional discovery. A hearing was scheduled to begin on April 11, 1989. When DER renewed its demand for Blosenski's financial records and attempted to schedule him for a deposition, Blosenski took the position that DER had to obtain Board permission for any additional discovery. DER maintained, however, that its discovery request dated from 1985 and was not covered by the Board Order of December 5, 1989. The dispute was presented to the Board on March 31, 1989, when DER filed Motions for Continuance and Sanctions. The scheduled hearing was cancelled on April 4, 1989, over Blosenski's objections, because the Board did not have the time available to resolve the dispute in the time remaining prior to the hearing. Blosenski responded to DER's Motions on April 13, 1989.

The applicability of the Board's December 5, 1988, Order to DER's discovery request dating back to 1985 was unclear and the parties were justified in the positions they took. However, they did not promptly present it to the Board for resolution prior to the hearing scheduled for April 11, 1989. While it appears that DER's legal counsel may have resisted early suggestions to follow this procedure, legal counsel for both parties ultimately must share the blame.

We will attempt to resolve this dispute by an Order that is as clear and precise as we can make it, but legal counsel for both parties are admonished to bring before the Board for prompt resolution any future disputes concerning the Order.

ORDER

AND NOW, this 11th day of August, 1989, it is ordered as follows:

1. The Motion for Sanctions, filed by DER on March 31, 1989, is denied.

2. Joseph Blosenski, Jr. shall produce, at the Norristown Regional Office of DER or at such other location as is mutually agreeable to the parties, at such time and date within a period of 60 days following the date of this Order as is mutually agreeable to the parties, the documents listed in DER's original Notice of Deposition and Request for Production dated October 7, 1985.

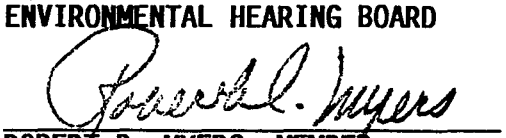
3. Joseph Blosenski, Jr. shall make himself available for deposition, on the date agreed upon for the production of documents and on such later date or dates to which the deposition may be continued, to provide deposition testimony related to the documents produced and the business and financial affairs covered thereby. Such deposition shall be concluded, in all events, within 90 days following the date of this Order.

4. The appeals will be scheduled for hearing on a date and time to be set by the Board, but not sooner than 120 days following the date of this Order.

5. If Joseph Blosenski, Jr. fails to comply with the provisions of this Order, or fails to cooperate in scheduling the dates for document production and deposition, or unreasonably refuses to answer deposition

questions propounded to him, the appeals (upon Motion of DER) will be dismissed for failure to comply with a Board Order.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: August 11, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kenneth A. Gelburd, Esq.
Eastern Region
For Appellants:
James W. Gerlach, Esq. (For Ada Blosenski)
Patrick C. O'Donnell, Esq. (For Joseph Blosenski)
James A. Cunningham, Esq. (For Joseph Blosenski)

nb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

FRANCIS NASHOTKA, SR., ET AL.	:	
v.	:	EHB Docket No. 88-216-M
COMMONWEALTH OF PENNSYLVANIA	:	consolidated appeals
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
LAWRENCE HARTPENCE AND IMOGENE KNOLL	:	
v.	:	EHB Docket No. 89-033-M
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 11, 1989

OPINION AND ORDER
SUR
MOTIONS FOR SANCTIONS AND MOTIONS FOR EXTENSIONS OF TIME

Synopsis

Motions for sanctions will not be granted, in appeals characterized by repeated discovery disputes, in an effort to move the cases to hearings on the merits. A party has the legal duty to make responses to discovery requests that are fully accurate and fully complete. A failure to comply with this legal duty subjects the party to sanctions. Appropriate sanctions can be imposed during the hearing if a party attempts to present evidence that contradicts discovery responses.

OPINION

Discovery in these related appeals has been an almost constant battle between the Department of Environmental Resources (DER) and the Appellants. Prior Board Orders have attempted to resolve the disputes but have been only partly effective. The latest matter to demand our attention is a Motion for Sanctions, filed by DER on June 13, 1989, at docket number 88-216-M, followed

by a Renewed Motion for Sanctions and a Motion for Extension of Time, filed by DER at the same docket number on July 13, 1989; and a Motion for Sanctions and a Motion for Extension of Time, filed by DER at docket number 89-033-M on July 13, 1989. The Appellants have filed Answers to these Motions.

The Board has little time or inclination to piece through Appellants' responses to DER's interrogatories and requests for production in order to discern whether they are fully accurate and fully complete. Appellants have the legal duty to see that their responses are fully accurate and fully complete, including the duty to supplement them, if necessary: Pa. R.C.P. 4006 and 4007.4. If they fail in this duty, they are subject to sanctions under Pa. R.C.P. 4019.

The Board will not impose sanctions at this time. If, during the hearings, Appellants attempt to present evidence which DER believes contradicts their discovery responses, the Motion for Sanctions can be renewed at that time. The Board is taking this approach in these appeals because it is apparent that the parties have become so enmeshed in discovery disputes that little progress is being made in moving the cases to hearing. For this same reason, we will grant only limited extensions of time to complete discovery.

ORDER

AND NOW, this 11th day of August, 1989, it is ordered as follows:

1. The Motion for Sanctions and Renewed Motion for Sanctions, filed by DER at docket number 88-216-M on June 13 and July 13, 1989, respectively, are denied.
2. The Motion for Extension of Time, filed by DER at docket number 88-216-M on July 13, 1989, is granted in part and denied in part, as follows:

(a) All discovery shall be completed by September 8, 1989;

(b) Supplements to pre-hearing memoranda may be filed, at the option of the parties, on or before September 15, 1989;

(c) The appeal will be scheduled for hearing subsequent to September 15, 1989; and

(d) No further extensions of time will be granted.

3. The Motion for Sanctions, filed by DER at docket number 89-033-M on July 13, 1989, is denied.

4. The Motion for Extension of Time, filed by DER at docket number 89-033-M on July 13, 1989, is granted in part and denied in part, as follows:

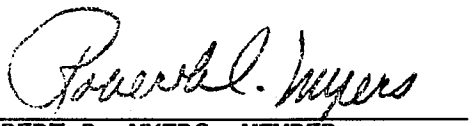
(a) All discovery shall be completed by September 8, 1989;

(b) Appellants shall file their pre-hearing memorandum on or before September 15, 1989;

(c) DER shall file its pre-hearing memorandum within 15 days after receipt of Appellants' pre-hearing memorandum; and

(d) no further extensions of time will be granted.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: August 11, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Amy Putnam, Esq.
Central Region
For Appellant:
Andrew Hailstone, Esq.
Scranton, PA

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

M. DIANE SMITH
SECRETARY TO THE BOARD

WILLIAM V. MURO	:	
	:	
v.	:	**EHB Docket No. 87-512-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 15, 1989**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A Motion for Summary Judgment will be denied in an appeal from a permit denial when the Appellant does not establish that he is entitled to judgment as a matter of law. The Department of Environmental Resources is not required to accept the unsupported conclusions of an expert in processing an application for a permit.

OPINION

William V. Muro (Appellant) initiated this appeal on December 16, 1987, contesting an Order and Permit Denial issued by the Department of Environmental Resources (DER) on November 17, 1987. On February 22, 1989, Appellant filed a Motion for Summary Judgment. DER responded to the Motion on March 8, 1989.

The Board may grant a Motion for Summary Judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa. Rules of Civil Procedure No. 1035(b). The evidence is to be viewed in a light most favorable to the non-moving party: Penoyer v. DER, 1987 EHB 131.

Quoting the expert opinion of Penn-East Engineering Co., Inc. (submitted to DER as part of the application process), Appellant argues that he is entitled to judgment as a matter of law. DER maintains, however, that Penn-East's opinion letter did not satisfy DER's concerns about Appellant's proposed fill and construction project on wetlands.

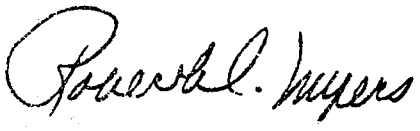
We have reviewed Penn-East's opinion letter and find that it contains a number of conclusions but very little explanation of the reasons supporting those conclusions. DER certainly has no obligation to accept the unsupported conclusions of any expert, and may deny an application that is based solely upon those conclusions. Since Appellant is not entitled to judgment as a matter of law, his Motion will be denied.

ORDER

AND NOW, this 15th day of August, 1989, it is ordered as follows:

1. The Motion for Summary Judgment, filed by William V. Muro on February 22, 1989, is denied.
2. The case shall be placed on the list of cases to be scheduled for hearing.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: August 15, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Norman G. Matlock, Esq.
Eastern Region
For Appellant:
Randall W. Turano, Esq.
Stroudsburg, PA
sb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

BOROUGH OF DICKSON CITY	:	
	:	
v.	:	**EHB Docket No. 88-510-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 15, 1989

OPINION AND ORDER SUR
MOTION TO DISMISS AS MOOT

Synopsis

An appeal is dismissed as moot where appellant has already fully complied with the order contested and there is no other relief that the Board can grant to it. The Board cannot adjudicate whether, under applicable municipal law, a developer or a municipality is the owner of a sewer line.

OPINION

This matter was initiated on December 12, 1988, with the filing of a notice of appeal by the Borough of Dickson City (Borough) from the Department of Environmental Resources' (Department) November 30, 1988, issuance of an order to the Borough pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (the Clean Streams Law). The order directed the Borough to repair a blocked sewer line along Route 6 which was discharging sewage to the surface of the ground and to convey, in a safe and sanitary manner, the sewage to the Scranton Sewer Authority for

treatment within 12 hours of receipt of the order. The sewer line in question was constructed pursuant to Sewerage Permit No. 3572406, which was issued by the Department to the Borough on February 26, 1973.

In its appeal, the Borough alleged that repair of the sewer line was the responsibility of Daniel and Joseph Siniawa, the local developers who initially installed the line and who have maintained it. In support of this contention, the Borough argued that although the developer has requested the Borough to accept the sewer line, it has not, and, therefore, it is the developer's responsibility to clean and maintain the sewer line.

On May 22, 1989, the Department filed a motion to dismiss the appeal as moot, or in the alternative, a motion for summary judgment. The Department avers that because the Borough has fully complied with the requirements of the order, there is no relief this Board can grant. In support of its motion for summary judgment, the Department alleges that in both the Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.*, and the Clean Streams Law, the Borough is vested with responsibility for maintaining sewer lines within its boundaries. Furthermore, the Department argues that the Borough, in applying for and accepting the sewerage permit, indicated a clear and unequivocal acceptance of the sewer line.

On June 13, 1989, the Borough responded to the Department's motions, admitting that it complied with the order, but under protest. The Borough maintains that the Board can still grant relief, since if the Board determines that the Borough is not responsible for the sewer line, the Borough can seek reimbursement of its repair expenses.

In determining whether a case is moot, the Board must inquire whether it will be able to grant effective relief. Commonwealth v. One 1978 Lincoln

Mark V, 52 Pa.Cmwlth 353, 415 A.2d 1000 (1980). Under the circumstances presented herein, we do not believe that we can grant the Borough any relief.

The Borough argues that the Board can grant it relief by determining the ownership of the sewer line. The Borough then argues that, assuming the determination was that the Borough did not own the line, it could seek reimbursement of the repair expenses from the owner. However, we are without authority to determine ownership of the line, Pengrove Coal Company v. DER, 1986 EHB 19. That is a matter involving the application of municipal law and which is properly before the Courts of Common Pleas. Because there is no relief that we can grant, this appeal must be dismissed as moot. Swatara Township et al. v. DER, 1988 EHB 330.

Since we have dismissed the Borough's appeal as moot, it is unnecessary for us to address the Department's motion for summary judgment.

O R D E R

AND NOW, this 15th of August, 1989, it is ordered that the appeal of the Borough of Dickson City is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Robert D. Myers

ROBERT D. MYERS, MEMBER

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK, MEMBER

DATED: August 15, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Mary Martha Truschel, Esq.
Central Region
For Appellant:
John P. Pesota, Esq.
Scranton, PA

bl

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

M. DIANE SMITH
SECRETARY TO THE BOARD

GREGORY AND CAROLINE BENTLEY	:	**EHB Docket No. 89-111-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	**Issued:** August 15, 1989
DONALD AND JOAN SILKNITTER, Permittees	:	

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

Synopsis

Permittees' motion to dismiss an appeal of a letter to the appellants relating to the permit is granted where the letter merely advises the appellants of the Department of Environmental Resources' legal position regarding appellants' request and, thus, does not constitute an appealable action. Appellants' request for allowance of an appeal *nunc pro tunc* from the issuance of the permit is denied where appellants have failed to allege good cause for the grant of their request.

OPINION

This matter was initiated by the April 24, 1989, filing of a notice of appeal by Gregory and Caroline Bentley (Bentleys) seeking review of the Department of Environmental Resources' (Department) March 24, 1989, response to the Bentley's November 9, 1988, request to invalidate Limited Power Permit No. 15-064A (permit) issued to Donald and Joan Silknitter (Permittees) on June 13, 1985, for the operation of a hydroelectric generator. The Bentleys'

letter also requested the Department to issue an order requiring the Permittees to cease all activity which may be infringing on the Bentleys' private property rights.

On June 9, 1989, the Permittees filed a motion to dismiss and a motion to stay proceedings pending the outcome of the motion to dismiss. The Permittees argue that the Department's March 24, 1989, letter was not an appealable action; that the Bentleys' notice of appeal was untimely; and that 25 Pa.Code §105.13(g) did not require the Bentleys' signature on the permit application.

By letter dated June 16, 1989, the Department advised the Board that it supported the Permittees' motion to dismiss. The Department agreed with the Permittees' characterization of the March 24, 1989, letter as an unappealable action, as it merely expressed the Department's legal position. The Department also suggested, citing Grimaud v. DER and Lake Winona Municipal Authority, 1986 EHB 1156, that because the letter did not alter the status quo, it was not an appealable action.

The Bentleys responded to the motion to dismiss on June 29, 1989, arguing that their appeal was not untimely because, as holders of an equitable interest in the hydroelectric dam, they were entitled to actual notice of the issuance of the permit. The Bentleys also contended that the Department's issuance of the permit without the requisite signatures of the Bentleys on the permit application was invalid and, therefore, the 30 day appeal period in 25 Pa.Code §21.52 was never tolled. In the alternative, the Bentleys petitioned the Board for allowance of an appeal *nunc pro tunc* from the issuance of the permit.

Permittees replied to the Bentleys' response on July 11, 1989, emphasizing their argument that the Bentleys' appeal was untimely.

We will dismiss the Bentleys' appeal since the March 24, 1989, letter at issue is not reviewable by the Board.

The Board is empowered by §4(a) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. ___, No. 94, 35 P.S. §7514(a) (Environmental Hearing Board Act) "to hold hearings and issue adjudications...on orders, permits, licenses, or decisions of the department." Identical language was contained in §1921-A(a) of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §§510-21(a), which was repealed by the Environmental Hearing Board Act, and, in interpreting that language, the Board consistently held that in order for the Board to have jurisdiction, the subject matter of the appeal must constitute an "adjudication" as defined in the Administrative Agency Law, 2 Pa.C.S.A. §101 or an "action" as defined in 25 Pa.Code §21.2(a). Chester County Solid Waste Authority v. DER, 1988 EHB 1173.

The March 24, 1989, letter at issue was written by Anne Johnson, an Assistant Counsel in the Department's Bureau of Regulatory Counsel. In its entirety, the letter read:

> I am writing in response to your November 9, 1988 letter to Joe Ellam. In that letter, you requested, on behalf of Gregory and Caroline Bentley, that the Department invalidate Limited Power Permit No. 15-064A on grounds that it was improperly issued to Donald and Joan Silknitter.
>
> The Department's records indicated that Permit No. 15-064A was issued on June 13, 1985 after notice was published twice in the Pennsylvania Bulletin.
>
> Any appeal of the Department's permit action must be pursued in compliance with the regulations governing the Environmental Hearing Board (25 Pa.Code Chapter 21). These regulations maintain that aggrieved parties must appeal an action of the Department of Environmental Resources to the Environmental Hearing Board within 30 days of receipt of notice of such action. Publication of the permit action in the

> Pennsylvania Bulletin provides constructive notice. Therefore it is the Department's position that the time for filing an appeal of this permit action has lapsed.
>
> If you have any further questions or concerns regarding this matter please do not hesitate to call.

This letter merely states the Department's position that since the Bentleys did not timely challenge the issuance of the permit, they cannot do so now. The letter does nothing to alter the rights, privileges, immunities, duties, or responsibilities of any person; rather, it simply advises the Bentleys of the regulations applicable to appeals of Department actions. As such, the letter does not constitute an action or adjudication of the Department, Sandy Creek Forest v. Com., Dept. of Env. Res., 95 Pa.Cmwlth 457, 505 A.2d 1091 (1986), and Adams County Sanitation Company and Kenneth Noel v. DER, EHB Docket No. 88-441-W (Opinion issued March 1, 1989), and we are, therefore, without jurisdiction to review it.

Having dismissed the Bentleys' appeal as being from a non-appealable action, we normally would not address any other issues raised by the parties. However, we must address the petition for allowance of an appeal *nunc pro tunc* of the permit issuance contained in the Bentleys' response to the Permittees' motion to dismiss.[1] The Bentleys contend, citing Pivirotto v. City of Pittsburgh, 515 Pa. 246, 528 A.2d 125 (1987), and Curtis v. Redevelopment Authority, Etc., 432 Pa. 58, 343 A.2d 377 (1978), that they, as equitable

---

[1] The Bentleys go on at great length on how their appeal was not untimely because the Department's issuance of the permit was invalid and because notice of the permit's issuance was never given to them personally. These arguments brush aside the fact that the action appealed by the Bentleys, as specified in their notice of appeal, was the Department's March 24, 1989, letter. The Bentleys' appeal from that letter was certainly timely. Any challenge to the permit itself was either untimely or precluded by principles of administrative finality.

owners of half the dam, were entitled to actual notice of the permit's issuance. The failure of the Department to provide actual notice, they argue, is grounds for an appeal *nunc pro tunc*.

The Board may grant leave to file an appeal *nunc pro tunc* if good cause is shown. 25 Pa.Code §21.53(a). Good cause has been interpreted as fraud or breakdown in the Board's processes, Mack Altmire v. DER, 1988 EHB 1022, or other compelling circumstances. The cases cited by the Bentleys in support of their contention that they were constitutionally entitled to actual notice of the permit's issuance are distinguishable from the situation presently before us. Pivirotto involved the adequacy of the City of Pittsburgh's notice to an equitable owner of property of its intent to demolish a building on the property. In holding that the equitable owner was entitled to actual notice, the Supreme Court emphasized that the matter involved the governmental taking of private property. Similarly, in Curtis the Supreme Court was concerned with protection of private property rights in deciding the adequacy of a notice of taking to the prospective condemnee, a holder of an easement. What is involved here is the grant of regulatory approval to construct a dam, not the governmental taking of private property. There is no requirement in either the DSEA or the regulations promulgated thereunder that the Department provide actual notice of the permit's issuance to the Bentleys. Nor do we believe that the Bentleys are constitutionally entitled to actual notice, for the Department's issuance of the permit is a determination that the Silknitters' permit application complied with the requirements of the DSEA; the permit does not affect either the Silknitters' or Bentleys' property rights. Because of this, we do not believe the Bentleys

have any constitutional right to actual notice of the permit's issuance.[2] Consequently, the Bentleys' allegations concerning the Department's failure to provide them with actual notice of the permit's issuance do not constitute grounds for the allowance of an appeal *nunc pro tunc*. Daniel E. Blevins et al. v. DER and Southeastern Chester County Refuse Authority, 1988 EHB 1075. Accordingly, we will deny their petition.

---

[2] Ms. Bentley received actual notice of the permit's issuance during the course of a July 22, 1987, public hearing on the proposed designation of the Lower Brandywine as a scenic river. Although the Bentleys contend that the notice was insufficient because the permit number was incorrect, it is clear from the transcript of the hearing that the permit was the Silknitters (N.T. 55-57). The Bentleys have offered no explanation, other than this, for failing to appeal the permit in 1987.

O R D E R

AND NOW, this 15th day of August, 1989, it is ordered that:

1) Donald and Joan Silknitter's motion to dismiss is granted and the appeal of Gregory and Caroline Bentley is dismissed; and

2) The Bentleys' request for allowance of an appeal *nunc pro tunc* is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Robert D. Myers

ROBERT D. MYERS, MEMBER

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK, MEMBER

DATED: August 15, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kenneth E. Gelburd, Esq.
Eastern Region
For Appellants:
Horace D. Nalle, Jr., Esq.
Clare Keefe Foster, Esq.
DRINKER BIDDLE & REATH
Philadelphia, PA
For Permittees:
John M. Myers, Esq.
MONTEVERDE, HEMPHILL, MASCHMEYER & OBERT
Philadelphia, PA
bl

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

M. DIANE SMI
SECRETARY TO THE I

VALLEY FORGE PLAZA ASSOCIATES	:	
	:	
v.	:	**EHB Docket No. 89-119-M**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and PHILADELPHIA SUBURBAN WATER	:	**Issued:** August 21, 1989
COMPANY, Intervenor	:	

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Synopsis

A DER order to remove stream obstructions, some of which were lawful when installed and some of which were unlawful when installed, will not be superseded when the petitioner fails to show that it is likely to prevail on the merits and when the obstructions threaten the public health and the property of another party. A DER denial of a permit application for the stream obstructions will not be superseded when the petitioner concedes that, after five years, the application was still incomplete.

OPINION

Valley Forge Plaza Associates (VFPA) filed a Notice of Appeal on April 27, 1989, from a Permit Denial and Order issued by the Department of Environmental Resources (DER) on March 23, 1989. In its action giving rise to the appeal, DER denied VFPA's application for a permit under the Dam Safety

and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1, et seq., and ordered VFPA to remove obstructions from the channel and flood plain of Trout Creek in Upper Merion Township, Montgomery County.

On May 26, 1989, VFPA filed a Petition for Supersedeas. DER moved to dismiss the Petition on June 7, 1989, and VFPA responded to the motion the following day. DER filed an Answer to the Petition for Supersedeas on June 9, 1989. Philadelphia Suburban Water Company (PSWC) was allowed to intervene by a Board Order dated June 28, 1989. A hearing on the Petition for Supersedeas was held before Board Member Robert D. Myers in Harrisburg on August 4, 1989. All parties were represented by legal counsel and presented evidence in support of their positions.

VFPA has been the developer of a complex of buildings on a site located in the northeast quadrant of the intersection of First Avenue and North Gulph Road in King of Prussia, Upper Merion Township, Montgomery County. The first stage of development, constructed in 1972, involved a hotel, office building, dinner theater and related facilities. Major additions in 1984 included a convention center and another hotel. A third hotel is proposed for the future.

Bordering the VFPA site on the northeast is a 3+ acre tract of land owned by PSWC. This tract consists primarily of a pumping station site but includes an accessway, approximately 40 feet wide, that extends some 500 feet westwardly from Moore Road. PSWC constructed a pumping station (a one-story brick structure housing pumping equipment and related facilities) on this tract in 1966 and continues to use it in furnishing water to its customers.

A stream, known variously as Maschellmac Creek and Trout Creek (we will use the latter designation) flows in a general easterly direction through

the VFPA site, across part of the pumping station site and then south of, and roughly parallel to, the accessway to Moore Road. Trout Creek separates the buildings in the VFPA complex from PSWC's tract. In preparation for the expansion that actually occurred in 1984, VFPA filed an application with DER, dated March 28, 1979, seeking an encroachment permit under the Water Obstructions Act, Act of June 25, 1913, P.L. 555, as amended (since repealed) for two driveway crossings of Trout Creek to consist of 23' x 6'4" structural plate arch culverts. Water Obstruction Permit No. 4679713 was issued for this project by DER on August 6, 1979. Among the conditions was one providing for expiration of the Permit if work was not completed by December 31, 1982.

VFPA's primary reason for seeking the driveway crossings over Trout Creek was to gain access to that portion of the site north of Trout Creek for parking purposes. Similar reasons prompted VFPA to enter into a "Lease of Parking Area" with PSWC on January 31, 1980. This agreement, which is currently the subject matter of a dispute between these parties, gave VFPA the right, inter alia, to construct a paved road on the accessway leading from Moore Road and to use the accessway and the pumping station site for parking purposes.[1]

Water Obstruction Permit No. 4679713 expired on December 31, 1982 because VFPA had not performed the construction work by that date. In response to VFPA's inquiry, DER stated on December 23, 1983, that the Permit would be reactivated if VFPA filed an acceptable maintenance bond. Shortly thereafter, VFPA decided to change the design of the project, substituting one 450-foot long, 33'1" x 12'5" structural plate arch culvert for the two culverts previously approved. An Erosion and Sedimentation Control Plan and

---

[1] VFPA claims that the agreement gives it broader rights. We offer no opinion on that claim, since the matter is in litigation.

Narrative (E&S Plan), dated February 6, 1984, was prepared and submitted to the U. S. Department of Agriculture's Soil Conservation Service (SCS). Among other provisions, the E&S Plan involved the construction of three temporary crossings of Trout Creek to enable construction equipment to cross from one side to the other without going through the Creek. One of these temporary crossings was to be placed within the area intended to be occupied by the 450-foot culvert and removed when construction progressed to that point. The other two were to be placed downstream of the culvert location.

The E&S Plan was approved by SCS on February 7, 1984. The revised culvert project was approved by the Federal Emergency Management Agency on February 9, 1984, by the Upper Merion Township Planning Commission on February 22, 1984, and by the Pennsylvania Fish Commission on April 20, 1984. Permit No. 4679713 was amended by DER on August 30, 1984, approving the 450-foot culvert and extending the time for construction to December 31, 1986. VFPA proceeded with construction of the 450-foot culvert, utilizing the three temporary culverts mentioned in the E&S Plan. One of these temporary culverts was removed, but the other two are still in place today.

Apparently, VFPA had begun some of the construction work before the amended Permit was issued. A DER letter of June 7, 1984, notified VFPA of the following encroachments on Trout Creek:

1. Three stream crossings consisting of three, 4 ft. diameter corrugated metal pipes backfilled with stone and earth.

2. A 22 ft. wide, 1050 ft. long paved access road which is adjacent to the north side of Trout [Creek].

3. Two storm sewer outfalls.

4. A 100 ft. long retaining wall composed of derrick stone which is near the south bank of the stream.

5. A 12± ft. high 500± ft. long fill, adjacent to the south bank, on which a new parking area has been created.

6. A several hundred foot long fill and grading area located along south bank just downstream of the Route 363 PennDOT culvert.

VFPA was admonished that these encroachments violated the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq., and would have to be removed unless a permit was obtained.

An application for a Water Obstruction Permit for "Three Driveway Crossings"[2] of Trout Creek was filed with DER by VFPA sometime during July 1984. On August 8, 1984, DER sent a review letter to VFPA specifying the items that needed to be submitted in order for the application to be complete. Having received nothing additional from VFPA, DER sent a follow-up letter on December 27, 1984, advising that, unless the requested items were submitted within 15 days, the application would be denied and an Order issued for the removal of the obstructions.

VFPA was attempting to obtain special exceptions for the obstructions from the Upper Merion Township Zoning Hearing Board. The first hearing on VFPA's request was held on September 13, 1984, but a second hearing was not held until more than two years later. This delay, according to the Zoning Hearing Board, was caused by VFPA's changes in plans and tardy submittals of information. The special exceptions finally were granted, subject to 8 conditions, on March 26, 1987.

All of the stream encroachments remained in place during this time. VFPA was utilizing the paved road on the accessway to PSWC's pumping station

---

[2] Despite the denomination, the application apparently covered most or all of the encroachments listed in DER's June 7, 1984, letter. See DER's letter of December 27, 1984.

as a means of ingress and egress for trucks and buses servicing VFPA's complex. These vehicles would cross Trout Creek on one of the temporary culverts, follow a loop through the heart of the complex and exit over the other temporary culvert to the paved road on PSWC's tract. This use of the accessway and the flooding threats to the pumping station caused, according to PSWC, by VFPA's stream encroachments, generated controversy between VFPA and PSWC. After receiving the special exceptions from the Upper Merion Township Zoning Hearing Board, VFPA turned its attention to resolving this controversy.

That task was made more difficult by repeated instances of threatened flooding. The pumping station was taken out of service 5 times during 1988 because of flood waters. PSWC is convinced that VFPA's constriction of the flood plain downstream from the pumping station and VFPA's continued use of the two inadequately-sized culverts, both of which are also downstream from the pumping station, create this flooding hazard. There is evidence that the pumping station was out of the flood plain when it was built, and that a stream relocation brought Trout Creek closer to the structure. The two temporary culverts each consist of 3 corrugated metal pipes, 4' in diameter, laid side by side and covered with stone, earth and paving material. Debris carried downstream by the waters of Trout Creek collects at the entrance to these pipes, obstrucing the flow of water.

PSWC takes the pumping station out of service whenever the waters rise to a level where flooding is threatened. This is done to make certain that flood waters do not enter the water system and pollute it. When a shutdown occurs and flood waters actually enter the pumping station, the clear well must be pumped out and bacterial tests done on the replacement water in that well. This takes 3 to 4 days. Even if the flood waters do not actually enter the pumping station, it takes 2 to 3 days to get it back into service.

Apparently, there was some communication between VFPA and DER during the 4 years that elapsed subsequent to DER's letter of December 27, 1984. DER was aware that VFPA was attempting to gain local approval and to resolve the dispute with PSWC. In any event, after verifying on February 18, 1989, that the unpermitted obstructions still existed, DER issued the Permit Denial and Order on March 23, 1989.

On or about March 28, 1989, VFPA filed a Petition under Chapter 11 of the Bankruptcy Code, and the proceeding currently is pending in the United States Bankruptcy Court for the Eastern District of Pennsylvania at docket number 89-11136-S. VFPA has not refiled an application with DER to obtain a permit for the stream obstructions and has not submitted to DER any of the data necessary to make its 1984 application complete. VFPA explains that, in order to do so, it needs the services of technical experts and cannot hire them without approval of the Bankruptcy Court. A request to that effect was made to the Court on July 19, 1989, but has not yet been approved or disapproved.

VFPA claims that, if it is forced to remove the two culverts, buses and delivery trucks will have no access to the rear of the complex because of an inadequate turning radius for vehicles of that size. The buildings appear to approach within 100 feet of Trout Creek. PSWC, on the other hand, claims that there is adequate space on VFPA's property to accommodate such vehicles without using the culverts.

Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514, provides that the Board may grant a supersedeas upon cause shown. Among the factors to be considered are:

1. irreparable harm to the petitioner;
2. the likelihood of the petitioner prevailing on

the merits;

3. the likelihood of injury to the public or other parties.

A supersedeas may not be issued where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. See also 25 Pa. Code §21.78.

DER's Motion to Dismiss VFPA's Petition for Supersedeas was based upon a line of cases in which the Board has refused to grant a supersedeas when the appeal is from a permit denial. To grant a supersedeas in such cases, the Board has reasoned, would permit the applicant to engage in unpermitted and, therefore, unlawful conduct. See, for example, Joseph R. Amity v. DER, 1988 EHB 766; and Raymark Industries, Inc. v. DER, 1986 EHB 176. Parker Sand and Gravel v. DER, 1983 EHB 557, represents an exception to this rule, however. That case involved an appeal from DER's denial of a license renewal. The Board granted a supersedeas because the status quo that existed before DER's action lawfully allowed the applicant to engage in surface mining.

The two culverts, which are the primary focus of the present case, were lawful structures when installed in 1984 as part of the construction of the 450-foot culvert. VFPA claims that they lawfully remained in place during the years after 1984 when VFPA's application for a permit was pending. The structures became unlawful only when DER denied the application on March 23, 1989. Thus, the status quo that existed prior to DER's action lawfully allowed the structures to remain in place. Certainly, DER's inaction during those intervening years lends credence to VFPA's argument. Since the

validity of VFPA's position could not be determined until a hearing, action on DER's Motion was deferred. In light of our disposition of VFPA's Peition for Supersedeas, DER's Motion is now moot and will be denied.

VFPA has failed to carry its burden of persuading us that a supersedeas should be granted. Its argument that the stream obstructions existed lawfully since constructed in 1984 is meritless. While some of the obstructions, including the two culverts, may have been legal when installed, others had no connection with the permitted activity of installing the 450-foot culvert. These obstructins had no claim of right to support their initial construction. The two culverts and other obstructions that were part and parcel of the 450-foot culvert project were legally in place only until that project was completed -- apparently sometime in 1985. After that date, they became unlawful. Their status did not improve by reason of the pending application for a permit or by reason of DER's forbearance. The status quo that existed immediately prior to DER's action on March 23, 1989, was the unlawful existence of stream obstructions. In accordance with Board precedents, a supersedeas is inappropriate to maintain such a status quo.

VFPA has not shown that it is likely to prevail on the merits. The action appealed was DER's denial of a permit for the stream obstructions and an order to remove them. VFPA presented no evidence at all to show that DER abused its discretion in denying the permit application. VFPA conceded, in fact, that its application was not complete on March 23, 1989, almost 5 years after it was filed. How could DER's denial of a permit, under these circumstances and after this passage of time, amount to an abuse of discretion?

It is the order to remove the obstructions that prompts VFPA's appeal and Petition for Supersedeas. But the obstructions are unlawful without a

permit, and VFPA has presented no evidence to show that it would be entitled to a permit if the requested data were submitted. The evidence presented by DER and PSWC strongly suggests that a permit would not be granted. Moreover, it is far from certain that PSWC will refile its application or be able to provide the data needed to satisfy DER's concerns. The approval of the Bankruptcy Court is needed before the necessary experts can be hired. A request for such approval was not filed until two months after the filing of the Petition for Supersedeas. The approval has not yet been given and there is no assurance that it will be given. DER's Order to remove the obstructions, under these circumstances, can hardly be considered an abuse of discretion.

The likelihood of injury to PSWC and to the public it serves is all too apparent. Flooding threats to the pumping station have occurred repeatedly during 1988 and 1989, prompting VFPA to sandbag a portion of the complex on one occasion. PSWC was forced to shut down the pumping station on each of these occasions in order to reduce the chance of polluted surface water entering its distribution system. Whenever this occurs, even if flood waters do not actually enter the pumping station, the facility is out of service for several days. If the flood waters rise high enough, the clear well becomes polluted and must be pumped out. Bacteria tests must be performed before the pumping station can be put back in service. The threat to the public is real and should not be allowed to continue.

Finally, VFPA has not convinced us of irreparable harm. The testimony concerning other access to the complex for trucks and buses is conflicting. While we are unable to resolve the conflicts at this stage of the proceeding, it is obvious to us that VFPA has not yet carried its burden of proof in this regard. Even if irreparable harm had been shown, however,

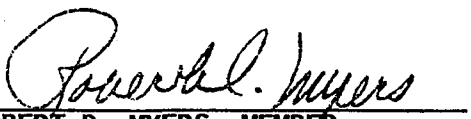
the other factors to be considered in reviewing a Petition for Supersedeas would far outweigh it.

ORDER

AND NOW, this 21st day of August, 1989, it is ordered as follows:

1. The Petition for Supersedeas, filed by VFPA on May 26, 1989, is denied.
2. The Motion to Dismiss Petition for Supersedeas, filed by DER on June 7, 1989, is denied as moot.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: August 21, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kenneth Gelburd, Esq.
Eastern Region
For Appellant:
Gary D. Fry, Esq.
Howard Rosenthal, Esq.
Philadelphia, PA
For Intervenor:
J. Bradford McIlvain, Esq.
Richard H. Glanton, Esq.
Philadelphia, PA

mjf

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

M. DIANE SMITH
SECRETARY TO THE BOARD

TECHNIC, INC.	:	
	:	
V.	:	**EHB Docket No. 87-459-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 30, 1989**

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

By Terrance J. Fitzpatrick, Member

Syllabus:

A civil penalty assessment of $1000 issued by the Department of Environmental Resources (DER) under the Solid Waste Management Act, 35 P.S. §6018.101 et seq. is dismissed. DER did not prove that the Appellant violated 25 Pa. Code §75.263(d)(1) by not listing its identification number on line 10 of the transportation manifest, because the identification number was listed on line 6, and a review of the entire manifest indicated that the numbers were likely to be the same.

INTRODUCTION

This proceeding involves an appeal by Technic, Inc. (Technic), a corporation with a business address of 1 Spectacle Street, Cranston, Rhode Island, from a civil penalty assessment of $1000 issued by the Pennsylvania Department of Environmental Resources (DER). The civil penalty assessment was based upon the allegation that Technic, which both transports hazardous waste and operates a treatment, storage, or disposal (TSD) facility for hazardous

waste, violated 25 Pa. Code §75.263(d)(1) by signing a hazardous waste manifest form which had not been completed by the generator of the waste. This manifest form was in conjunction with Technic's transportation on March 10, 1987 of waste cyanide solution from AMP, Inc. in Carlisle, Pennsylvania to Technic's storage facility in Cranston, Rhode Island.

A hearing was held in this proceeding on June 9, 1988. DER presented testimony from David Weisberg, the Secretary and manager of operations for Technic, and from DER employees Leonard W. Tritt, Kenneth P. Beard, and David R. Shipman. Technic, which was represented by Mr. Weisberg (a non-lawyer), did not present testimony.

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

FINDINGS OF FACT

1. The Appellant in this proceeding is Technic, Inc. (Technic), a corporation with a business address of 1 Spectacle Street, Cranston, Rhode Island (Transcript 8-9).

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), an executive agency which is charged with the duty of administering and enforcing the provisions of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S. §6018.101 et seq., and the regulations promulgated under this Act.

3. On March 10, 1987, Technic transported waste cyanide solution (a hazardous waste) from AMP, Inc. in Carlisle, Pennsylvania, to Technic's facility in Cranston, Rhode Island (Commonwealth Exhibit 1, T. 12)

4. The hazardous waste manifest form which accompanied this shipment listed Technic's name on lines 5 (name of transporter) and 9 (name and address of designated facility) because Technic was both the transporter of the waste

and the facility designated to receive the waste (Comw. Ex. 1).

5. The manifest form listed the same telephone number (401 781-6100) on line D (Transporter's phone) and line H (Facility's phone) (Comw. Ex. 1).

6. Technic's United States Environmental Protection Agency Identification Number was listed in block 6 (number of transporter), but was not listed in block 10 (designated facility's number) (Comw. Ex. 1, T. 12-13).

7. Technic sometimes lists its address as 1 Spectacle Street (the address on its hazardous waste license) and sometimes lists its address as 88 Spectacle Street (the address listed on the manifest form), but these different addresses refer to the same location (T. 13-14). This location is on a dead-end street (T. 14).

8. Leonard W. Tritt, Chief of the Transportation and Reporting Section in the Bureau of Waste Management in DER, did not discover that Technic uses two different addresses until after DER issued the civil penalty assessment to Technic (T. 35-36).

9. DER has developed a civil penalty matrix for violations of the Solid Waste Management Act. This matrix was developed to ensure consistency and to enable DER to obtain authorization to enforce the federal Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq. (T. 51, 66).

DISCUSSION

DER has assessed a $1000 civil penalty against Technic based upon Technic's alleged violation of the Solid Waste Management Act and the regulations promulgated under the Act. DER bears the burden of proving that the civil penalty assessment should be upheld. 25 Pa. Code §21.101(b)(1)(3), Chrin Brothers v. DER, EHB Docket No. 84-283-F (Adjudication issued August 7, 1989). In reviewing DER's action, the Board's task is to determine whether DER abused its discretion or carried out its duties in an arbitrary manner.

Chrin, Pennsbury Village Condominium v. DER, 1977 EHB 225, 231. First, we must determine whether Technic committed the violation for which the penalty was assessed. Second, if we find that Technic committed the violation, we must determine whether the amount of the penalty matches the severity of the violation. Refiner's Transport and Terminal Corp. v. DER, 1986 EHB 400, 447-448, Trevorton Anthracite Co. v. DER, 42 Pa. Commw. 84, 400 A. 2d 240, 243 (1979).

In this case, the civil penalty assessment issued by DER was based upon the allegation that Technic violated 25 Pa. Code §75.263(d)(1), which provides:

> (1) A transporter may not accept hazardous waste from a generator or another transporter unless it is accompanied by a manifest which has been completed and signed by the generator under §75.262 . . . .

DER contends that Technic violated this section by accepting hazardous waste from AMP, Inc. on March 10, 1987, even though the manifest accompanying the waste was incomplete in that Technic's United States Environmental Protection Agency (EPA) identification number was not listed on line 10. DER also argues that the amount of the civil penalty ($1000) was reasonable because it was computed in accord with the civil penalty matrix which DER developed for violations of the Solid Waste Management Act. DER explains that this matrix was developed to assure consistency among fines and to obtain authorization from EPA to enforce the federal Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq. DER argues that, under this matrix, $1000 is the minimum assessment for any violation.

Technic argues that the civil penalty assessment was arbitrary and capricious. It contends that its EPA identification number was supplied on line 6, the line for the transporter's identification number, even though it

was not listed again on line 10, the line for the designated facility's identification number.[1] Technic also argues that the $1000 civil penalty is disproportionate to the nature of the alleged violation, in that there was no harm to the environment and Technic did not benefit from the alleged violation.

The threshold question is whether Technic violated 25 Pa. Code §75.263(d)(1). More specifically, we must determine whether the manifest which accompanied the shipment was incomplete. After reviewing all the circumstances here, we find that DER did not carry its burden of proving that Technic violated this regulation. The fact that one line on the manifest was left blank does not necessarily lead to the conclusion that the manifest was incomplete. Such a determination requires an examination of the entire manifest, not just one of its parts. In this case, line 10--the line for the designated facility's EPA identification number--was left blank. However, Technic's EPA identification number was listed a scant one inch above line 10 on line 6, the line for the transporter's EPA identification number. Technic's name was listed and clearly visible on both line 5 (Transporter's name) and line 9 (Designated facility's name). Therefore, unless there was some reason to think that the Technic listed as the transporter was a different entity from the Technic listed as the designated facility, or that EPA would assign Technic different identification numbers for the different functions Technic serves, we do not see how leaving line 10 blank would cause any confusion to someone reviewing the manifest.

There was no reason to expect that the Technic, Inc. listed on line 5

---

[1] The manifest elicits information regarding both the transporter and the facility which will receive the waste. In this case, Technic served both functions.

was a different entity from the Technic, Inc. listed on line 9. This was particularly true because line D of the manifest (Transporter's phone) lists the same telephone number as line H (Facility's phone).

DER introduced evidence to show that there was actual, or at least potential, confusion regarding whether the Technic listed as transporter was the same entity or was located at the same place as the Technic listed as the designated facility. The alleged confusion was due to the fact that the address listed on line 9 of the manifest was 88 Spectacle Street, while the address listed in Technic's licensing record was 1 Spectacle Street (T. 35).[2] The following colloquy took place between DER's counsel and DER witness Leonard Tritt:

> A . . . . Transporter identification numbers are not necessarily the same as treatment storage or disposal EPA numbers.
>
> Q Why is that?
>
> A Because of a couple reasons: Obviously if we have two different companies, they are going to have two different numbers. That is one possibility.
>
> And in the case in point here, the manifest indicated that Technic was a transporter and also that Technic was a TSD.
>
> However, Technic has a licensee [sic] at 1 Spectacle Street at Cranston, as you elicited earlier, and Technic the TSD is at 88 Spectacle Street. There are two different addresses.
>
> And according to the way EPA identification numbers are issued, a different facility would have a different EPA identification number. Two different addresses there is no way we can be expected to know that it's the same place.
>
> They are based on numbers. You'd have No. 1 on the one corner of the block or one end of the block, and 88 would be theoretically at the other end of the block.

---

[2] Mr. Weisberg explained in his testimony that Technic is located on a dead-end street and that both addresses refer to the same location (T. 14).

There is no way that we could know it's the same place in fact and therefore might have the same number.

* * * *

Q And if indeed the addresses are different, as they are here, 1 Spectacle Street versus 88 Spectacle Street, the common thing to do would be to assume that those were two different places?

A Yes.

Q With two different numbers?

A Two different numbers.

Q So when it came to your attention that indeed a number was missing, a number that was across from a different address from the licensee, you certainly picked out this manifest as being in violation of all the regulations and laws that you have already stated?

A That's right.

Q Because indeed there are two different addresses. And as you just stated you did not assume that this was the same place. And you did assume that there should be two different EPA ID numbers, is that correct?

A That's correct. It's illogical to assume that number 1 would be the same address as number 88.

(T. 23-25) This discussion clearly implied that DER was confused by the discrepancy between the addresses, and that this confusion was one of the reasons why the manifest was found to violate the regulations. Later, however, in response to questioning from the bench, Mr. Tritt revealed that he did not see the 1 Spectacle Street address in the files until after the civil penalty assessment was issued (T. 35-36). Therefore, the discrepancy between the two addresses could not have confused DER when it first reviewed the manifest and could not have been one of the reasons why DER concluded

that Technic had violated the regulations.[3]

Regarding the possibility that the EPA identification number on line 10 might not be the same as the number on line 6, Mr. Tritt also stated that it is possible for licensees who perform both transportation and TSD functions to have different EPA identification numbers for their two operations (T. 25-26). We do not attach great weight to this testimony because it establishes only the bare possibility that the numbers could be different without addressing how likely this would be. If the purpose of the EPA identification numbers is, as Mr. Tritt testified, to keep track of "who is doing what" (T. 23), we fail to see how this purpose is served by assigning more than one number to a single company which both transports and stores hazardous waste. Indeed, in this case, it is undisputed that Technic only had one EPA identification number to cover both its transportation and storage functions.

In summary, we conclude that the manifest was complete because, even though Technic's EPA identification number was not separately listed on line 10, it was listed on line 6, and a reasonable person reviewing all of the information on the manifest would expect the two numbers to be the same. We do not believe that imposing a requirement that the person reviewing the manifest act reasonably and look at the entire manifest poses a danger to the consistency which the Department is striving for in enforcing its regulations. We might add that while consistency is a virtue, rigidity is not.

---

[3] Mr. Tritt subsequently explained on cross-examination that his testimony regarding the different addresses was "really just supportive evidence for our need to have that [EPA identification] number there." (T. 39) We do not understand how this potential confusion which never materialized is relevant to the issues in this case.

CONCLUSIONS OF LAW

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

2. DER bears the burden of proving that a civil penalty assessment does not constitute an abuse of discretion. 25 Pa. Code §21.101(b)(1)(3), T. C. Inman, Inc. v. DER, 1988 EHB 613.

3. A transporter of hazardous waste may not accept hazardous waste from a generator unless the waste is accompanied by a manifest which has been completed by the generator. 25 Pa. Code §75.263(d)(1).

4. In determining whether a manifest is "complete," DER must examine the entire manifest and not just one of its parts.

5. DER did not prove that the manifest involved in this case was incomplete due to the fact that Technic's EPA identification number was not listed on line 10, because Technic's EPA identification number was listed on line 6, and a review of the entire manifest indicated that the identification numbers were likely to be the same.

ORDER

AND NOW, this 30th day of August, 1989, it is ordered that the appeal of Technic, Inc. from the civil penalty assessment issued by the Department of Environmental Resources on October 2, 1987 is sustained, and said civil penalty assessment is dismissed.

ENVIRONMENTAL HEARING BOARD*

Robert D. Myers

ROBERT D. MYERS, MEMBER

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK, MEMBER

DATED: August 30, 1989

cc: Bureau of Litigation
Harrisburg, PA
For the Commonwealth, DER:
Norman G. Matlock, Esq.
Central Region
For Appellant:
David D. Weisberg, Esq.
Providence, RI

*Chairman Maxine Woelfling did not participate in this Adjudication.

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

M. DIANE SMITH
SECRETARY TO THE BOARD

SALFORD TOWNSHIP BOARD OF SUPERVISORS	:	
	:	
V.	:	**EHB Docket No. 86-660-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 7, 1989**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment to dismiss an appeal as moot because the permits at issue have expired by operation of law is denied because there are material issues of fact regarding whether the permittee initiated mining activities on the site prior to the expiration of the permits.

OPINION

This matter was initiated with the filing of four separate appeals challenging the Department of Environmental Resources' (Department) November 7, 1986, issuance of surface mining and mine drainage permits and an air quality plan approval to Mignatti Construction Company (Mignatti) authorizing the construction and operation of the Naceville Quarry (Quarry) in West Rockhill Township, Bucks County.

Surface Mining Permit No. 300696-09850601-01-0 (the mining permit) was issued pursuant to the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 et seq. (Noncoal SMCRA); Mine Drainage Permit No. 09850601 was issued pursuant to

the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (the Clean Streams Law); and Air Quality Plan Approval No. 09-310-028 was issued pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq. The appeal of West Rockhill and Salford Townships was docketed at No. 86-660-W, the appeal of Dr. Donald W. Raub was docketed at No. 86-678-W, the appeal of Margaret A. Fitzgerald was docketed at No. 87-005-W, and the appeal of Dr. David C. Rilling was docketed at No. 87-007-W. The four appeals were consolidated at Docket No. 86-660-W by order of the Board dated March 19, 1987.

The Department originally issued a mine drainage permit to Mignatti for the Quarry in November, 1974, and a surface mining permit in October, 1976. The Townships and others appealed the surface mining permit in Township of Salford v. DER and Mignatti Construction Company, 1978 EHB 62, and the Board remanded the matter to the Department to require Mignatti to submit a soil and erosion plan and an application for an air quality permit for an integrated quarry operation. The Department was then to decide whether or not to reinstate the contested mine drainage permit. The Board's holding was affirmed in part by the Commonwealth Court in Mignatti Construction Company, Inc. v. Com., Environmental Hearing Board, 49 Pa. Cmwlth. 497, 411 A.2d 860 (1980), which reversed that portion of the Board's decision requiring Mignatti to submit an erosion and soil plan.

On June 7, 1984, Mignatti was advised by the Department to submit an application for reissuance of the mine drainage permit because the Quarry had not been placed in operation within two years of the issuance of the permit. While Mignatti contested the need to reapply, it did file the application and on November 7, 1986, the mine drainage permit was reissued, the surface mining

permit was reinstated, and the air quality plan approval was issued. These appeals followed.

The Townships moved for summary judgment on April 14, 1987, and the Board denied their motion at 1988 EHB 486.

On February 14, 1989, the Department notified Mignatti that its mining and mine drainage permits had expired by operation of law under 25 Pa. Code §77.102(a)(6), which provides that permits expire two years from the date of issuance, unless mining has been initiated or an extension of time has been granted by the Department. Mignatti appealed this letter on March 14, 1989, and its appeal was docketed at No. 89-066-W. West Rockhill Township has intervened in that appeal.

On April 17, 1989, West Rockhill Township filed a motion for summary judgment, contending that this matter has been rendered moot because Mignatti's permits have expired by operation of law. West Rockhill Township asserted that no surface mining activity, site preparation, drilling or other construction activities have taken place on the site. West Rockhill also argued that the letter of notification sent by the Department to Mignatti was not an appealable action, citing Alternate Energy Store, Inc. v. Com., Department of Environmental Resources, 107 Pa. Cmwlth. 66, 527 A.2d 1077 (1987).

On May 11, 1989, Mignatti filed its answer and brief in opposition to the motion for summary judgment, arguing that the mine drainage permit issued in 1974 was final and the surface mining permit issued in 1976 was remanded to the Department by the Commonwealth Court in 1980 for review on only one narrow issue and is subject to attack on that issue only. Mignatti asserts that the provisions of 25 Pa. Code §77.102 (a)(6) were never made a condition of these permits. Mignatti also alleges that there has been surface mining activity on

the site from 1969 to present and documents activity occurring since the issuance of the most recent permits in November, 1986. Finally, Mignatti argues the Departments' notification letter is an appealable action affecting its property rights and privileges.

The Department filed no response to the Township's motion.

This Board is empowered to grant summary judgment if there are no genuine disputes over material facts and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. No. 1035; Summerhill Borough v. DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978). In ruling on a motion for summary judgment, the Board will look at the facts in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

The relevant regulation, 25 Pa. Code §77.102 (a)(6), provides:

> (6) The permit issued shall expire two years from the date of permit issuance unless mining has been started or an extension of time has been granted by the Department.

Mignatti alleges that 25 Pa. Code §77.102 (a)(6) does not apply to this permit since it was not explicitly included as a permit condition when other specific provisions of Chapter 77 were incorporated. Mignatti explains that this provision of Chapter 77 was intentionally excluded because surface mining had started as acknowledged on the approved plan of operations. We note, however, that the very first standard condition incorporated in the permit declares:

> 1. This permit is issued subject to the Conditions of Subchapter E, Chapter 77, "Surface Non-coal Mining Operation"; compliance with the provisions of this subchapter, as provided for herein, is expressly made part of the conditions of this permit.

This, we believe, is a specific incorporation of 25 Pa. Code §77.102(a)(6).

Having determined that 25 Pa. Code §77.102(a)(6) is applicable to Mignatti's permit, we must now determine whether the permit falls within either of the two exceptions to the two year expiration date. Since neither party has suggested that Mignatti ever asked for or received an extension of the current mining permit, the issue here is whether mining ever commenced at the Quarry.

While neither the Clean Streams Law nor Noncoal SMCRA contain definitions of "initiation of mining," they do define related terms; we will rely on these provisions to provide guidance as to what constitutes the initiation of mining. Section 3 of Noncoal SMCRA defines "surface mining" as

> The extraction of minerals from earth, from waste or stock piles or from pits or from banks by removing the strata or material that overlies or is above or between them or otherwise exposing or retrieving them from the surface, including, but not limited to, stripped mining, auger mining, dredging, quarrying and leaching and all surface activity connected with surface or underground mining, including, but not limited to, exploration, site preparation, entry, tunnel, drift, slope, shaft and boar hole drilling and construction activities relating thereto;...
>
> (emphasis supplied)

Section 315 of the Clean Streams Law defines the operation of a mine to include

> preparatory work in connection with the opening or reopening of the mine, refuse disposal, backfilling, sealing, and other closing procedures and any other work done on land in connection with the mine.

Both of these definitions suggest a broad interpretation of the activities which may be regarded as constituting the commencement of mining activity.

While the affidavit of West Rockhill's engineer, C. Robert Wynn, states that he observed no activity on the site, the affidavit of Joseph A. Mignatti, which was appended to Mignatti's response to the motion for summary judgment, details a number of activities on the site between November 7, 1986,

and November 6, 1988. These activities, which appear to fall within "site preparation" or "preparatory work," include:

- Repeated repairs to the chain link fence and gates at the perimeter of the site.
- Removal of previously mined and crushed stone from the stockpile on site.
- The performing of ambient sound surveys by Vibro-Tech Engineers, Inc.
- The performance of site access and intersection field surveys and the preparation of foundation plans for the quarry crusher and conveyer equipment.
- The undertaking of field surveys in connection with engineering for delineation of settlement basins and the final storm water management and erosion control plan and the submission of the plans to the Department on April 29, 1988.
- The collection and analysis of water samples and water level measurements from a domestic well on the site, wells previously drilled on site for exploratory and stone analysis purposes and from representative wells within 1,000 feet of the permit boundaries.

Because in considering a motion for summary judgment, the Board must view the record in the light most favorable to Mignatti and any doubts as to the existence of a genuine issue of material fact must be resolved in Mignatti's favor, we cannot grant summary judgment in West Rockhill's favor. It appears from Mignatti's recitation of events which have occurred at the Quarry that there are material issues of fact concerning the activity at the site.

Finally, West Rockhill alleges that the Department's February 14, 1989, letter to Mignatti notifying it of the permit's expiration is not an appealable action, since it merely advised Mignatti that its permits have expired by operation of law. We cannot ascertain the relevance of this argument to West Rockhill's motion for summary judgment. In any event, the question of the appealability of that letter is properly an issue in the appeal at EHB Docket No. 89-066-W. In the instant appeal, we must first determine whether or not these permits have expired by operation of law, and that cannot be determined on the basis of the record currently before us.

ORDER

AND NOW, this 7th day of September, 1989, it is ordered that:

1) West Rockhill Township's motion for summary judgment is denied;

2) All discovery in this matter must be completed on or before October 30, 1989; and

3) West Rockhill Township shall file its pre-hearing memorandum on or before November 15, 1989.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: September 7, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kenneth A. Gelburd, Esq.
Eastern Region
For Salford Township:
Robert G. Bricker, Esq.
Souderton, PA
For West Rickhill Township:
John B. Rice, Esq.
Perkasie, PA
For Rilling, Fitzgerald and Raub:
Stephen D. Shelly, Esq.
Lansdale, PA
For Mignatti Construction:
Paul W. Callahan, Esq.
Norristown, PA

sb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

KERRY COAL COMPANY	:	
	:	
V.	:	**EHB Docket No. 86-124-M**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 8, 1989**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Summary judgment is entered for DER in appeals from a compliance order and civil penalty assessment issued by DER under the provisions of SMCRA for the failure to file an annual report on time. The Board holds that there is no dispute as to any material fact and that DER is entitled to judgment as a matter of law, since it has the statutory authority under SMCRA to require the reporting of annual data.

OPINION

Kerry Coal Company (Kerry) filed an appeal on March 3, 1986 (docket no. 86-124-M), from Compliance Order 86G073 issued by the Department of Environmental Resources (DER) on February 1, 1986. Kerry filed another appeal on June 1, 1987 (docket no. 87-212-M), from an Assessment of Civil Penalty made by DER on May 1, 1987. The Compliance Order informed Kerry of its failure to file its annual tonnage report in connection with Mining Permits Nos. 04823006(c), 04823005 and 04840102 and ordered Kerry to file the report by February 5, 1986. The Assessment of Civil Penalty, in the amount of

$230.00, related to the same violation. The appeals were consolidated by Board Order dated November 18, 1988.

The parties had filed a Stipulation of Facts with respect to the appeal from the Compliance Order on July 21, 1988. The document was supplemented by a Second Stipulation of Facts, filed on March 6, 1989, pertaining to both of the consolidated appeals. On March 24, 1989, DER filed a Motion to Limit Issues. Kerry responded to this Motion on April 17, 1989, and DER replied on May 5, 1989. DER inadvertently used the title Motion to Limit Issues instead of Motion for Summary Judgment. It is clear from the body of the Motion and the prayer for relief that summary judgment was intended. We will treat the Motion as such.

The stipulated facts are simple. In December 1985 DER requested all coal surface mining operators in the Commonwealth to submit an annual report identifying for each Mine Drainage Permit the location (by county); the name of the geologic formation; the average thickness of the mineral; the pounds of explosives used (by classification); the total number of employees; the number of fatal and non-fatal accidents; the tonnage of coal shipped by rail, water and truck; the total annual production of coal; the number of days worked during the year; and the tonnage of coal shipped to in-state, out-of-state and foreign destinations. Forms for this annual report were sent to coal surface mining operators, directing them to complete the report and file it by January 25, 1986.

Kerry received one of these report forms early in December 1985. DER's Mine Conservation Inspector, John Davidson, delivered a telephoned reminder on January 24, 1986. Kerry failed to file the report, and DER issued the Compliance Order on February 1, 1986, requiring Kerry to file the report by February 5, 1986. Kerry met this latter deadline. Kerry's Mining Permits

make no mention of an annual report requirement. The civil penalty of $230.00 is reasonable and appropriate if Kerry was legally required to file the annual report.

The Compliance Order refers to section 4(f) of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4(f). The Assessment of Civil Penalty cites this same section; but also refers to section 18.6 of SMCRA (52 P.S. §1396.24), section 611 of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.611, and 25 Pa. Code §86.13. The only reference specifically dealing with a report is section 4(f) of SMCRA, which reads as follows:

> Within ninety days after commencement of surface mining operations and in the case of surface coal mining each thirty and, in the case of noncoal surface mining each three hundred and sixty-five days thereafter unless modified or waived by the department for cause, the operator shall file in triplicate an operations and progress report with the department on a form prescribed and furnished by the department, setting forth (i) the name or number of the operation; (ii) the location of the operation as to county and township and with reference to the nearest public road; (iii) a description of the tract or tracts; (iv) the name and address of the landowner or his duly authorized representative; (v) a monthly report of the mineral produced, number of employes and days worked; (vi) a report of all fatal and nonfatal accidents for the previous three months; (vii) the current status of the reclamation work performed in pursuance of the approved reclamation plan; and (viii) such other or further information as the department may reasonably require.

A failure to file the reports required by the provision clearly would constitute a violation of 25 Pa. Code §86.13 and section 18.6 of SMCRA. A violation of section 611 of the CSL is not apparent, however, and will not be considered further.

The issue before us is whether the annual report which DER ordered Kerry to file for the calendar year 1985 falls within the scope of section

4(f) of SMCRA. Items (i), (ii), (v) and (vi), as described in section 4(f), were also called for in the report in issue; but the remaining items were omitted. Much of the data requested on the form supplied by DER is not mentioned at all in section 4(f). SMCRA is not the only statute governing coal operators, however. Surface miners of bituminous coal also are subject to the Act of June 18, 1941, P.L. 133, as amended, 52 P.S. §1471 et seq. (1941 Act) (see section 14 of the Act of October 10, 1980, P.L. 835). Section 3 of that statute, 52 P.S. §1473, requires the filing of monthly and annual reports on the amount of coal produced; number of employees; number of days worked; and number of fatal and non-fatal accidents.

The annual report form distributed by DER, in essence, provides for a consolidated report satisfying both statutes. As a result, the failure to file the annual report constitutes a violation of SMCRA and §5 of the 1941 Act, 52 P.S. §1475.

There is nothing inherently wrong in DER providing for a consolidated annual report in place of a series of separate annual reports containing a good deal of duplicative information. If anything, it is a benefit to the coal operators. Kerry maintains, nevertheless, that section 4(f) of SMCRA calls only for monthly reports from coal operators, not annual reports. Consequently, Kerry's failure to file the annual report on time cannot be a violation of SMCRA, the statute under which the Compliance Order was issued and the civil penalty assessed. Kerry's legalistic approach to section 4(f) fails to account for some of the language. The reports are to be filed at the intervals specified in the statute "unless modified or waived by [DER] for cause." If DER has a good reason for doing so, it may change the reporting interval or waive the requirement entirely. The reports are to contain "(viii) such other or further information as [DER] may reasonably require."

Without changing the filing intervals at all, DER could require the reports to contain year-to-date figures in addition to the monthly amounts.

Since DER has the statutory authority under SMCRA to require the reporting of annual data, it is of no consequence that the data is required to be reported on a separate piece of paper that also contains annual data mandated by another applicable statute. Kerry's failure to file the annual report on time was a violation of section 4(f) of SMCRA and 25 Pa. Code §86.13. It also was a violation of the 1941 Act, as discussed above. The parties have stipulated that the civil penalty is appropriate and reasonable. Therefore, there is nothing further to be resolved. There are no disputes as to any material facts and DER is entitled to judgment as a matter of law: Pa. Rules of Civil Procedure No. 1035(b).

ORDER

AND NOW, this 8th day of September, 1989, it is ordered as follows:

1. The Motion for Summary Judgment, filed by the Department of Environmental Resources on March 24, 1989, denominated a Motion to Limit Issues, is granted.
2. Judgment is entered in favor of the Department of Environmental Resources and the consolidated appeals of Kerry Coal Company are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Robert D. Myers

ROBERT D. MYERS, MEMBER

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK, MEMBER

DATED: September 8, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Katherine S. Dunlop, Esq.
Western Region
For Appellant:
Bruno Muscatello, Esq.
Butler, PA
sb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

RESIDENTS OPPOSED TO BLACK BRIDGE INCINERATOR (ROBBI)	:	
v.	:	**EHB Docket No. 87-225-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
YORK COUNTY SOLID WASTE AND REFUSE AUTHORITY, Permittee	:	**Issued:** September 8, 1989

OPINION AND ORDER SUR MOTION TO LIMIT ISSUES AND EXCLUDE EVIDENCE OR, ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT

Synopsis

A motion to exclude evidence allegedly not provided as a supplement to the depositions of expert witnesses is denied where no prejudice has been demonstrated by the moving party. A motion to limit issues is denied where the issues raised by the appellant appear, on the basis of the appellant's response to the motion, to be properly before the Board.

OPINION

This matter was initiated by the filing of a notice of appeal by the Residents Opposed to Black Bridge Incinerator (ROBBI) on June 12, 1987. ROBBI is seeking review of Plan Approval No. 67-340-001 (plan approval), which was issued to the York County Solid Waste and Refuse Authority (Authority) by the Department of Environmental Resources (Department) pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.* (Air Pollution Control Act). The Authority previously

moved to strike all issues except those associated with the Department's plan approval when ROBBI raised claims in its pre-hearing memorandum which were related to the solid waste and water quality permits which were also issued for the incinerator. The Board treated the motion as a motion to limit issues and granted it at 1988 EHB 500. Thereafter, the parties engaged in discovery, with the inevitable disputes that normally arise during the course of discovery.

A hearing on the merits was originally scheduled for April 3-7, 1989, but was postponed to allow the parties to conduct further discovery. On June 29, 1989, the Authority filed a motion to limit issues or, in the alternative, a motion for partial summary judgment, to which ROBBI responded on July 18, 1989. The Authority replied to ROBBI's response on July 26, 1989. The Department has taken no position on the Authority's motion. A hearing is presently scheduled for September 11-15 and 20-21, 1989.

The Authority's motion is divided into seven separate claims. The Authority contends that ROBBI's lack of specificity in its pre-hearing memorandum and Pre-Hearing Order No. 2 submission and its failure to supplement the depositions of its three expert witnesses with information concerning their qualifications or any additional contentions that would be raised is in disregard of Board orders and impairs the Authority's ability to prepare its case. Environmental Protection Agency (EPA) policies and guidance documents relating to Best Available Control Technology (BACT) which ROBBI intends to introduce at the hearing are, the Authority claims, irrelevant because they are not applicable to permits issued before a certain date. The Authority argues that any evidence relating to enforcement by the Department and the adequacy and reliability of the vendor of the incinerator technology should be excluded as irrelevant. Similarly, the Authority contends that any evidence

by ROBBI of standards in other states should be excluded as irrelevant and that the Department's adoption of the Best Available Technology (BAT) guidance for resource recovery facilities cannot, in and of itself, be challenged. Citing Pa.R.C.P. No. 4007.4, the Authority urges the Board to exclude any evidence based upon information which ROBBI agreed to provide the Authority but has failed to do. And, finally, the Authority objects to the introduction by ROBBI of various documents because such documents are hearsay.

Predictably, ROBBI disputes the Authority's characterization of its conduct during discovery as dilatory and instead points to the Authority's conduct as dilatory and argues that it has provided the Authority with all of the information relating to its experts and their opinions to which the Authority is entitled under the Rules of Civil Procedure. Regarding the EPA Guidance Documents and policies, ROBBI disputes the Authority's characterization of their applicability, as well as the Authority's interpretation of case law relating to when an administrative agency's duty to consider new information ceases. ROBBI concedes that evidence relating to the Department's enforcement program is not properly before the Board, but urges that information relating to the Westinghouse incinerator technology, as well as other resource recovery facilities in and out of the state, is relevant. In response to the Authority's claim that ROBBI is attacking the BAT Guidance in general, ROBBI argues that its contentions are, in fact, site specific. ROBBI argues that the Authority's request to exclude any evidence related to exhibits for which the Authority is seeking supplemental information is drastic, unwarranted, and premature. Finally, ROBBI claims that the Authority's request to exclude exhibits the Authority characterizes as hearsay

is a tactic which exploits ROBBI's lack of monetary resources and requests the Board to direct the Authority to stipulate as to their identity and authenticity.

It is apparent from the motion and response that there are disparities in the parties' characterizations of the issues, as well as their perceptions of their pre-trial conduct. We do believe that ROBBI's pre-trial submissions are specific enough to apprise the Authority of the issues which will be addressed at hearing. As for ROBBI's alleged failure to fulfill its commitment to supplement the depositions of its experts, we cannot see, based on an examination of the information agreed to be provided, how the Authority will be prejudiced if we do not exclude these documents, nor has the Authority demonstrated to us how it will be prejudiced. Regarding the Authority's request to exclude documents which the Authority characterizes as hearsay, we believe such a ruling would be premature in that we do not, as yet, know precisely how ROBBI will utilize them in the testimony of its experts. However, we will not grant ROBBI's request to order the Authority to stipulate to these documents, as that is a matter primarily between counsel. As for the remainder of the issues, the parties' characterizations of the issues are so significantly different that we cannot, based on our reading of ROBBI's response to the Authority's motion, conclude that the issues ROBBI intends to raise are not properly before the Board. Without testimony, we cannot determine whether the EPA guidance and policies cited by ROBBI are inapplicable to the Authority's plan approval. Evidence relating to the Westinghouse technology to be employed here is not precluded by the Board's adjudication in T.R.A.S.H. et al. v. DER et al., EHB Docket No. 87-352-W (Adjudication issued April 28, 1989), nor does it appear that ROBBI is attacking the BAT Guidance in the abstract, rather than its application to the Authority's plan approval.

O R D E R

AND NOW, this 8th day of September, 1989, it is ordered that the York County Solid Waste and Refuse Authority's motion to limit issues and exclude evidence is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

DATED: September 8, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
J. Robert Stoltzfus, Esq.
Eastern Region
For Appellant:
Mark S. Lohbauer, Esq.
LEATHER & LOHBAUER
Philadelphia, PA
For Permittee:
John Proctor, Esq.
Scott W. Clearwater, Esq.
Scott DuBoff, Esq.
BISHOP, COOK, PURCELL & REYNOLDS
Washington, DC

bl

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

M. DIANE SMIT
SECRETARY TO THE E

BRIDGEVIEW, INC.	:	
	:	
v.	:	**EHB Docket No. 88-418-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 14, 1989

OPINION AND ORDER
SUR
MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

Synopsis

Summary judgment is entered for DER on an appeal by Bridgeview challenging DER's return without approval of plan approval applications under the Air Pollution Control Act (APCA) for two new infectious and chemotherapeutic waste incinerators on a site where one or more of such incinerators have been in operation since 1985. DER's conclusion that the moratorium on permit issuance established by Act No. 93 of 1988 applied to Bridgeview's applications is upheld by the Board after an analysis of legislative intent.

OPINION

Bridgeview, Inc. (Bridgeview) filed an appeal on October 13, 1988, objecting to the October 4, 1988 action of the Department of Environmental Resources (DER) returning Bridgeview's plan approval applications nos. 06-301-093 and 06-301-096 (Applications). The Applications had sought approval under the Air Pollution Control Act, Act of January 8, 1960, P.L.

(1959) 2119, as amended, 35 P.S. §4001 et seq. (APCA), for the construction and operation of two commercial incinerators on a site in Robeson Township, Berks County, to be used for the disposal of infectious and pathological waste. Applications for these same two incinerators also had been filed with DER pursuant to provisions of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA). Bridgeview has operated two or three[1] existing incinerators on the Robeson Township site since 1985 under permits issued by DER. One or two of the existing incinerators is used for the disposal of infectious medical waste; the other is used for the disposal of animal carcasses.

Applications for the two proposed additional incinerators were still pending before DER on July 13, 1988, when Act No. 93 of 1988 (Act of July 13, 1988, P.L. 525, 35 P.S. §6019.1 et seq.) became effective. Relying on a moratorium on permit issuance established by Act No. 93, DER returned the Applications without approval. The companion applications under the SWMA are still pending before DER.

The parties presented a partial stipulation of facts on March 20, 1989 in anticipation of a hearing scheduled to commence 8 days later. Prior to that date, however, at the request of the parties and with the Board's approval, the hearing was cancelled in order to enable the parties to file motions for summary judgment. DER's Motion for Summary Judgment, together with supporting affidavits, was filed on April 6, 1989, followed by a brief on April 12, 1989. Bridgeview's response to DER's Motion and its own Cross-Motion for Summary Judgment were filed on April 17, 1989, accompanied by

---

[1] The affidavits submitted by the parties conflict on this point. However, the number of existing incinerators is not material to the disposition of the appeal.

affidavits and a brief. DER's brief in reply to Bridgeview's Cross-Motion was filed on April 24, 1989. The sole issue presented by the Motion and Cross-Motion is the applicability of the Act No. 93 moratorium to Bridgeview's Applications.

Act No. 93 addresses the need for a statewide comprehensive plan and revised regulations dealing with the handling and disposal of infectious and chemotherapeutic (I&C) wastes. The legislative findings in section 1 of the Act, 35 P.S. §6019.1, unequivocally state that I&C wastes are best managed at the place of generation (on-site) and are best disposed of by high-temperature incineration. Section 2, 35 P.S. §6019.2, requires DER to prepare a statewide comprehensive plan and to revise its existing regulations under the APCA and the SWMA. The comprehensive plan must determine the present and future volume of I&C wastes, the need for additional commercial disposal facilities, the geographic distribution of such facilities, and the policy criteria for siting such facilities. The revised regulations must cover, at the least, the handling and disposal of I&C wastes, the siting of commercial disposal facilities, the technology standards for air quality control of emissions from new and existing disposal facilities, liability insurance and emergency planning.

The study and preparation of the comprehensive plan and revised regulations are to be accomplished within one year after the effective date of Act No. 93--July 13, 1988. Within 14 months after the effective date, the comprehensive plan is to be submitted to the Environmental Quality Board and such Board is required to adopt a final comprehensive plan within 90 days thereafter. Section 3(a) of the Act, 35 P.S. §6019.3(a), authorizes DER to issue a permit under the APCA or the SWMA for a commercial facility for the disposal of I&C wastes only after the adoption of the comprehensive plan and

only in accordance with its provisions.[2] This moratorium is qualified in section 3(b), 35 P.S. §6019.3(b), which reads as follows:

> (b) Interim permits.--After the effective date of this act and prior to the adoption of a plan by the Environmental Quality Board as provided for in section 4, the Department of Environmental Resources shall have the authority to issue or reissue any required permit or permits for the following purposes:
>
> (1) The operation of any facility for the incineration of infectious or chemotherapeutic wastes, provided that the facility for which the permit or permits are issued or reissued was in existence and had been in operation on or before the effective date of this act or that the facility for which the permit or permits are issued or reissued is or will be an onsite facility managing wastes generated by that facility.
>
> (2) An onsite incineration facility for infectious or chemotherapeutic wastes for which permits deemed complete by the department have been filed on the effective date of this act.

Bridgeview claims to meet the requirements of paragraph (1); DER argues that Bridgeview fails to come within the scope of any portion of subsection (b).

Bridgeview maintains that its existing incinerators constitute a "facility" that "was in existence and had been in operation on or before the effective date" of Act No. 93. Consequently, DER can issue permits for new incinerators at that facility and reissue permits for the existing incinerators at that facility. This construction of Act No. 93, according to Bridgeview, conforms to the definition of "facility" in DER's APCA regulations-"a combination of air contamination sources located on one or more contiguous or adjacent properties and which is owned or operated by the same person or by persons under common control": 25 Pa. Code §121.1, and similar definitions in regulations under other environmental statutes. This same

---

[2] The parties appear to agree that Bridgeview's activities are "commercial" rather than "on-site." We will assume that this is the case.

distinction between one unit (source) and a combination of units (facility) appears in DER's Best Available Technology and Chapter 127 Plan Approval Criteria for Hospital/Infectious Waste Incinerators, dated January 21, 1988 and used by DER in reviewing Bridgeview's Applications. An "incinerator" is defined in that document as "any device specifically designed to provide the controlled combustion of wastes . . . ." A "hospital/infectious waste incinerator facility" is defined as "any combination of . . . incinerators located on one or more contiguous or adjacent properties and which is owned or operated by the same person or by persons under common control."

Our examination of Act No. 93, where the words "facility" and "facilities" are employed frequently without definition, uncovers no evidence that the legislature intended these words to be given anything other than their common and accepted meaning: Statutory Construction Act, Act of December 6, 1972, P.L. 1339, as amended, 1 Pa. C.S.A. §1903; Mt. Laurel Racing Assn. v. Zoning Hearing Board, 73 Pa. Cmwlth. 531, 458 A.2d 1043 (1983). Thus, a "facility" must be construed to mean "something that makes an action, operation, or course of conduct easier" or "something (as a hospital) that is built, installed, or established to serve a particular purpose": Webster's Ninth New Collegiate Dictionary (1987). In the aggregate, these things are called "facilities." Applying this construction to section 3 of the Act, it is apparent that "facility" may refer to an individual incinerator unit or to a particular place where one or more of such units exist. Since the meaning is not clear, legislative intent must be ascertained: Statutory Construction Act, supra, 1 Pa. C.S.A. §1921(c). Matters to be considered include the occasion and necessity for the Act, the object to be attained, the consequences of particular interpretations, contemporaneous legislative history, and legislative and administrative interpretations.

A careful reading of Act No. 93, its findings as well as its empowering sections, convinces us that the statute grew out of a legislative concern that I&C wastes were not being handled and disposed of in acceptable fashion. The General Assembly determined that a thorough study of the problem had to be undertaken by DER, followed by the formulation of a comprehensive plan and the modification of existing regulations. To insure that DER gave more than perfunctory attention to the subject, the legislature mandated that the study period be not less than one year. Once the study was concluded, DER was directed to move promptly to revise its regulations and to formulate a comprehensive plan. The contents of the plan were carefully enumerated by the lawmakers--I&C waste volumes, needs for disposal facilities, geographic distribution of disposal facilities, and policy criteria for siting disposal facilities.

In order to give DER time to perform the study and prepare the plan, and in order to stop the construction of disposal facilities that would not be subject to the provisions of the plan and the new regulations, the legislature imposed a moratorium on the issuance of permits. There was no desire to interfere with already operating disposal facilities, however, and there was no desire to discourage the construction of on-site disposal facilities which the General Assembly clearly favored. Accordingly, these were excepted from the moratorium.

Proceeding from this analysis of the motives prompting the passage of the Act, it is manifest that Bridgeview's argument would provide a loophole that would seriously frustrate the statutory purpose. Any commercial establishment, engaged in the disposal of I&C wastes under permits previously issued by DER, could force the issuance of permits for any number of additional disposal units on the same site, regardless of any considerations

of need, siting and geographical distribution. It is inconceivable that the legislature would have intended such a result in the same statute where these considerations were designated as critical items for DER's year-long study and comprehensive plan.

Bridgeview contends, however, that the legislative authorization in section 3(b) to "issue or reissue" permits makes sense only if it includes the permitting of new units as part of a previously existing facility. Otherwise, there would be a need only to "reissue" the permits for the units that were there on the effective date of the Act. The contention overlooks the fact that a new permit must be obtained under the APCA whenever a previously permitted unit is modified (25 Pa. Code §127.11 and §127.21), and that a new permit may be required when a previously-issued permit expires (25 Pa. Code §127.24). In either situation, a new permit could be "issued" with respect to a previously-existing unit.

Finally, Bridgeview cites certain portions of the debate in the House of Representatives when House Bill 1387 (which eventually became Act No. 93) was being considered for final passage. On page 301 of the Legislative Journal, covering the proceedings in the House on February 24, 1988, Representative Wambach interrogated Representative George, the prime sponsor of the bill, as follows:

> Mr. Wambach. Thank you, Mr. Speaker. Mr. Speaker, legislative intent is the purpose of this interrogation, and I would like to ask you, do the provisions of the bill as proposed in HB 1387 affect any currently operating incinerators?
>
> Mr. George. Absolutely not.
>
> Mr. Wambach. Absolutely not?
>
> Mr. George. Absolutely not.
>
> Mr. Wambach. Okay. Also, are any additions to currently operating plants affected by this bill, any

additions as to construction and those kinds of things?

Mr. George. Your currently operating plants I assume are permitted, and if they are permitted, it would not affect them.

Mr. Wambach. All right. Thank you, Mr. Speaker. Thank you, Mr. Speaker.

While this brief colloquy seems to suggest that some augmentations[3] could be made to existing incinerators, it sheds no light on the issue before us. House Bill 1387, in the form in which it passed the House (P.N. 2915), placed a moratorium on all types of incinerators, empowered local municipalities to lift the moratorium, and provided for certain exceptions. The Environmental Resources and Energy Committee in the Senate gutted the entire bill, including the title, and substituted the provisions which (after some minor amendments) became Act No. 93. The final version of House Bill 1387 (P.N. 3568), which was passed by the Senate and concurred in by the House with little discussion, differs substantially from the version that passed the House on February 24, 1988. Section 3, with which we are concerned in this appeal, bears no resemblance at all to section 4 of the earlier version which prompted the exchange between Representatives Wambach and George. That discussion, as a result, is of no help in discerning legislative intent.

Our examination of the Legislative Journal, especially of the proceedings in the Senate and the House subsequent to the complete rewriting of the bill, reveals nothing else of significance in resolving the issue before us. The statements of Representatives Cornell and Sauerman, contained in letters written months after the final enactment of Act No. 93, are not controlling. They are not part of the contemporaneous legislative history and, in addition, may reflect some confusion about the specific version of

---

[3] It is uncertain what was meant by the term "additions."

House Bill 1387 that these House members recalled.

After considering all of the relevant indicia of legislative intent, we are of the opinion that the word "facility" in section 3 of Act No. 93 means an individual incinerator rather than a combination of incinerators on the same site. Since the two incinerators proposed by Bridgeview were not in existence and in operation on July 13, 1988, no permits could be issued during the moratorium period. DER, therefore, was fully justified in returning the Applications unapproved.

There are no genuine issues as to any material facts and DER is entitled to judgment as a matter of law. Accordingly, summary judgment may properly be entered in favor of DER: Pa. R.C.P. No. 1035(b).

ORDER

AND NOW, this 14th day of September, 1989, it is ordered as follows:

1. DER's Motion for Summary Judgment, filed on April 6, 1989, is granted.

2. Bridgeview's Counter-Motion for Summary Judgment, filed on April 17, 1989, is denied.

3. Summary judgment is entered in favor of DER and against Bridgeview.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: September 14, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Janice V. Quimby, Esq.
Eastern Region
For Appellant:
G. Thompson Bell, III, Esq.
Reading, PA

nb

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

M. DIANE SMIT
SECRETARY TO THE B

MICHAEL F. AND KAREN L. WELTEROTH	:	
	:	
v.	:	**EHB Docket No. 88-327-W**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	
and	:	
	:	**Issued: September 15, 1989**
CLINTON TOWNSHIP BOARD OF SUPERVISORS	:	

OPINION AND ORDER SUR MOTIONS TO DISMISS AND TO REMAND

Synopsis

Motion to dismiss made by Permittee at the close of Appellants' case, treated as a motion for non-suit, is granted where Appellants' case was clearly insufficient to satisfy their burden of proving that the Department of Environmental Resources' (Department) issuance of a permit for an encroachment under the Dam Safety and Encroachments Act was an abuse of discretion. The Department was not required to assess the road construction project of which the encroachment was part and was not prohibited from taking action without taking into account certain provisions of municipal law. One who proceeds *pro se* assumes the risk that his unfamiliarity with the law will severely impair his ability to present his case.

OPINION

This matter was initiated by the August 25, 1988, filing of a notice of appeal by Michael F. and Karen L. Welteroth (Welteroths) seeking review of the Department's July 26, 1988, issuance of Permit No. E41-198 to Clinton Township, Lycoming County. The permit, which was issued pursuant to the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.* (the Dam Safety and Encroachments Act), authorized Clinton Township to remove an existing bridge and to construct and maintain a box culvert in a tributary of the West Branch of the Susquehanna River on Township Road T-421, which is known as Saeger's Station Road. The box culvert is part of the Grumman Access Road Project. As grounds for their appeal, the Welteroths contended that the Department had violated numerous provisions of the regulations adopted under the Dam Safety and Encroachments Act, including, *inter alia*, 25 Pa.Code §§105.14, 105.17, 105.19, 105.104, and 105.332, had disregarded a Lycoming County Court of Common Pleas order of October 7, 1986, and had issued the permit based on plans and specifications depicting a different road configuration.

Clinton Township filed a motion for sanctions on March 17, 1989, and the Board advised the Welteroths, in a March 22, 1989, letter, that a response to the motion must be filed by March 29, 1989. Having received no response to the motion, the Board issued an order on April 5, 1989, precluding the Welteroths from presenting any expert testimony other than that of Harry Vitolins as a result of the Welteroths' failure to respond to Clinton Township's Expert Interrogatories; establishing the character and description of the Welteroths' property as set forth in the claims of Clinton Township as a result of the Welteroths' failure to respond to Clinton Township's Request for Entry for Inspection; and establishing the matters which were the subject of

Clinton Township's First Set of Interrogatories in accordance with the claims of Clinton Township as a result of the Welteroths' failure to respond to the interrogatories.

A hearing on the merits was originally scheduled for April 11-13, 1989, but it was continued in response to a request by the Welteroths. The Board rescheduled the hearing for April 25-26, 1989, and, by order of April 11, 1989, directed the parties to meet in an attempt to resolve the matter and to advise the Board of the status of the matter on or before April 20, 1989. The parties met on April 17, 1989, and, on the basis of the Department's April 20, 1989, status report, the Board determined that settlement of the appeal was not likely.

A hearing on the merits was held before Chairman Woelfling on April 25-26, 1989. Michael Welteroth appeared *pro se*, and Chairman Woelfling advised him of his right to so proceed, as well as the difficulties associated with appearing without counsel. At the close of the Welteroths' case, Clinton Township moved to dismiss the appeal, arguing that the Welteroths had failed to produce any testimony that established that the Department abused its discretion in issuing the permit and, therefore, failed to satisfy their burden of proof under 25 Pa.Code §21.101(c)(3). The Department joined in Clinton Township's motion.

The Welteroths also moved at the close of their case that the Board rule on their claim that the Department's issuance of the permit was in violation of the Second Class Township Code, the Act of May 1, 1933, P.L. 103, as amended, 53 P.S. §65101 *et seq.* (Second Class Township Code). The Board will characterize this motion as a motion to remand the matter to the

Department. Rather than separately address the Welteroths' motion, we will address it in the context of our ruling on Clinton Township's motion to dismiss.

Chairman Woelfling advised the parties that she, as a single Board Member, could not grant Clinton Township's motion to dismiss. However, in an effort to conserve the resources of the Board and the parties, she recessed the hearing to allow the parties to submit memoranda of law in support of their respective positions and to have the Board, as a whole, consider the motion to dismiss.

On May 8, 1989, Clinton Township filed a memorandum in support of its motion to dismiss. Clinton Township characterized the evidence presented by the Welteroths as falling into four general categories of objections: that a less environmentally damaging route for the proposed road is available; that the road will adversely impact the environment on the Welteroths' property; that the project will adversely affect the subsurface methane gas on the Welteroths' property; and that the proposed road project violates the Second Class Township Code. Clinton Township argued that, while alternative routes are available, there has been no competent or credible testimony that any other route is preferable, and that, in any event, the design of the road project is not before this Board. Further, Clinton Township claimed that the Welteroths failed to prove that the project will have a substantial impact on the environment, although it admits that the encroachment will result in a change of the landscape on the Welteroths' property. Additionally, Clinton Township argued that it has stipulated that methane gas exists in the Welteroths' tap water, but that no evidence has been presented that this condition will be affected by the project, or that the encroachment will have a potentially life threatening effect. Finally, Clinton Township contended that the provisions

of the Second Class Township Code cited by the Welteroths are inapplicable to this matter.

The Welteroths filed a lengthy response to Clinton Township's motion to dismiss on May 9, 1989. The response raised numerous objections to the encroachment permit, as well as the Grumman Access Road Project. The Welteroths argued that the Department's issuance of the permit violated the Second Class Township Code, as well as an order of the Lycoming County Court of Common Pleas; that an environmental impact study to assess the least environmentally damaging route should have been performed; and that the Department failed to protect the health, safety, and welfare of the Welteroths, as well as the environment. Claiming that $213,000 worth of trees would be destroyed by the project, the Welteroths contended that they never gave their permission for the cutting of trees. They faulted the Department and Clinton Township for their handling of the methane gas issues and objected to any alteration of the stream and alleged wetlands. They also argued that the Department committed an abuse of discretion in failing to inspect the area during the course of the permit application process, especially as such an inspection would have identified the existence of an endangered species (the "furrytailed" rat). The Welteroths attacked the modification of the permit to allow for a curve in the road, contending that the Department should have contacted them regarding the alteration and published notification of it in the Pennsylvania Bulletin.

Although the Welteroths have raised numerous objections to the permit's issuance, those objections actually addressed at the hearing can be broken down into four general categories: 1) a less environmentally damaging route is available; 2) the adverse environmental impact on the Welteroths' property; 3) safety risks; and 4) a violation of Second Class Township Code if the proposed road project is constructed. We will address each of these ob-

jections and discuss the evidence presented on each issue. There are other miscellaneous issues raised in the documentary evidence admitted as part of the Welteroths' case that we will address under the category of "other issues."

The Pennsylvania Rules of Civil Procedure provide for compulsory non-suit to be entered at the end of a plaintiff's case upon defendant's motion, because of plaintiff's failure to prove a *prima facie* case. We will treat Clinton Township's motion to dismiss as a motion for non-suit. The entering of a non-suit is limited to clear cases of insufficiency of the appellant's case. Clearfield Municipal Authority v. DER and E. M. Brown, Inc., EHB Docket No. 83-137-W (Opinion issued June 1, 1989).

The Welteroths, as third parties appealing the Department's issuance of a permit, have the burden of proof to show that the Department acted contrary to law or abused its discretion in issuing the permit. 25 Pa.Code §21.101(c)(3) and Dwight Moyer et al. v. DER and Horsham Township, EHB Docket No. 86-641-W (Adjudication issued August 10, 1989). Based on the evidence adduced at the hearing, we must rule that the Welteroths have clearly failed to sustain their burden and that the granting of Clinton Township's motion to dismiss is warranted.

In reaching our decision, we must emphasize that we are not blind to the difficulties of proceeding *pro se*. However, as we noted at the hearing in this matter, the Board, in its treatment of *pro se* appellants, cannot impair the rights of the other parties to an appeal in an attempt to ameliorate these difficulties. The Commonwealth Court has addressed such a situation recently in Appeal of Ciaffoni, ___ Pa.Cmwlth ___, 556 A.2d 504 (1989), wherein it quashed a *pro se* appeal for failure to comply with the Rules of Appellate Procedure. Specifically, the Commonwealth Court held:

> We are cognizant that Appellant is unrepresented by counsel herein and for this reason may not have been aware of these appellate guidelines imposing specific requirements on the contents of briefs. Nevertheless, this Court has previously held that a lay person who proceeds pro se in legal matters must to an extent assume the risk that his lack of expertise in legal matters will prove his undoing. *Huffman; Groch v. Unemployment Compensation Board of Review*, 81 Pa.Commonwealth Ct. 26, 472 A.2d 286 (1984). Additionally, when a party fails to comply with the rules regarding contents of briefs, an appellate court cannot speculate or for that matter formulate what we believe the party's argument on appeal is or ought to be. *Huffman*.
>
> 556 A.2d at 506
> (emphasis added)

The same difficulties in proceeding *pro se* apply to matters before the Board. We will now address each of the categories of objections.

Less Environmentally Damaging Route

Permit E-41-198, applied for on April 7, 1988, was based upon plans dated January 25, 1988, showing a T-intersection configuration for the proposed roadway known as the Brouse Connector Road. Clinton Township modified these plans and on or about December 30, 1988, submitted the Progress Drawings of July 6, 1988, changing the road design to a curve configuration known as the Saeger Station Road. The change to a curve configuration for the road resulted in the box culvert being moved upstream on the unnamed tributary to the West Branch of the Susquehanna River, locally known as Adams Run, near an existing bridge on Saeger Station Road and ten feet closer to the Welteroth property (N.T. 146).

Much of the testimony presented by Mr. Welteroth was directed to questioning Clinton Township's choice of a route for the Grumman Access Road

Project.[1] The Department expressed the position that its only authority was to review the culvert and the associated fill to determine the effect of the encroachment on the waters of the Commonwealth and not to pass upon the suitability of the road design (N.T. 14). We agree with this position. The purpose of the Dam Safety and Encroachments Act expressed in §2 is to:

> (1) Provide for the regulation of dams and reservoirs, water obstructions and encroachments in the Commonwealth, in order to protect the health, safety and welfare of the people and property.
>
> (2) Assure proper planning, design, construction, maintenance, monitoring and supervision of dams and reservoirs, including such preventive measures as are necessary to provide an adequate margin of safety.
>
> (3) Protect the natural resources, environmental rights and values secured by the Pennsylvania Constitution and conserve the water quality, natural regime and carrying capacity of watercourses.
>
> (4) Assure proper planning, design, construction, maintenance and monitoring of water obstructions and encroachments in order to prevent unreasonable interference with waterflow and to protect navigation.
>
> (emphasis added)

We find nothing in the Dam Safety and Encroachments Act which would extend the Department's authority in reviewing an encroachment application to all aspects of the project or activity associated with the encroachment. For example, because the Department is authorized to permit a culvert in a shopping center parking lot, it does not follow that the Department may determine the suita-

---

[1] Kenneth Larson, consulting engineer to Clinton Township, testified that the Lycoming County Planning Commission had done a feasibility study to consider building a highway on the southern line of the Conrail tracks. For this proposal, a T-intersection was thought to be the best design (N.T. 147). Because there was no funding to extend the road in this manner, the plans were changed to a curve design (N.T. 149).

bility of the shopping center's location. Other units of state and local government have the authority and expertise to review and approve those elements.

The Welteroths' challenge to the road configuration presents another legal problem. In the December 30, 1988, letter (App. Ex. 24) from counsel for Clinton Township requesting the Department to amend the permit to approve a revision which would reflect the realignment of the road from the T-configuration to the curved configuration, it is represented that "The revised roadway will have minimal effect on the placement of the box culvert." The Department approved the amendment in a January 26, 1989, letter (App. Ex. 24A) which also stated that all the conditions of the July 26, 1988, permit were to remain in effect.

During the hearing the Board noted a potential jurisdictional problem in that the Welteroths had not appealed the modification of the permit (N.T. 5-6, 91). Mr. Welteroth acknowledged receiving notice of the modification ("I did receive a letter stating that the DER had okayed a modification, yes, I did receive that.") (N.T. 6). When questioned by the Board regarding whether an appeal of the modification was filed, Mr. Welteroth replied, "I objected to the whole permit, as I thought that would cover anything that they decided to change." (N.T. 97). The Board then went on to explain that each action taken by the Department must be separately appealed.

The Welteroths' failure to appeal the permit amendment results in their being precluded from challenging the placement of the culvert further upstream as a result of the change of configuration of the road. However, since all of the other conditions of the permit remain in effect, the Welteroths may still challenge other aspects of the permit issuance.

Even if the Welteroths were not precluded from challenging the road configuration, the evidence they presented did not establish that the change in road configuration affected the design of the encroachment. Mr. Welteroth called Richard Yehl, a Department hydraulic engineer, as a witness. Mr. Yehl testified that his review of the culvert was not affected by the alteration of the road configuration from a T-intersection to a curve and that his primary considerations were the sizing of the structure, its placement in or over the waterway, and the hydrologic and hydraulic computations relating to the waterway (N.T. 317).

Adverse Environmental Impact

The Welteroths have claimed that the Department erred in failing to perform an environmental impact study and that the Department failed to consider the environmental impact of tree removal or the existence of wetlands in the vicinity.

In certain circumstances, permit applicants are required to submit environmental assessments with their applications; the Department reviews these assessments and then determines whether it requires additional information to reach a decision regarding impacts and means to mitigate them. See 25 Pa.Code §105.15(b). However, the encroachment at issue here is not of the type which would trigger the requirement for a detailed environmental assessment. 25 Pa.Code §105.15(a).

As for the Welteroths' contentions regarding tree removal and wetlands, the only evidence presented on either of these issues supports the Department's decision to issue the permit. Mr. Larson testified that "we do not intend to take all the trees within the right of way..." and stated he had told Welteroth that Clinton Township would work with the contractor to save as many trees as possible (N.T. 161). Mr. Larson also expressed his opinion,

based on his experience in the field, that this project will not have an adverse impact on the environment (N.T. 160).

The Welteroths also failed to establish the existence of wetlands in the area of the box culvert. In sustaining the objections of counsel for Clinton Township and the Department to the Welteroths' attempt through his own testimony to demonstrate the existence of wetlands, Chairman Woelfling instructed Mr. Welteroth that determining whether an area contains wetlands is a mixed legal and scientific judgment requiring expert testimony (N.T. 68).

Safety Risks

The Welteroths objected generally to the permit issuance on the grounds that certain safety risks the Department should have addressed in order to protect the health, safety and welfare of the citizenry were not considered, including the safety of the new curve road design and the existence of subsurface methane on the Welteroths' property.

Initially, the Welteroths attempted to elicit the testimony of Roger McCrae, a concerned citizen, on the issue of traffic safety. The testimony was prohibited on the grounds that McCrae was not qualified as an expert to give an opinion on highway safety and any such answer would be speculation (N.T. 14-15).

Mr. Larson testified at length on the curve road design, stating he did not think it is an unreasonably dangerous intersection (N.T. 162) and noting that the Pennsylvania Department of Transporation has approved a speed limit decrease. Further, Larson remarked that if the intersection is widened and a better radius is put in, the safety problem will be helped (N.T. 162). Mr. Larson testified he has met with Welteroth 50 times with regard to this project (N.T. 164-165). He explained his calculation for fill, stating less than 200 cubic yards will be deposited below the high water flood mark (N.T.

165-166). Larson said plans were changed in 1987 to shift the alignment of the culvert west by 30 feet to move it away from the Welteroths' house (N.T. 166) and that particular attention had been paid to erosion and sedimentation controls (N.T. 166).

Much of the Welteroths' concerns regarding traffic safety are directed toward the design of the Grumman Access Road. As we have noted, *supra*, there is no authority in the Dam Safety and Encroachments Act for the Department to assess the general suitability of the road itself; the Department's responsibility is to assess whether the box culvert complies with the requirements of the Dam Safety and Encroachments Act and the regulations adopted thereunder. Section 105.14(b)(3) of the regulations requires the Department to assess potential threats to life and property created by the project. There is nothing on the record which establishes that the design of the box culvert creates a safety risk. Furthermore, even assuming that the Department had authority to review the design of the Grumman Access Road Project and that the Welteroths had not failed to appeal the permit amendment, it appears that the curve configuration is, in fact, a safer configuration than the original T-configuration.

The Welteroths have also alleged that the Department did not adequately address the risks associated with the possible displacement by the culvert of subsurface methane on their property. Clinton Township stipulated that the Welteroths' tap water contains methane which will ignite (N.T. 60). However, there is nothing in the record to establish that the Welteroths' methane gas problem was caused by conditions in the area of the proposed culvert or that the proposed culvert will be placed in geologic strata which contained methane gas and which are hydrologically connected to the strata in which the Welteroths' water well was drilled.

Even assuming that the Welteroths' methane problem was linked to the box culvert, the record demonstrates that Clinton Township and the Department did not ignore the alleged problem and that Clinton Township made substantial efforts to ameliorate the Welteroths' concerns. Mr. Larson testified that he had spoken to Welteroth about the methane and the reason a box culvert was chosen was because they wanted a structure with very low foundation pressures (N.T. 193) and that the culvert was wrapped in such a way as to minimize any disturbance to the foundation (N.T. 193).

Although the Department's hydraulic engineer, Richard K. Yehl, testified that the Department was aware of the methane gas allegations, he also believed that it was not a serious problem (N.T. 296). In the absence of any more specific evidence of the relationship between the box culvert and the methane gas condition,[2] we cannot conclude that the Department abused its discretion in this respect or failed to satisfy its obligation under 25 Pa.Code §105.14(b)(1).

Alleged Violations of the Second Class Township Code

The Welteroths contend that the Department is prohibited from issuing a permit under the Dam Safety and Encroachments Act if such a permit would violate §§1170 and 1175 of the Second Class Township Code, 53 P.S. §§66170 and 66175.[3] Clinton Township argues that neither provision is applicable to the situation now before the Board.

---

[2] The Welteroths were to present the expert testimony of one Harry Vitolins on this issue. They apparently misunderstood the Board's sanction order and did not produce Mr. Vitolins. Again, we must note that this is the sort of hazard resulting from appearing *pro se*.

[3] Section 1170 of the Second Class Township Code prohibits raising the grade of a township highway under various circumstances, while §1175 prohibits cutting trees and shrubbery within certain distances of township roads in improved and uncultivated areas.

We must decline to decide this controversy. The Board is unaware of any requirement which would compel the Department, prior to reaching its decision, to determine whether a particular activity for which a permit is sought under the Dam Safety and Encroachments Act satisfies the provisions of statutes administered by local governments. While 25 Pa.Code §105.14(b)(6) requires the Department to consider whether a permit application complies with applicable laws administered by the Department, the Fish Commission and any river basin commission created by interstate compact, the Department's regulations at 25 Pa.Code §105.23 explicitly recognize the permittee's independent obligation to comply with other applicable laws and regulations:

> Receipt of a permit under the provisions of this chapter shall not relieve the permittee of the obligation of complying with Federal, interstate compact and State laws, regulations and standards applicable to the construction, operation or maintenance of the dam or water obstruction.

Indeed, the permit at issue in this appeal specifically recognizes this obligation in Condition 3:

> 3. This permit does not give any property rights, either in real estate or material, nor any exclusive privileges, nor shall it be construed to grant or confer any right, title, easement, or interest, in, to, or over any land belonging to the Commonwealth of Pennsylvania; neither does it authorize any injury to private property or invasion of private rights, nor any infringement of Federal, State, or local laws or regulation; nor does it obviate the necessity of obtaining Federal assent when necessary;
>
> (emphasis added)

Because the Department has no obligation to assure Clinton Township's compliance with the Second Class Township Code, we cannot hold that the Department

abused its discretion in issuing the permit without specific consideration of the Second Class Township Code.

Other Issues

The Welteroths contend that Clinton Township and the Department ignored what the Welteroths characterize as "environmentally protective easements" and thereby have placed the lives of the Welteroth family in jeopardy. These so-called easements, which are recorded in the Lycoming County Recorder of Deeds' Office, are between Michael and Karen Welteroth, appellants herein and the grantors, and their minor children, Michael and Melissa Welteroth, the grantees. The easements purport to place numerous restrictions on the Welteroth property, as well as third parties, including "takers" of the property and counsel representing the grantees. While the Board has no authority to determine the validity or the applicability of this easement, we do note again that the encroachment permit specifically recognizes that it does not convey any rights to private property. As a result, the Department cannot be held to have committed an abuse of discretion in not accounting for them in the review of the permit application.

The Welteroths contend that it was improper to consider Clinton Township's motion to dismiss their appeal until after Clinton Township had presented its case because the Welteroths depended upon Clinton Township's witness and document list. However, it is the obligation of the Welteroths to produce sufficient evidence to prove their case and they cannot rely upon other parties, especially adverse parties, to produce that evidence. The Welteroths also requested the Board to view a videotape produced by Mr. Welteroth. A portion of that videotape, which is approximately four hours long, was viewed at the April hearing. The videotape, which was narrated by Mr. Welteroth, was full of commentary by Mr. Welteroth which was either hear-

say testimony or in the nature of expert testimony (N.T. 29-75). As such, it was of little probative value.

The Welteroths argued that they were entitled to personal notice of the change to the culvert as a result of the alteration of the road configuration and/or that the Department was obligated to notice the modification to the application resulting from the alteration of the road configuration in the Pennsylvania Bulletin. Since the Welteroths failed to appeal the permit amendment, they cannot raise any alleged deficiencies in the process for amending the permit.

The Welteroths also argue that Clinton Township's permit application was incomplete because it did not refer to the unnamed tributary to the West Branch of the Susquehanna River as Adams Run and that the permit application incorrectly referred to the existing bridge to be replaced on Saeger Station Road as a culvert. As Mr. Yehl explained, the Department relies on the United States Geologic Services' (USGS) topographic maps for stream locations and names (N.T. 278). The USGS map relevant here did not denote the stream as Adams Run. We can hardly fault the Department for relying on a standard research tool. Moreover, the name of the stream is entirely irrelevant to the proposed encroachment's compliance with the requirements of the Dam Safety and Encroachments Act. As for referring to the structure being replaced as a culvert, rather than a bridge, we cannot see the practical import, as the structure being erected in its place is the relevant structure.

The Welteroths argue that the encroachment is subject to an individual, rather than nationwide, permit under §404 of the Clean Water Act, 33 U.S.C. §1344. The Section 404 permit program is administered by the U.S.

Army Corps of Engineers, not the Department. We have no jurisdiction to determine whether the nationwide permit was erroneously applied to these circumstances.

The Welteroths allege that the Department ignored an October 7, 1986, order of the Lycoming County Court of Common Pleas. That order, which relates to proceedings under the Eminent Domain Code, the Act of June 22, 1964, P.L. 84, 26 P.S. §1-101 *et seq.*, does not in any way bind the Department.

Finally, the Welteroths claim that it was an abuse of discretion to deny them the services of the Department after they had followed the Department's advice and filed an appeal. The Welteroths misapprehend their obligations as appellants. It is their responsibility to secure the evidence necessary to substantiate their appeal. They cannot rely on the Department, Clinton Township, or the Board to fulfill that responsibility.

The Board has devoted a great deal of time and energy in deciding this matter. Although we have done our best to ascertain the Welteroths' claims and to review any evidence which would tend to support their claims, we "cannot speculate or for that matter formulate what we believe the party's argument...is or ought to be." Appeal of Ciaffoni, *supra*. Because the Welteroths' case was clearly insufficient, we must grant Clinton Township's motion to dismiss and deny the Welteroths' motion to remand.

O R D E R

AND NOW, this 15th day of September, 1989, it is ordered that:

1) The motion to remand of Michael F. and Karen L. Welteroth is denied;

2) The motion to dismiss of Clinton Township is granted; and

3) The appeal of Michael F. and Karen L. Welteroth is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK, MEMBER
Administrative Law Judge
Member

DATED: September 15, 1989

cc: **For the Commonwealth, DER:**
Lisa Comer, Esq.
Central Region
For Appellants:
Michael F. Welteroth
Montgomery, PA
For Permittee:
Scott T. Williams, Esq.
Williamsport, PA
bl

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

M. DIANE SMITH
SECRETARY TO THE E

PHILADELPHIA SUBURBAN WATER COMPANY	:	
	:	
v.	:	**EHB Docket No. 85-151-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 19, 1989**
and NORTH WALES WATER AUTHORITY, Permittee	:	

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

By Robert D. Myers, Member

Synopsis

The Department of Environmental Resources (DER) issued a water allocation permit to North Wales Water Authority (NWWA) authorizing NWWA to purchase up to 500,000 gallons of water per day from Philadelphia Suburban Water Company (PSWC). At or about the same time, DER issued a modification to PSWC's water allocation permit requiring PSWC to reserve 500,000 gallons of water per day from its total combination of surface water sources for sale to NWWA. On appeal from these issuances, the Board concludes that the Act of June 24, 1939, P.L. 842, as amended, 32 P.S. §631 et seq. (Water Rights Act) does not authorize DER to issue a permit similar to that issued to NWWA.

PROCEDURAL HISTORY

This appeal was initiated by Philadelphia Suburban Water Company (PSWC) on April 25, 1985, challenging two actions of the Department of Environmental Resources (DER) -- the March 18, 1985, issuance of Water

Allocation Permit WA46-693A to North Wales Water Authority (NWWA) and the March 25, 1985, issuance of a Modification Order to PSWC's Water Allocation Permit WA-67. The permit issued to NWWA authorized that agency to purchase up to 500,000 gallons per day (gpd) of water from PSWC. The Modification Order required PSWC to reserve 500,000 gpd of water for sale to NWWA.

At the request of the parties, continuances were granted because of settlement discussions and pending legislation that, if enacted into law, would have resolved the controversy. A hearing was held before Board Member Robert D. Myers in Harrisburg on October 18, 1988, at which the parties presented a Joint Stipulation and oral testimony. Briefs also have been filed.

The record consists of the Joint Stipulation, a hearing transcript of 195 pages and 41 exhibits. After a full and complete review of the record, we make the following findings.

FINDINGS OF FACT

1. PSWC is a corporation organized and existing under laws of the Commonwealth of Pennsylvania and has its principal place of business at 762 Lancaster Avenue, Bryn Mawr, PA 19010 (Joint Stipulation, paragraph 1).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the Act of June 24, 1939, P.L. 842, as amended, 32 P.S. §631 et seq. (Water Rights Act) (Joint Stipulation, paragraph 2; section 1901-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §501-1).

3. NWWA is a municipality authority of the Commonwealth of Pennsylvania and has its principal office at 200 West Walnut Street, P. O. Box 1339, North Wales, PA 19454 (Joint Stipulation, paragraph 3).

4. PSWC is an investor-owned public utility, regulated by the Pennsylvania Public Utility Commission, supplying water to the public in 60 different municipalities in portions of Montgomery, Delaware and Chester Counties. PSWC serves about 230,000 customers in a service area covering 35 square miles (N.T. 71-72).

5. NWWA supplies water to the public in 7 municipalities in Montgomery and Bucks Counties. It has about 17,000 customers (Joint Stipulation, paragraph 7).

6. PSWC and NWWA are public water supply agencies as defined in section 1 of the Water Rights Act, 32 P.S. §631 (Joint Stipulation, paragraph 9).

7. PSWC's primary sources of surface water supply are the Schuylkill River and the following 4 rural streams: Crum Creek in Delaware County, Pickering Creek in Chester County, Perkiomen Creek in Montgomery County and Neshaminy Creek in Bucks County. This supply is supplemented by surface water from Upper Merion Reservoir, a former limestone quarry, and groundwater from about 39 wells (Joint Stipulation, paragraph 4; N.T. 72-73).

8. PSWC has had interconnections with other public water supply agencies for a number of years. Through these interconnections, PSWC presently purchases water from Bucks County Water and Sewer Authority, Chester Water Authority and West Chester Authority (N.T. 79; Commonwealth's Exhibit No. 3 (b)).

9. Prior to this proceeding, PSWC held the following water rights permits issued by the Pennsylvania Water and Power Resources Board, the agency that administered the Water Rights Act prior to the creation of DER:

Source	Million gallons per day (Mgd)	Date Issued or Confirmed
Crum Creek	20.0	February 15, 1944
Pennypack Creek	1.0	"
Perkiomen Creek	7.5	"
	16.5	January 11, 1951
Pickering Creek	15.0	February 15, 1944
Schuylkill River	20.0	April 12, 1961
Upper Merion Reservoir	20.0	October 10, 1967
Neshaminy Creek	*	August 13, 1941

*All supply reasonably necessary. Delaware River Basin Commission entitlement is 13 Mgd.
(Joint Stipulation, paragraph 5; Joint Exhibits Nos. 1-5).

10. PSWC operates a zoned distribution system consisting of 47 pressure zones supported by 35 standpipes. This distribution system has a combined storage capacity of 130.5 million gallons and is connected by nearly 2,700 miles of transmission and distribution mains. In addition, PSWC operates and maintains approximately 9,700 fire hydrants (Joint Stipulation, paragraph 6).

11. Through the interconnections with other water supply agencies, PSWC presently sells water to Bucks County Water and Sewer Authority, the Borough of Malvern, the Borough of Ambler, the Hatboro Water Authority, the Warminster Municipal Authority, the Borough of Media, Pennsylvania Water Company and NWWA (N.T. 79-80; Commonwealth's Exhibit No. 3 (b)).

12. From 1964 to 1980, PSWC sold water through a service connection located in Upper Dublin Township, Montgomery County, to NWWA and its predecessor, Delaware Valley Industrial Water Company, pursuant to a letter agreement dated November 20, 1964 (1964 Agreement) and subsequent unwritten understandings (Joint Stipulation, paragraph 10; N.T. 32; Joint Exhibit No. 6).

13. On May 24, 1980, PSWC entered into an Agreement (1980 Agreement) with NWWA to make available a supplemental supply of metered water at tariff

rates through the same service connection utilized since 1964 (Joint Stipulation, paragraph 10; N.T. 33; Joint Exhibit No. 9).

14. The 1980 Agreement is similar to the 1964 Agreement in that it does not guarantee the delivery or availability of any specific quantity of water and does not specify that any particular source of PSWC's supply will be employed to provide water to NWWA. Both agreements expressly acknowledge the possibility of interruption and fluctuation in supply, and condition the availability of water on the ordinary and changing operating conditions of PSWC. Either party may terminate the 1980 Agreement upon 60 days notice prior to the expiration of the year-to-year term (Joint Stipulation, paragraph 11; N.T. 33; Joint Exhibits Nos. 6 and 9).

15. Although the 1980 Agreement contains no statement of purpose, the intention of the parties was to provide a short-term arrangement for a supplemental supply of water to NWWA pending completion of the Point Pleasant Project, which would provide NWWA with a supply of water diverted from the Delaware River (N.T. 34).

16. The sale of water by PSWC to NWWA, pursuant both to the 1964 Agreement and the 1980 Agreement, takes place at an interconnection in a meter pit located within, but near the boundary of, PSWC's service area (N.T. 34-36; PSWC's Exhibit No. 1).

17. On February 16, 1979, DER informed Keystone (Norristown District) by letter, with a copy to NWWA, that NWWA would be required to obtain a subsidiary water allocation permit for a proposed service connection that would enable NWWA to purchase water from Keystone (Norristown District). In a subsequent letter on this subject on April 30, 1984, DER informed NWWA that it also was required to obtain a subsidiary water allocation permit for its service connection with PSWC under the 1980 Agreement. NWWA filed an

appeal (docket No. 84-168) with the Board from DER's April 30, 1984, letter, objecting to the requirement for a subsidiary water allocation permit with respect to the connection with Keystone (Norristown District) (Joint Stipulation, paragraph 12; N.T. 37; Joint Exhibits Nos. 7, 10 and 12).

18. On September 13, 1984, NWWA filed with DER an application for a subsidiary water allocation permit covering both the connection with PSWC (500,000 gpd) and the connection with Keystone (Norristown District) (1,400,000 gpd) (Joint Stipulation, paragraph 13; N.T. 38; Joint Exhibit No. 13).

19. On November 14, 1984, DER notified PSWC of NWWA's application (enclosing a copy), informed PSWC that any allocation approved for NWWA would be offset against PSWC's existing allocations and invited PSWC to submit comments within 30 days (N.T. 39, 147; Joint Exhibit No. 14).

20. PSWC responded to the notification on December 6, 1984, by advising DER that, since the water supplied to NWWA is groundwater rather than surface water, no subsidiary allocation is required. The letter concluded: "I do not object to the issuance of an allocation; however I believe it is not necessary" (N.T. 39-40, 148; Joint Exhibit No. 15).

21. On March 18, 1985, DER issued Water Allocation Permit WA 46-693A to NWWA, authorizing it to purchase up to 500,000 gpd from PSWC (N.T. 40; Joint Exhibit No. 16).

22. DER notified PSWC of this permit issuance by letter dated March 25, 1985, in which was enclosed a Modification Order to PSWC's Water Allocation Permit WA-67, basically requiring PSWC to reserve 500,000 gpd for NWWA from its total combination of sources except Neshaminy Creek (Joint Stipulation, paragraphs 14 and 15; N.T. 40-41; Joint Exhibits Nos. 17 and 18).

23. On April 11, 1985, NWWA withdrew its appeal at Board Docket No. 84-168 (Joint Stipulation, paragraph 12; N.T. 38).

24. On April 25, 1985, PSWC filed with the Board a Notice of Appeal with respect to the issuance of Water Allocation Permit WA46-693A to NWWA and the issuance of the Modification Order to PSWC's Water Allocation Permit WA-67 (Joint Stipulation, paragraph 17).

25. At an unknown date, DER also issued to NWWA Water Allocation Permit WA46-693, authorizing it to purchase water from Keystone (Norristown District) (Joint Stipulation, paragraph 8; N.T. 122-123).

26. NWWA's principal sources of supply now are approximately 30 wells and the water purchased from PSWC and Keystone (Norristown District). NWWA's groundwater sources are insufficient to meet the requirements of its customers (Joint Stipulation, paragraph 8).

27. On April 3, 1985, PSWC forwarded a copy of the 1980 Agreement to DER and pointed out that the requirement in the Modification Order that PSWC "reserve" 500,000 gpd for NWWA conflicted with the terms of the 1980 Agreement (N.T. 41-42; PSWC's Exhibit No. 2).

28. Although DER attempts to make the terms of subsidiary permits and related modification orders consistent with existing underlying water sales agreements, it did not do so in this case. The explanation given was that NWWA would need the water in time of drought and it would be inappropriate to permit PSWC to cut it off as allowed by the 1980 Agreement (N.T. 121-122, 130-131).

29. The modification order issued to Keystone (Norristown District) in connection with the issuance of Water Allocation Permit WA46-693 to NWWA did not require Keystone (Norristown District) to "reserve" the water allocated to NWWA but only to "recognize" the allocation (N.T. 122-123).

30. Because of confusion over the meaning of "reserve," DER now uses "recognize" in subsidiary water allocation permits (N.T. 149-150).

31. Water Allocation Permit WA46-693A, issued to NWWA, also conflicts with the 1980 Agreement in terms of duration. The permit extends for 37 years but terminates sooner if NWWA fails to renew its water purchase agreement with PSWC. The 1980 Agreement, on the other hand, provides for a year-to-year arrangement, terminable by either party at the end of any year and terminable at other times by PSWC if the water is necessary to serve other customers (N.T. 42-44; Joint Exhibits Nos. 9 and 16).

32. According to DER's William A. Gast, Chief of the State Water Plan Division, the permit language was intended to bring about a termination of the permit if the underlying agreement terminates, regardless of how or by whose action (N.T. 150-151, 157-159).

33. There is intense competition for surface water and groundwater resources in southeastern Pennsylvania among public water supply agencies, industrial and commercial establishments, and individual homeowners (N.T. 113-114).

34. The Water Rights Act, which applies only to public water supply agencies and their surface water rights, gives DER regulatory control over only about 9%-10% of the total surface water used in Pennsylvania (N.T. 116).

35. The first subsidiary water allocation permit was issued under the Water Rights Act in 1971 for the sale of water by Chester Water Authority to Bethel Township Water Company. No other subsidiary permits were issued until 1984 when DER began an enforcement program. Presently, there are 63 subsidiary permits in existence, 10 of which were issued prior to WA46-693A

issued to NWWA on March 18, 1985. DER is aware of about 150 current service interconnections between water supply agencies (N.T. 116-117, 164-165, 180-181; Commonwealth's Exhibit No. 1).

36. Regulations concerning water allocation permit fees, which regulations also dealt in part with subsidiary water allocations, were approved by the Environmental Quality Board as proposed rulemaking on October 18, 1983, and published in the Pennsylvania Bulletin at 14 Pa.B. 1815 (May 26, 1984). The Environmental Quality Board has not promulgated final regulations regarding the application for and issuance of subsidiary water allocation permits. The decision as to whether a subsidiary water allocation permit should be issued or denied and whether there is a need to modify primary water allocations to reflect service interconnections or sale of water agreements is made by DER on a case-by-case basis (Joint Stipulation, paragraph 18; N.T. 48-50, 83, 152; Joint Exhibit No. 11).

37. DER officials prefer to administer the subsidiary water allocation program on a case-by-case basis because, in their opinion, each application presents a unique combination of factors to be considered (N.T. 152-153).

38. DER's administration of the subsidiary water allocation program has not been consistent. While it has recognized generally that emergency and temporary interconnections should not require a permit, it has vacillated on the subject (N.T. 51-52, 120-121, 154).

39. DER officials believe that subsidiary water allocation permits are essential to the administration of the Water Rights Act for the following reasons:

(a) an accurate water inventory, which accounts for all water withdrawn from surface sources and traces it through the distribution system

to the place where it is discharged into the groundwater or surface water, cannot be maintained without some enforcement mechanism effective against water supply agencies purchasing water from other such agencies (N.T. 107, 133-134, 172-173);

(b) water conservation practices cannot be successfully implemented without some enforcement mechanism effective against water supply agencies purchasing water from other such agencies (N.T. 107-109, 170-172);

(c) water cannot be allocated equitably among water supply agencies without some enforcement mechanism effective against such agencies purchasing water from other such agencies (N.T. 106-107, 109-111, 173).

40. While DER obtains some information on water usage from the Annual Water Supply Report required to be filed by all public water suppliers under 25 Pa. Code §109.701 (b) (2), such reports:

(a) would not enable DER to maintain an accurate water inventory because they do not show where the water is discharged (N.T. 133); and

(b) frequently do not contain reliable figures (N.T. 118-119). However, there is no legal impediment to DER's requesting additional information in such reports (N.T. 135).

41. While the Public Utility Commission may have some regulations that might prohibit inequitable water allocations, about 2/3 of the public water supply agencies in the state are not within the jurisdiction of said Commission (N.T. 136-137).

42. At the time PSWC entered into the 1980 Agreement, officials knew nothing about subsidiary water allocation permits. If, according to these officials, they had anticipated that DER would issue such a permit to NWWA as

the result of the 1980 Agreement, they either would not have entered into it or they would have demanded a higher rate from NWWA in exchange for "reserving" the 500,000 gpd (N.T. 36-37, 46-47, 82-83).

43. During 1988, PSWC experienced several days when the amount of water dispensed exceeded the total safe yield of all PSWC's sources of supply. If it is required to "reserve" 500,000 gpd for NWWA on these days, PSWC will have to impose more severe restrictions on its other customers. In the view of PSWC's president, this produces an inequitable result (N.T. 73-78).

44. PSWC officials are of the opinion that DER's insistence on subsidiary water allocation permits for all interconnections between public water supply agencies will discourage such agencies from making such interconnections. This would be an unfortunate result, because interconnections lower capital costs, improve water supply and quality, and provide greater flexibility in dealing with emergency situations (N.T. 80-82, 85-86).

45. According to a study conducted by PSWC, covering the period May 27, 1987 to September 8, 1988, the water sold by PSWC to NWWA is 98% groundwater from wells near the point of interconnection. PSWC operates an integrated system, however, and the amount of groundwater furnished on any particular day depends on service demands and other management considerations. All water supplied to NWWA, whether surface water or groundwater, is pretreated (N.T. 53, 62-69, 91-97, 168-169, 188-189; PSWC's Exhibits Nos. 1, 3 and 4).

DISCUSSION

The burden of proof is divided in this appeal. PSWC bears it in connection with the issuance of Water Allocation Permit WA46-693A to NWWA (25 Pa. Code §21.101 (c) (3)); DER bears it with respect to the issuance of the

Modification Order to PSWC's Water Allocation Permit WA-67 (25 Pa. Code §21.101 (b) (2)).[1] PSWC must prove by a preponderance of the evidence that DER exceeded its legal authority and abused its discretion in issuing the Permit to NWWA; DER must prove by a preponderance of the evidence that it acted within the bounds of its legal authority and did not abuse its discretion in issuing the Modification Order to PSWC: Wisniewski v. DER, 1986 EHB 111; Clymar Sanitary Landfill v. DER, 1983 EHB 223.

PSWC argues that (1) DER lacks statutory authority to issue subsidiary water allocation permits and modification orders, (2) DER's subsidiary water allocation permit program is unlawful without regulations, and (3) DER's issuance of the Modification Order to PSWC is not supported by the facts.

The parties agree that DER's statutory authority to issue water allocation permits stems solely from the Water Rights Act. That statute, enacted in 1939, received its impetus from the land and water reclamation and conservation movement of the 1930s.[2] Fifty years later, it exists essentially in its original form, having been amended only slightly on two occasions. The title to the act, and its preamble, read as follows:

> An Act relating to the acquisition of rights to divert water from rivers, streams, natural lakes, and ponds, or other surface waters within the Commonwealth or partly within and partly without

---

[1] The Board's rules do not specifically address the placing of the burden of proof in an appeal by the permittee from an action of DER modifying the permit. Since such action amounts, in this case, to a partial revocation, the burden falls on DER.

[2] There had been prior legislative attempts to regulate the acquisition of water rights, but they had not proved effective. See, for example, the Act of June 7, 1907, P.L. 455, and the Act of April 8, 1937, P.L 258, both of which were repealed by the Water Rights Act. For a comprehensive review of common law and statutory regulation, see Legal Controls of Consumptive Water Use in Pennsylvania Power Plants, Weston and Gray, 80 Dickinson Law Review 353 (1976).

the Commonwealth; defining various words and phrases; vesting in the Water and Power Resources Board certain powers and authorities for the conservation, control and equitable use of the waters within the Commonwealth in the interests of the people of the Commonwealth; making available for public water supply purposes, water rights heretofore or hereafter acquired but not used; providing for hearings by the Water and Power Resources Board and for appeals from its decisions; fixing fees; granting to all public water supply agencies heretofore or hereafter created the right of eminent domain as to waters and the land covered by said waters; repealing all acts or parts of acts inconsistent herewith, including Act No. 109, Pamphlet Laws 152, approved April 13, 1905, Act No. 307, Pamphlet Laws 455, approved June 7, 1907, Act No. 64, Pamphlet Laws 258, approved April 8, 1937.

Whereas, An adequate and safe supply of water for the public is a matter of primary concern affecting the life, health and comfort of the people of this Commonwealth; and

Whereas, The increase of the population makes it necessary that the available supply of water be conserved, controlled and used equitably for the best interests of all concerned; and

Whereas, The use of water for the supply of water to the public is the most essential of all public service, vital to life itself; and

Whereas, the public interest requires that public water supplies be developed not only for present needs but also for developing needs for a reasonable time in the future from and after any original appropriation or acquisition of a source of supply; and

Whereas, The public interest requires that sources of water supply appropriated or acquired but not used or not reasonably necessary for future needs should be available for appropriation or acquisition by others requiring such sources.

There are 15 sections to the Act, establishing a procedure for validating pre-existing water rights and for regulating the future acquisition

of rights pursuant to permits from the Water and Power Resources Board.[3] It is apparent, even from a cursory reading of the statute, that it applies only to the water rights of public water supply agencies. These two terms are defined in section 1, 32 P.S. §631, as follows:

> "Public water supply agency" shall mean any corporation or any municipal or quasi-municipal corporation, district, or authority, now existing or hereafter incorporated under the laws of the Commonwealth of Pennsylvania and vested with the power, authority, right or franchise to supply water to the public in all or part of any municipal or political subdivision of the Commonwealth of Pennsylvania.
>
> * * * *
>
> "Water rights" shall mean 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, except water rights heretofore or hereafter acquired under the Act of June 14, 1923, Pamphlet Laws 704.

Clearly, the statute regulates only water utilities (publicly or privately owned) and only their rights to divert surface water. Groundwater is not regulated at all; neither is the diversion of surface water by the sizable group of private riparian owners who account for 90% or more of all the surface water used in Pennsylvania (see Finding of Fact No. 34). The scope of regulation is narrow indeed, limiting DER's ability to conserve, control and equitably allocate existing surface water resources as called for in the title and preamble to the Water Rights Act.

Sections 3 and 4 of the Act, 32 P.S. §633 and §634, set up a mechanism whereby public water supply agencies could register with the Water and Power Resources Board their pre-existing claims to water rights. This had

---

[3] In 1971 DER succeeded the Water and Power Resources Board as the agency administering the Water Rights Act by amendments to the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, adopted in section 1901-A of the Act of December 3, 1970, P.L. 834, 71 P.S. §510-1.

to be done by June 24, 1940, in order to preserve the rights. PSWC, a public water supply agency within the meaning of the Water Rights Act, complied with this requirement and received confirmation (on August 13, 1941, and February 15, 1944) of its pre-existing rights in the waters of Neshaminy Creek, Crum Creek, Pennypack Creek, Perkiomen Creek (7.5 Mgd), and Pickering Creek (see Finding of Fact No. 9). Sections 5, 6 and 7 of the Act, 32 P.S. §635, §636 and §637, established a permit system for the acquisition of future water rights. Pursuant to these sections, PSWC received a permit increasing its diversion from Perkiomen Creek (Joint Exhibit No. 3), and permits granting it rights to the waters of the Schuylkill River (Joint Exhibit No. 4) and of Upper Merion Reservoir (Joint Exhibit No. 5).

PSWC's water rights, whether pre-existing or later acquired, were all subject to the following provision in section 7 of the Act, 32 P.S. §637:

> In case of established conflict of interests, the board, after receipt of an application or at any time or from time to time, shall have the power to issue, modify or impose conditions in permits or confirmed claims for, or to the acquisition of, water rights theretofore or thereupon issued when deemed necessary by the board in the public interest, and it shall be the duty of the board to issue and it shall issue all such permits and modification and conditioning orders as the public interest shall require.

This language put PSWC on notice that its water rights could be modified in the future, without its consent, when that became necessary in the public interest to resolve a "conflict of interests." That term is not defined, but covers a wide range of public and private interests according to the Supreme Court's decision in Borough of Collegeville et al. v. Philadelphia Suburban Water Co., 377 Pa. 636, 105 A.2d 722 (1954). Based on this holding, we conclude that a water allocation permit can be modified whenever a consideration of conflicting private and quasi-private interests of

individuals, corporations or municipalities convinces DER that a modification will further the public interests of conservation, control and equitable distribution of a surface water source.

The difficulty with the present case (completely aside from any consideration of whether or not PSWC and NWWA had "conflicting" interests) stems from the fact that, while the permit issued to NWWA purports to authorize the acquisition of water rights in specific surface water sources, it actually authorizes NWWA only to "purchase up to 0.5 million gallons per day from the Philadelphia Suburban Water Company." The only water rights which DER can grant under the Act are rights "to take or divert water from any rivers, streams, natural lakes and ponds, or other surface waters." The right to take water already in the distribution system of another water supply agency at a pipeline interconnection can hardly be said to fall within the scope of those rights. The water obviously is not being taken from any river, stream, natural lake or pond; and to say that it is being taken from "other surface waters" is to put a novel meaning on that term.

DER argues that a taking or diversion can be indirect as well as direct. If it cannot regulate indirect takings, DER says, it would be a simple matter for a public water supply agency to avoid all regulation simply through the device of setting up a separate entity to do the actual taking from the surface water source. The argument cannot withstand close analysis. If the water-diverting entity is itself a public water supply agency, it would need a water allocation permit from DER. If it is not such an agency, the entity's diversion rights could exist only by reason of the ownership of riparian land. A riparian owner does not have the right to divert water for the use of others. See Philadelphia and R. R. Co. v. Pottsville Water Co., 182 Pa. 418, 38 Atl. 404 (1897); Harley v. Meshoppen Water Co., 174 Pa. 416,

34 Atl. 568 (1896): Filbert v. Dechert, 22 Pa. Super. Ct. 362 (1903); and the more recent case of Pa. P.U.C. v. Pennsylvania Gas and Water Co., 492 Pa. 326, 424 A.2d 1213 (1980).

We agree that an indirect taking can be subject to the Act, however. If, for example, two public water supply agencies possess water rights to specific quantities from a specific surface source, there is no reason why they cannot utilize a common diversion facility that may be owned by just one of the agencies. In such a situation, the non-owner agency would be exercising its permit rights indirectly through the diversion facilities of the other agency. In the case at bar, NWWA was not given any water rights in any of the specific surface sources identified in PSWC's permits. PSWC was diverting water from these sources pursuant to its own water rights, not as the proxy for NWWA in the exercise of NWWA's water rights. The distinction is critical - the former arrangement falls within the regulatory scope of the Act; the latter does not.

DER next points to the language of section 6 of the Water Rights Act, quoted in DER's brief as follows:

> Hereafter no acquisition of water rights shall be made or taken by any public water supply agency except as follows: Any such public water supply agency desiring to acquire new water rights, a new source of water supply, or to acquire an additional quantity of water or water rights from an existing source of water supply...shall make application to the board for a permit to acquire such designated waters or water rights.... (Emphasis added by DER)

DER argues that the underscored language indicates a legislative intent that DER's authority to require permits goes beyond diversions of surface waters (water rights) by public water supply agencies. If, according to DER, this interpretation is not accepted, and if the permit requirement is limited to diversions of surface waters, then the Board is guilty of writing

the underscored language out of the statute. The distinction which the legislature appears to draw between "water" and "water rights" in section 6 and some later sections is puzzling, to say the least. It may be that the lawmakers wanted to emphasize the fact that a permit had to be obtained whenever a public water supply agency desired to increase its sources of surface supply, whether by increasing its diversion of specific surface water or by acquiring existing water rights from another public water supply agency.

The language used may be the result of loose drafting, which also is evident in another part of section 6 where it states that a permit application must be accompanied by information regarding, inter alia:

> 1. The river or stream from which the supply is proposed to be taken and the necessity for such new water rights, new source, or additional quantity.

Is this to be interpreted as excluding other types of surface water, such as lakes and ponds? That would fly in the face of the definition of "water rights" in section 1(e), 32 P.S. §631(e). The words "river or stream" properly must be construed to include all sources of surface supply. The words "new source, or additional quantity" are superfluous, therefore, since they refer back only to surface waters which are adequately covered by the term "new water rights."

This conclusion, furthermore, is the only logical deduction that can be made from the introductory clause of section 6 where the legislature states unequivocally that the section deals with the method of obtaining "water rights." A public water supply agency successfully pursuing that method receives a permit granting it certain definitive "water rights". Those rights, obviously, must conform to the statutory definition.

To construe section 6 to cover any new source of water supply or any additional quantity of water, as DER maintains, would mean that a permit would

be required for drilling a well into groundwater, a source of supply that DER readily acknowledges is beyond the scope of the Water Rights Act. The language is not a model of legislative draftsmanship; but it is clear enough to conclude that there was no legislative intent to expand the scope of DER's authority beyond surface waters.

DER's most fervent argument is based on another analysis of legislative intent. Citing the title and preamble to the Water Rights Act and the ruling of the Supreme Court in the Collegeville case, supra, DER asserts that the purpose of the statute is to establish a single tribunal with statewide jurisdiction to determine questions of appropriation and diversion of water from the streams of the Commonwealth. To achieve this goal DER is required to consider a broad range of water sources and competing interests in order to effect the conservation, control and equitable allocation of water in the public interest. This cannot be accomplished, according to DER, without the power to regulate transfers of water between public water supply agencies. Without the power to impose on the transferee the same permit conditions imposed on the transferror, conservation and equitable allocation of surface water cannot be achieved in any meaningful way.

Even if we accept the validity of this contention, arguendo, we still must find statutory provisions bestowing on DER the powers it claims to need. Allusions to such powers in the title and preamble alone are not sufficient: Statutory Construction Act, Act of December 6, 1972, P.L. 1339, 1 Pa., C.S.A. §1921 and §1924; Barasch v. Pa. P.U.C., 516 Pa. 142, 532 A.2d 325 (1987); Commonwealth v. Magwood, 503 Pa. 169, 469 A.2d 225 (1983); Freeman v. City of Philadelphia, 178 Pa. Super. Ct. 290, 116 A.2d 349 (1955); Commonwealth v. Cooper, 277 Pa. 554, 121 Atl. 502 (1923); In re State Highway Route No. 72, 265 Pa. 369, 108 Atl. 820 (1919). As already discussed, the body of the Water

Rights Act does not empower DER to issue a permit authorizing one public water supply agency to purchase water from another such agency. Consequently, such power cannot be derived from the title and preamble.[4]

DER challenges our interpretation of the Water Rights Act, finally, on the basis that it is contrary to an opinion of a Pennsylvania Attorney General and to a decision of a U.S. District Court. Opinion No. 361 was issued by Attorney General Claude T. Reno on August 5, 1940, addressed to the Secretary of Forests and Waters. It attempts to answer 6 questions pertaining to the Water Rights Act. Two of the questions dealt with water companies purchasing their supplies from other water companies, municipalities or industrial concerns. Attorney General Reno advised that such water companies should nonetheless file proof of pre-existing water rights under section 3 of the Act, 32 P.S. §633. It is clear from a reading of the opinion that the filing requirement related to the pre-existing water rights of these companies that were not being used, in whole or in part, because the companies were purchasing water from other suppliers. The opinion does not mention any filing requirement for the water being purchased.

Delaware River Basin Commission v. Bucks County Water and Sewer Authority, 474 F. Supp. 1249 (U.S. Dist. Ct., E.D. Pa., 1979), vacated on other grounds, 641 F. 2d 1087 (U.S.C.A., 3d cir., 1981), involved the liability of the Authority (BWSA) for charges imposed by the Commission on water withdrawn from the Delaware River by the City of Philadelphia and sold

---

[4] It is interesting to note that, while the title and preamble both refer to the conservation, control and equitable use of water, the body of the Water Rights Act contains no express mention of these terms. Undoubtedly, they were intended to form the context for DER's actions, as discussed in the Collegeville case, supra, but were not intended to expand the scope of those actions. This conclusion is suggested by the language of the title which refers to "certain powers" rather than unlimited powers.

to BWSA. BWSA claimed to be exempt from the charges because Philadelphia had the right to withdraw the water before the Commission was created. The court held that the water allocation permit issued to Philadelphia under the Water Rights Act was limited to water necessary for the use of the city and did not include water for resale to others. Consequently, BWSA possessed no diversion rights that pre-existed the creation of the Commission.

In the course of its opinion the District Court stated:

> ...[I]t would appear that, under the [Water Rights Act], [DER] may well have the authority to approve arrangements, such as the one between Philadelphia and BWSA, by which one municipality provides water to users outside its borders.

and

> ...[T]he permit may not be construed as authorizing Philadelphia to divert water from the Delaware River for sale to BWSA.
> (474 Fed. Supp. 1249 at 1254)

DER seizes upon these statements as support for its position that a bulk purchaser such as BWSA (NWWA in the present case) needs a permit to obtain water from a supplier. The argument seeks to extract more from the language than is there. The court was simply observing that, since a water allocation permit is to be issued only for the present purposes and future needs of the applicant's service area, any transfer of water beyond those boundaries, without DER's approval, may jeopardize the continued existence of the water rights covered by the permit.

We are not convinced that our decision will emasculate the Water Rights Act, as DER seems to fear. As already noted, the Act imposes only a very limited regulatory mechanism on the use of surface water within the

Commonwealth.[5] Despite the circumscriptions of our holding, we believe that DER has legitimate means under the Water Rights Act for accomplishing these limited purposes.

Since we have concluded that DER does not have the authority under the Water Rights Act to issue the type of water allocation permit issued to NWWA, it is unnecessary for us to discuss any of the other issues raised by the parties.[6]

CONCLUSIONS OF LAW

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

2. PSWC has the burden of proving by a preponderance of the evidence that the issuance of Water Allocation Permit WA 46-693A to NWWA was not authorized by law or was an abuse of DER's discretion.

3. DER has the burden of proving by a preponderance of the evidence that the issuance of the Modification Order to PSWC's Water Allocation Permit WA-67 was authorized by law and not an abuse of DER's discretion.

4. DER's authority to issue water allocation permits stems solely from the Water Rights Act.

5. The Water Rights Act regulates only public water supply agencies and only their rights to divert surface water.

---

[5] Achieving the goals of conservation, control and equitable use is extremely difficult when only 8% - 10% of total surface water is subject to regulation. It is easy to understand why DER would have a tendency to expand the scope of regulation in an effort to do a more effective job.

[6] We have not dealt separately with the Modification Order because DER obviously treated it as an integral part of the water allocation permit issued to NWWA. Since we have found the permit to be unauthorized by law, we will nullify the Modification Order too. We express no position on whether or not the Modification Order is capable of standing on its own.

6. PSWC received confirmation of its pre-existing water rights in the waters of Neshaminy Creek, Crum Creek, Pennypack Creek, Perkiomen Creek and Pickering Creek; and received permits for water rights in the waters of Perkiomen Creek, Schuylkill River and Upper Merion Reservoir.

7. PSWC's water rights are subject to modification, without its consent, whenever a consideration of conflicting private and quasi-private interests of individuals, corporations or municipalities convinces DER that a modification will further the public interests of conservation, control and equitable distribution of the surface water source.

8. DER's authority to issue water allocation permits under the Water Rights Act does not include the authority to issue permits for the right to purchase, through a pipeline interconnection, water already in the distribution system of another public water supply agency.

9. A public water supply agency possessing water rights to a specific quantity of water from a specific surface source does not become exempt from regulation under the Water Rights Act simply because it utilizes the diversion facilities of another public water supply agency.

10. Despite the use of the words "water" and "water rights" in section 6 of the Water Rights Act, 32 P.S. §636, and some later sections, it is clear that these sections deal only with the issuance of permits for "water rights" as defined in the statute.

11. Statutory power must be granted in the body of a statute; allusions to such power in the title and preamble are not sufficient.

ORDER

AND NOW, this 19th day of September 1989, it is ordered as follows:

1. The appeal filed by Philadelphia Suburban Water Company on April 25, 1985, is sustained.

2. Water Allocation Permit WA46-693A, issued by the Department of Environmental Resources to North Wales Water Authority on March 18, 1985, is null and void..

3. The Modification Order, issued by the Department of Environmental Resources on March 25, 1985, to Philadelphia Suburban Water Company's Water Allocation Permit WA-67 is null and void.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Chairman Woelfling was recused and did not participate in this decision.

DATED: September 19, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Cathy Myers, Esq.
Bureau of Regulatory Counsel
Harrisburg
For Appellant:
David B. MacGregor, Esq.
Philadelphia
For the Permittee:
Jeremiah Cardamone, Esq.
Ambler, PA

sb

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

M. DIANE SMIT
SECRETARY TO THE BO

KEYSTONE WATER COMPANY	:	
	:	
v.	:	**EHB Docket No. 86-383-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 19, 1989**

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

By Robert D. Myers, Member

Syllabus:

The Department of Environmental Resources (DER) issued a Modification Order to the Water Allocation Permit of Keystone Water Company (Keystone), imposing a new condition requiring Keystone to apply for water allocation permits for its purchase of water from Newtown Artesian Water Company and from the Muncipal Authority of the Borough of Morrisville. On appeal from this action, the Board concludes that the Act of June 24, 1939, P.L. 842, as amended, 32 P.S. §631 et seq. (Water Rights Act), does not authorize DER to require water allocation permits for water purchases such as those of Keystone.

PROCEDURAL HISTORY

This appeal was initiated by Keystone Water Company[1] (Keystone) on August 1, 1986, and challenges a Modification Order dated July 22, 1986, issued by the Department of Environmental Resources (DER) with respect to Keystone's Water Allocation Permit WA-622B. The Modification Order, inter alia, added a new condition (No. 14) to the Water Allocation Permit requiring Keystone to file water allocation applications for its interconnections with Newtown Artesian Water Company (Newtown) and the Municipal Authority of the Borough of Morrisville (Morrisville Authority).

Hearings were scheduled on two separate occasions. They were cancelled the first time by reason of pending legislation that, if enacted into law, would have resolved the controversy. They were cancelled the second time when the parties presented a Joint Stipulation of Facts together with exhibits. Keystone's brief was filed January 13, 1989, and DER's brief was filed February 28, 1989. The record consists of the Joint Stipulation of Facts and 24 exhibits.

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

Findings of Fact

1. Keystone is a corporation organized and existing under laws of the Commonwealth of Pennsylvania and has an office at 800 West Hersheypark Drive, Hershey, PA. 17033 (Joint Stipulation #1).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the Act of June 24, 1939, P.L. 842, as amended, 32 P.S. §631 et seq. (Water Rights Act) (Joint

---

[1] The company's name has since been changed to Pennsylvania - American Water Company.

Stipulation #2; section 1901-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-1).

3. Keystone is a public utility providing water service to approximately 7,320 customers in the Borough of Yardley and portions of Lower Makefield and Falls Townships, Bucks County. Rates charged and service provided by Keystone are subject to regulation by the Pennsylvania Public Utility Commission (Joint Stipulation #3).

4. Keystone is a public water supply agency as defined in section 1 of the Water Rights Act, 32 P.S. §631 (Joint Stipulation #1).

5. Keystone's primary source of surface water supply is the Delaware River. Keystone has augmented its supply through the development of ground water sources and interconnection agreements with other public water suppliers, namely Newtown and Morrisville Authority (Joint Stipulation #4).

6. Keystone currently holds Water Allocation Permit WA-622B, issued by DER on March 4, 1983, granting Keystone the right to withdraw up to four million gallons of water per day (mgd) from the Delaware River (Joint Stipulation #5, Exhibit No. 1).

7. Keystone needs the water supply provided by Water Allocation Permit WA-622B and other developed sources to meet the present and long-term water supply requirements of its customers, and Keystone has made substantial capital investment to construct and acquire facilities to develop these sources (Joint Stipulation #6).

8. On August 1, 1985, Keystone entered into an Agreement (Newtown Agreement) with Newtown and Indian Rock Water Company (Indian Rock) wherein Newtown and Indian Rock agreed to sell to Keystone a certain amount of water, determined as follows:

> Keystone agrees that when the first of either the purchases from Water Companies [Newtown and Indian

> Rock] reach 150,000 gallons per day based on the monthly average, or a three year period elapses from the date when Keystone receives its first billing from Water Companies, then Keystone will be required to purchase from Water Companies a daily minimum amount of 150,000 gallons based on a monthly average. Additionally, Water Companies hereby agree to allow Keystone to increase said minimum during the term of this contract as long as Water Companies have the capacity to supply the increased amount of water requested and as long as Keystone gives the Water Companies ninety (90) days notice. Also, Keystone reserves the right to reduce the aforementioned minimum, provided that should Keystone exercise its right to reduce said minimum, the minimum would be reduced by no more than the annual average consumption of each new customer added to Water Companies' system after said minimum is established until such time that said minimum is reduced to zero. This calculation will be performed by Water Companies on each annual anniversary date of the establishing of the minimum. A copy of said calculation will be provided to Keystone within 45 days of such annual anniversary date.
> (Joint Stipulation #7; Exhibit No. 4)

9. The interconnection is located on Lower Dolington Road at the common political boundaries of Lower Makefield Township and Newtown Township; the sale of water takes place entirely within Keystone's existing service territory (Joint Stipulation #8; Exhibit No. 20).

10. During the first three years of the Newtown Agreement there is no guarantee of the purchase or delivery of any specific quantity of water. Nor does the Newtown Agreement specify any particular source of supply to be employed in providing water to Keystone. The Newtown Agreement expressly acknowledges (1) the right of Keystone to reduce the amount of water purchased and, (2) the right of Newtown and Indian Rock to subordinate any obligation to supply water to Keystone to their ability to secure the necessary supply and their obligation to meet the needs of their own customers (Joint Stipulation #9; Exhibit No. 4).

11. The water supplied to Keystone by Newtown and Indian Rock is withdrawn and diverted from the Delaware River by the City of Philadelphia, and transferred to Newtown by way of Bucks County Water and Sewer Authority (Joint Stipulation #16).

12. Keystone currently has an interconnection with the Borough of Morrisville and Morrisville Authority governed by an Agreement dated February 9, 1976 (Morrisville Agreement) wherein the parties thereto agree to furnish the other water in the event of an emergency or breakdown of one of the water systems. The Morrisville Agreement does not guarantee the delivery or availability of any specific quantity of water. Nor does it specify that any particular source of water will be employed to provide water (Joint Stipulation #10; Exhibit Nos. 5 and 20).

13. Morrisville Authority diverts and withdraws water from the Delaware River to provide water supplied to Keystone (Joint Stipulation #17; Exhibit No. 6).

14. Keystone requested a modification of a permit condition in Water Allocation Permit WA-622B, in order to extend the time to complete construction of the water treatment plant (Joint Stipulation #11).

15. In its July 22, 1986 response granting Keystone's request, DER noted that interconnections had been made with other public water supply agencies without application for a water allocation permit to acquire the water or water rights (Joint Stipulation #12; Exhibit No. 2).

16. The Modification Order issued by DER on July 22, 1986 included four permit conditions amending Water Allocation Permit WA-622B (Joint Stipulation #13; Exhibit No. 3).

17. Three of the conditions related to the construction of additions to the water treatment plant. These conditions have not been appealed (Stipulation #14; Exhibit No. 3).

18. On July 22, 1986, DER issued a Water Allocation Permit Modification Order modifying Keystone's Water Allocation Permit WA-622B issued on March 4, 1983. Among the modifications was a new permit condition No. 14: "The permittee shall file an application for water allocation for the interconnections with Newtown Artesian Water Company and the Municipal Authority of the Borough of Morrisville, within 120 days of the date of this Modification Order...." (Joint Stipulation #15; Exhibit No. 3).

19. Newtown and Indian Rock do not have water allocation permits (Joint Stipulation #18).

DISCUSSION

In an Adjudication issued on this same date in the case of Philadelphia Suburban Water Company v. Commonwealth of Pennsylvania, Department of Environmental Resources and North Wales Water Authority, Docket No. 85-151-M, the Board has ruled that the Water Rights Act does not authorize DER to issue water allocation permits for the right to purchase, through a pipeline interconnection, water already in the distribution system of another public water supply agency. The Discussion portion of that Adjudication is incorporated herein by reference. The ruling applies to the water that Keystone purchases from Newtown and from Morrisville Authority. Accordingly, new condition 14, added to Keystone's Water Allocation Permit by the July 22, 1986 Modification Order, is null and void.

CONCLUSIONS OF LAW

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

2. DER's authority to issue water allocation permits stems solely from the Water Rights Act.

3. The Water Rights Act regulates only public water supply agencies and only their rights to divert surface water.

4. DER's authority to issue water allocation permits under the Water Rights Act does not include the authority to issue permits for the right to purchase, through a pipeline interconnection, water already in the distribution system of another public water supply agency.

5. Despite the use of the words "water" and "water rights" in section 6 of the Water Rights Act, 35 P.S. §636, and some later sections, it is clear that these sections deal only with the issuance of permits for "water rights" as defined in the statute.

6. Statutory power must be granted in the body of a statute; allusions to such power in the title and preamble are not sufficient.

ORDER

AND NOW, this 19th day of September, 1989, it is ordered as follows:

1. The appeal filed by Keystone Water Company on August 1, 1986, is sustained.

2. Condition 14, added to Keystone Water Company's Water Allocation Permit WA-622B by a Modification Order dated July 22, 1986, is null and void.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Chairman Woelfling was recused and did not participate in this decision.

DATED: September 19, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Scott R. Thistle, Esq.
Bureau of Regulatory Counsel
For Appellant:
Michael D. Klein, Esq.
Hershey, PA
sb

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

M. DIANE SMI
SECRETARY TO THE I

JOSEPH BLOSENSKI, JR., et al.	:	
	:	
V.	:	**EHB Docket No. 85-222-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 22, 1989**

OPINION AND ORDER
SUR
MOTION TO AMEND ORDERS

Synopsis

A Motion to Amend Orders to insert language necessary for a litigant to take an appeal from interlocutory orders will be denied when the orders involve a discovery dispute that is not a controlling question of law and about which there is no substantial ground for difference of opinion.

OPINION

On September 11, 1989, Joseph Blosenski, Jr. (Appellant) filed a Motion requesting the Board to Amend its Orders of August 11 and 29, 1989, to include a statement that the Orders "involve a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the Order may materially advance the ultimate determination of the matter." This is the language required by the Judicial Code, Act of July 9, 1976, P.L. 586, 42 Pa. C.S.A. §702(b), in order to enable a litigant to seek permission to appeal an interlocutory order. Appellant has filed a Petition for Permission to Appeal with the Commonealth Court of Pennsylvania.

The Orders of August 11 and 29, 1989, to which the Motion refers, dealt with a discovery dispute. The Department of Environmental Resources (DER), within a few months after this case was instituted in 1985, requested Appellant to produce financial documents. His failure to do so resulted in the imposition of sanctions by a Board Opinion and Order, dated August 15, 1986, which also ordered Appellant to produce the documents and to submit himself to deposition concerning them. Appellant filed a Petition for Review of this Order with Commonwealth Court (No. 2781 C.D. 1986), which was quashed sua sponte on October 27, 1986, because of the interlocutory nature of the Order. A Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on June 1, 1987 (No. 1177 E.D. Allocatur Docket 1986).

The case was scheduled for a hearing to commence on April 11, 1989. When DER renewed its request for Appellant's financial documents and attempted to schedule him for a deposition, Appellant refused on the ground that Board permission had to be obtained prior to any additional discovery, according to a Board Order of December 5, 1988. DER maintained that the December 5, 1988 Order did not apply to discovery requests made prior to that date. Because this dispute was not presented to the Board in a timely fashion, the hearing had to be cancelled pending disposition of DER's Motion for Sanctions filed on March 31, 1989.

The Board's August 11, 1989, Opinion and Order disposed of DER's Motion by denying it (because of the lack of clarity in the Board's December 5, 1988 Order) but ordered Appellant to produce the financial documents and appear for deposition concerning them. The Order clearly notified Appellant that, if he continued to defy Board orders, sanctions would be imposed in the

form of dismissal of the case. The Board's August 29, 1989, Order refused Appellant's request for reconsideration and Appellant's Counter Motion for Sanctions.

The substance of the case involves Appellant's alleged violation of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., and DER's assessment of civil penalties as a result thereof. Whether or not Appellant should be required to produce financial records and present himself for deposition concerning them in no way controls the ultimate determination of whether or not DER abused its discretion. At this stage of the proceedings, it is unknown whether or not the records will even be entered into evidence.

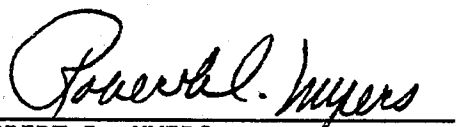
Furthermore, there is no substantial ground for a difference of opinion on this discovery issue. The Board has held that factors to be considered in setting a civil penalty include the savings realized by the violator and deterrence: DER v. Jefferson Township, 1978 EHB 134; DER v. Lawrence Coal Company, 1988 EHB 561, affirmed by Commonwealth Court in an unreported opinion dated July 12, 1989 (No. 1891 C.D. 1988). The financial records of the violator, therefore, are appropriate objects for DER discovery purposes.

Allowing an appeal on this discovery issue will not materially advance the ultimate determination of the case but, on the contrary, will further delay it.

ORDER

AND NOW, this 22nd day of September, 1989, it is ordered that the Motion to Amend Orders, filed by Appellant on September 11, 1989, is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: September 22, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kenneth A. Gelburd, Esq.
Eastern Region
For Appellants:
James W. Gerlach, Esq. (For Ada Blosenski)
Patrick C. O'Donnell, Esq. (For Joseph Blosenski)
James A. Cunningham, Esq. (For Joseph Blosenski)
sb

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

M. DIANE SMIT
SECRETARY TO THE BO

MORCO CORPORATION	:	
	:	
v.	:	**EHB Docket No. 88-168-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 25, 1989**

OPINION AND ORDER
SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT

Synopsis

Partial summary judgment will be granted in favor of DER on some of the issues raised in an appeal when a deposition of one of the corporate officers and owners of the Appellant establishes that there is no dispute as to the facts surrounding those issues and where it appears that DER is entitled to judgment as a matter of law.

OPINION

This appeal was filed by Morco Corporation (Morco) on April 28, 1988, from a March 30, 1988 Order of the Department of Environmental Resources (DER) setting forth provisions of a Closure Plan applicable to hazardous waste alleged to be stored at Morco's facility in the Borough of Cochranton, Crawford County. The Order was issued pursuant to provisions of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., and the regulations adopted pursuant to said statutes.

Both parties have filed pre-hearing memoranda and a hearing has been scheduled. On August 11, 1989, DER filed a Motion for Partial Summary Judgment supported by affidavit, deposition and exhibits. Although notified of the filing, Morco has filed no response.

Summary judgment may be granted in an appeal when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law": Pa. R.C.P. 1035(b). The judgment rendered may be partial or total, depending on the circumstances. In passing upon a Motion for Summary Judgment, the Board is required to view the facts in the light most favorable to the non-moving party: Robert C. Penoyer v. DER, 1987 EHB 131.

DER's Motion is based primarily upon the deposition of Robert M. Deets, an officer and one of the owners of Morco, given at Meadville, Pennsylvania, on April 18, 1989. A reading of this deposition establishes beyond doubt that there are numerous factual issues concerning which there is no dispute between the parties. It is equally clear that DER is entitled to judgment as a matter of law on a number of legal issues dependent on these undisputed facts. Accordingly, DER's Motion for Partial Summary Judgment will be granted, and we will enter an order setting forth those legal and factual issues in detail.

ORDER

AND NOW, this 25th day of September 1989, it is ordered as follows:

1. DER's Motion for Partial Summary Judgment, filed on August 11, 1989, is granted.
2. Summary judgment is entered in favor of DER and against Morco on the following issues:

(a) The paint sludge and wastewater containing toluene from the painting line constitutes a hazardous waste pursuant to 25 Pa. Code §§75.261(h), 75.261(b)(i) and 75.261(b)(ii).

(b) The sludge containing trichloroethylene from the vapor degreaser constitutes a hazardous waste pursuant to 25 Pa. Code §§75.261(h), 75.261(b)(1)(i) and 75.261(b)(1)(ii).

(c) Between November 1980 and April 1986, Morco illegally stored and/or disposed of hazardous wastes, namely paint sludge containing toluene and degreaser sludge containing trichloroethylene, behind its manufacturing plant without authorization or a permit from DER, in violation of sections 401, 501, and 610 of the SWMA, 35 P.S. §§6018.401, 6018.501 and 6018.610.

(d) Between November 1980 and April 1986, Morco illegally disposed of a hazardous waste, namely wastewater from the painting line baths containing toluene, in an impoundment behind its manufacturing plant without authorization or a permit from DER, in violation of sections 401, 501 and 610 of the SWMA, 35 P.S. §§6018.401, 6018.501 and 6018.610.

(e) The cement pad behind Morco's manufacturing plant constitutes a "waste pile" and "hazardous waste management facility" within the meaning of 25 Pa. Code §§75.260 and 75.264(t).

(f) The lagoon behind Morco's manufacturing plant constitutes a "surface impoundment" and "hazardous waste management facility" within the meaning of 25 Pa. Code §75.260.

(g) The cement pad and surface impoundment are subject to the closure and post-closure requirements of 25 Pa. Code §§75.264(o), 75.264(s), and 75.264(t), and the groundwater assessment and abatement requirements of 25 Pa. Code §75.264(n).

3. Hearings in this appeal shall be limited to those issues that have been properly raised and are not foreclosed by the partial summary judgment granted in paragraph 2.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: September 25, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
George Jugovic, Jr., Esq.
Eastern Region
For Appellant:
Jon Hogue, Esq.
Pittsburgh, PA
sb

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

M. DIANE SMIT
SECRETARY TO THE B

NEW HANOVER CORPORATION	:	
	:	
V.	:	**EHB Docket No. 89-122-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 29, 1989

OPINION AND ORDER SUR
PETITIONS TO INTERVENE
AND REQUEST TO APPROVE STIPULATION

Synopsis

The Board sua sponte raises the issue of jurisdiction in an appeal of a letter commenting on a permit application and dismisses the appeal because the letter was not a final action of the Department of Environmental Resources. Because the Board has no jurisdiction over the underlying appeal, it has no authority to rule upon petitions to intervene or to approve a stipulation of counsel.

OPINION

This matter was initiated with the May 1, 1989, filing of a notice of appeal by the New Hanover Corporation seeking the Board's review of a March 30, 1989, letter from the Department of Environmental Resources (Department). The letter at issue is a 30-page document containing extensive comments on New Hanover Corporation's application to repermit its landfill in New Hanover

Township, Montgomery County.[1]

On August 14, 1989, the Board received a petition to intervene from New Hanover Township, and on August 18, 1989, the Paradise Watch Dogs petitioned the Board for leave to intervene. The petitions, which are virtually identical, contend that the interests of the petitioners will not be adequately represented because the petitioners and the Department are adversaries at Docket No. 88-119-W and the repermitting conditions are not strong enough to protect the interests of the petitioners. Neither the Department nor New Hanover Corporation responded to the petitions to intervene.

In the meantime, the Department and New Hanover Corporation were attempting to negotiate an amicable resolution of the appeal. Their attempts culminated in the September 22, 1989, submission of a stipulation of counsel to the Board for its approval. The stipulation embodies the parties' agreement that the March 30, 1989, letter was not a final, appealable action and, therefore, New Hanover Corporation's withdrawal of this appeal would not affect its rights to later challenge the comments in the March 30, 1989, letter. The stipulation also rectified an erroneous comment in the March 30, 1989, letter and provided that New Hanover Corporation would withdraw its appeal upon approval of the stipulation by the Board.

The question of jurisdiction may be raised sua sponte by the Board. See, e.g., Thomas Fahsbender v. DER, 1988 EHB 417. We hold that we have no jurisdiction over this appeal because the March 30, 1989, letter is not a

---

[1] The Department's issuance of a permit for this landfill to New Hanover Corporation is the subject of New Hanover Township et al. v. DER and New Hanover Corporation, EHB Docket No. 88-119-W, which is presently pending before the Board. New Hanover Corporation's repermit application was necessitated by the adoption of comprehensive municipal waste management regulations at 18 Pa. B. 1681 (April 9, 1988).

final action of the Department and, therefore, not appealable to the Board. The letter is an exhaustive recitation of comments on a permit application still pending before the Department. The Department has yet to reach a final decision on the permit application, and it may well be that the concerns in the March 30, 1989, letter will be resolved as a result of the normal interplay between the Department and permit applicants or even that new concerns will arise as a result of that interplay. But, until the Department's final decision is embodied in the grant or denial of New Hanover Corporation's permit application, we have no authority to intrude upon that process.

Because we have no jurisdiction over the underlying appeal, we have no authority to rule upon the petitions to intervene or to approve the stipulation entered into by the Department and New Hanover Corporation.

ORDER

AND NOW, this 29th day of September, 1989, it is ordered that the appeal of New Hanover Corporation is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: September 29, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Mary Young, Esq.
Eastern Region
For Appellant:
Hershel J. Richman, Esq.
Mark A. Stevens, Esq.
Philadelphia, PA
For Petitioning Intervenors:
Albert J. Slap, Esq.
Alan Lee Levengood, Esq.
John E. Childe, Esq.

nb

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

M. DIANE SMIT
SECRETARY TO THE B

DECOM MEDICAL WASTE SYSTEMS (N.Y.), INC.	:	
	:	
V.	:	**EHB Docket No. 89-358-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 5, 1989

OPINION IN SUPPORT OF
ORDER GRANTING A PETITION FOR SUPERSEDEAS

Synopsis

A Compliance Order issued by the Department of Environmental Resources (DER) which closed the Appellant's facility is superseded pending disposition of the appeal. The facility does not constitute a "transfer facility" under DER's regulations because, as DER concedes, the "bulk transfer" of waste does not occur at the site. See 25 Pa. Code §271.1. In addition, the Appellant has shown that it will be irreparably injured if DER's order is not superseded, and that the public interest favors a supersedeas.

OPINION

This proceeding involves an appeal by Decom Medical Waste Systems (N.Y.), Inc. (Decom) from a compliance order of the Department of

Environmental Resources (DER) dated September 7, 1989.[1] In the compliance order, DER found that the Decom facility at Delaware Avenue in Philadelphia received and stored "special handling waste" (medical waste) without a permit from the Department, in violation of 25 Pa. Code §279.201 and Sections 201(a) and 501(a) of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. §6018.101 et seq. DER ordered Decom to cease accepting or storing waste, and ordered Decom not to remove waste until notified by the Department.

Decom filed a petition for supersedeas with its appeal. On September 15, 1989, the Board held a hearing on this petition, and on September 19, 1989 we issued an Order granting the petition and superseding DER's order pending the disposition of this appeal. This opinion explains the basis for the September 19, 1989 order.

In its petition, Decom alleged that the circumstances of this case satisfied the criteria for granting a supersedeas under the Board's regulations. See 25 Pa. Code §21.78. Decom alleged that the public would be harmed if the Board did not supersede DER's order because hospitals and nursing homes which Decom serves would have difficulty finding an alternative means of getting rid of their waste. Decom also alleged that the closing of Decom's Delaware Avenue site could lead to a back-up of medical waste at the hospitals and nursing homes, and would encourage improper disposal of medical

---

[1] The compliance order which is the subject of the appeal at EHB Docket No. 89-358-F was directed to American Environmental Services, Inc. (AES), but, as we will discuss below, the assets of AES were transferred to Decom effective September 8, 1989. Based upon this transfer, we issued an order on September 19, 1989 granting a motion to substitute Decom as the appellant. Because DER was not aware whether the transfer of assets had actually occurred, they had also issued a Compliance Order to Decom on September 7, 1989 (Transcript 212-213). Decom appealed this action at EHB Docket No. 89-422-F. On September 25, 1989, we issued an Order consolidating the two appeals.

waste. Decom also contended that it would suffer irreparable harm in the form of lost business and lost customers if a supersedeas was not granted. Finally, Decom contended that it was likely to succeed on the merits of its appeal because the Delaware Avenue site did not qualify as a "transfer facility" under DER's regulations, in that there was no storage of waste, no "bulk transfer" of waste, and no processing of waste at the site.

DER filed an answer to the petition. DER alleged that a supersedeas of its order would be contrary to the public interest because AES has a history of unlawful conduct and has committed several violations of the Solid Waste Management Act.[2] DER further alleged that other facilities can handle the waste currently handled by Decom. DER also contended that Decom was not likely to succeed on the merits of its appeal because waste was stored on the site, and because, although there was no "bulk transfer" of waste at the site, there was repackaging of damaged boxes in which the waste was contained.

The Board held a hearing on the petition for supersedeas on September 15, 1989. Decom presented evidence describing the normal operations at the Delaware Avenue terminal. Decom dispatches small van-type trucks to go to the hospitals and nursing homes to pick up the waste, which is in double bags placed inside of 200-pound cartons (T. 44-45, 68). The small trucks return to the terminal and the boxes are unloaded directly onto long-haul trailers; the trailers are then hauled to the Southland Exchange Incinerator in South

---

[2] At the time DER filed its answer, the Board had not yet substituted Decom as the appellant at EHB Docket No. 89-358-F. However, whether we treat this allegation of unlawful conduct as referring to AES or Decom, the only evidence introduced to support it was that the facility operated illegally because DER had not issued it a permit. As we will explain below, it does not appear that DER's regulations require a permit for the facility; therefore, the operation of the facility was not illegal.

Carolina[3] (T. 44-45). Under normal circumstances, waste remains at the site for 10-12 hours before it is shipped (T. 45). The Delaware Avenue terminal handles 56,000 pounds of waste per day (T. 93).

Shortly before DER issued the compliance order, a back-up of waste occurred at the facility (T. 50). This was a result of Southland Incinerator refusing to accept waste from AES because the owner of AES had exceeded his line of credit (T. 78-80). As a result, 26 trailers of waste accumulated at the Delaware Avenue facility (T. 53). In addition, as DER Inspector James Pagano testified, containers and drums of waste were placed in a building on the site.[4] (T. 203) While the waste was backing up on the site, Decom was initiating an equity action in the Common Pleas Court of Montgomery County to enforce an agreement whereby AES would transfer its assets, including the Delaware Avenue terminal, to Decom (T. 12-15). The Court entered an Order directing specific performance of the agreement (Exhibit A-1), and the closing took place on Friday, September 8, 1989 (T. 15). The Court also ordered Southland Incinerator, which was also a Plaintiff in the equity action, to accept waste from AES. Decom committed to DER that it would ship out all of the waste backed up at the site by September 17 (T. 84-85), (Exh. A-5). DER agreed to this plan (Exh. A-6).

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

1) irreparable harm to the petitioner,

---

[3] Southland Exchange Incinerator is a joint venture between two South Carolina businessmen and KML Corporation. KML Corp. owns 49% of the joint venture (T. 70). Both KML Corp. and Decom are owned by the Adams family (T. 66, 70).

[4] Mr. Pagano testified that 500-700 cartons of waste were stored in the building (T. 203-204). Mr. Pagano did not describe in detail how the waste in the drums was packed.

2) the likelihood of the petitioner's prevailing on the merits, and

3) the likelihood of injury to the public.

25 Pa. Code §21.78(a). In addition, a supersedeas may not be issued in cases where a nuisance or a significant amount of pollution, or other hazard to public health, would exist or be threatened while the supersedeas is in effect. 25 Pa. Code §21.78(b). Normally, a petitioner bears the burden of demonstrating that the above factors militate in favor of granting a supersedeas. Lower Providence Township v. DER, 1986 EHB 395. However, it is not necessary for the petitioner to establish irreparable injury and likelihood of injury to the public when it is shown that DER lacked the underlying authority to take the action at issue. Id., Ny-Trex, Inc. v. DER, 1980 EHB 355, WABO Coal Co. v. DER, 1986 EHB 71.

Applying these principles to this case, a supersedeas is warranted because DER lacked authority under its regulations to close the Delaware Avenue terminal. More specifically, it does not appear that the site fits the definition of "transfer facility" in DER's regulations.

DER's regulations define "transfer facility" as follows:

> *Transfer facility*--A facility which receives and temporarily stores solid waste at a location other than the generation site, and which facilitates the bulk transfer of accumulated solid waste to a facility for further processing or disposal. . . .

25 Pa. Code §271.1. Under this definition, it is clear that the facility must both temporarily store waste and facilitate the "bulk transfer" of waste. The use of the connector "and" in the definition indicates that both conditions must be met. Since the Department's answer conceded that no "bulk transfer" of waste ocurs at the site (Answer, para. 8(a)(ii)), we are bound to conclude that the site does not constitute a transfer facility under the regulations.

DER appears to have statutory authority under Section 201(a) of the

Solid Waste Management Act, 35 P.S. §6018.201(a), to promulgate regulations requiring a permit for storage alone, without regard to whether a bulk transfer of waste occurs at a site.[5] Under the current regulations, however, in light of DER's concession that no bulk transfer of waste occurs at this site, it is clear that DER may not close Decom's facility on the basis that it lacks a permit to operate a transfer facility. Thus, it appears that Decom is likely to succeed on the merits of its appeal.

Decom has also shown that it will be irreparably injured if a supersedeas is not granted. It is "highly likely" that Decom will not continue to serve its customers in Pennsylvania if the facility is closed (T. 88). The revenue which would be lost as a result could not be recouped, even if Decom were able at some point to reopen the facility and reestablish its customer base.

Finally, Decom has shown that the public is more likely to be injured by denying the supersedeas than by granting it. DER did not attempt to refute Decom's evidence that the hospitals and nursing homes served by Decom would have great difficulty finding a substitute for Decom's service (T. 86, 88, 140-143, 175-176). While the back-up of waste at the Delaware Avenue site did cause a public health concern (T. 190), this was not the normal manner of operation at the site, and the situation was caused by the former owner of AES (T. 78-80). Moreover, Decom committed to DER that it would eliminate the

---

[5] Decom applied for a permit as a transfer facility after it entered into the agreement with AES (T. 161-162). Decom explained at the hearing that although they questioned whether a permit was required, they thought the facility would be regulated eventually, and they wanted to have a permit in place (T. 76-78, 161-162). Their basis for believing a permit was not currently required was that the transfer of waste in individual containers did not constitute a "bulk transfer" of waste as that term was understood in the waste industry (T. 76, 134-135). According to Decom's evidence, DER itself was uncertain whether a permit was required (T. 167-168).

backup of waste at the site by September 17, 1989, and we have no reason to believe that Decom would not fulfill this commitment.

In conclusion, Decom has satisfied the criteria for granting a supersedeas stated in 25 Pa. Code §21.78. Therefore, a supersedeas pending disposition of the appeal is warranted.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: October 5, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kenneth Gelburd, Esq.
Eastern Region
For Appellant:
William H. Eastburn, III, Esq.
Doylestown, PA
nb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

BERKS PRODUCTS CORPORATION	:	
	:	
V.	:	**EHB Docket No. 89-351-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 10, 1989**

OPINION AND ORDER SUR PETITION FOR SUPERSEDEAS

Synopsis

A petition for supersedeas is granted in a case where the Department of Environmental Resources (DER) ordered the Petitioner to halt construction of an access road to its quarry. DER lacked jurisdiction to require a permit prior to construction of the road because the road will provide access not only to the quarry, but also to the Petitioner's non-regulated commercial activities.

ORDER

This proceeding involves an appeal by Berks Products Corporation (Berks Products) from a compliance order issued by the Department of Environmental Resources (DER) on August 28, 1989. In the compliance order, DER ordered Berks Products to cease off-permit mining activities at its quarry in Ontelaunee Township, Berks County. The alleged off-permit mining activities by Berks Products involved construction of an access road to the site.

Berks Products filed a petition for supersedeas with its appeal. A hearing on this petition was held on September 29, 1989. This Opinion and Order addresses the petition for supersedeas.

In its petition, Berks Products alleges that the new access road was planned in conjunction with the Pennsylvania Department of Transportation. Berks Products alleges that this new access road will intersect with Route 61 at a traffic signal, which will be safer for both the public and for Berks Products' trucks than the current intersection, which does not have a traffic signal. Berks Products also contends that the construction of the road has ceased, and that it runs the risk of losing the labor already expended on the road due to erosion and gullying. Finally, Berks Products argues that it will suffer irreparable harm if DER's order is not superseded, and that the public will not be harmed if the order is superseded.

DER filed an answer to the petition. DER alleges that Berks Products violated the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, No. 219, 52 P.S. §3301 et seq. by beginning construction on the road before DER issued a permit authorizing this construction.[1] Therefore, DER argues that any harm Berks Products might suffer due to the cessation of construction is attributable to the decision of Berks Products to operate in violation of the Act. With regard to the safety issue, DER argues that the current access road has been sufficient and that Berks Products can use a flagman to lessen any safety hazard.

In ruling upon a petition for supersedeas, the Board considers the

---

[1] It is undisputed that Berks Products filed an application which sought to include this road--characterized as a "haul road" on the map accompanying the application--within Berks Products' permitted area (T. 65, Exhibit A-7). However, Berks Products insisted that the only reason the road was included in the application was that DER directed it to do so (T. 54, 59-60).

following factors:

1) irreparable harm to the petitioner,

2) the likelihood of the petitioner's prevailing on the merits, and

3) the likelihood of injury to the public.

25 Pa. Code §21.78(a). In addition, a supersedeas may not be issued in cases where a nuisance or a significant amount of pollution, or other hazard to public health, would exist or be threatened while the supersedeas is in effect. 25 Pa. Code §21.78(b). Normally, a petitioner bears the burden of demonstrating that the above factors militate in favor of granting a supersedeas. Lower Providence Township v. DER, 1986 EHB 395. However, it is not necessary for the petitioner to establish irreparable injury and likelihood of injury to the public when it is shown that DER lacked the underlying authority to take the action at issue. Id., Ny-Trex, Inc. v. DER, 1980 EHB 355, WABO Coal Co. v. DER, 1986 EHB 71.

Applying these principles to the instant case, a supersedeas is warranted. The evidence at the hearing demonstrated that the access road is not subject to DER's permitting requirements; therefore, DER exceeded its jurisdiction by ordering construction of the road to cease.

Whether Berks Products was required to obtain a permit authorizing construction of this road hinges on whether the use of the road falls within the definition of "surface mining" under the Noncoal Mining Act. The Act defines this term, in relevant part, as follows:

> "**Surface mining.**" The extraction of minerals from the earth, from waste or stockpiles or from pits or from banks by removing the strata or material that overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip mining, auger mining, dredging, quarrying and leaching and all surface activity connected with surface or underground mining, including, but not limited to, exploration, site preparation, entry, tunnel, drift, slope, shaft and borehole drilling and construction

> and activities related thereto; but it does not include those mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings.

52 P.S. §3303 (emphasis supplied).

Applying this definition to this case, the question is whether a road which provides access to a mine site, but which also is used for other commercial purposes, is subject to the permitting requirements of the Noncoal Mining Act. The evidence shows that while the road in question provides access to the quarry, it also is intended to provide access to Berks Products' non-regulated activities at the site--a blacktop plant, a concrete plant, and probably the Company's main office (T. 54-55). Quarrying is but one aspect of Berks Products' activities on the site.

Both of DER's witnesses agreed that the road at issue here would not be subject to the permit requirements usually associated with a "haul road" if it could be properly characterized as a "common use road" (T. 25, 27-28, 74-74, 76). However, the criteria for distinguishing a "common use road" from a simple haul road were less than clear. DER Inspector Thomas Rooff considers a road to be a common use road if, in addition to providing access to a mine, it also provides access to a farm or a residence.[2] Frank Sentz, a Surface Mine Conservation Inspector Supervisor for DER, stated that "anything associated with a surface mining related activity, whether it's maintenance buildings, whether it's office buildings, whether it's haul roads, whether it's sedimentation ponds, is considered a surface mining activity." (T. 77). Mr. Sentz was unable to state that the road in question did not constitute a simple haul road because he was unsure what nonmining purposes the road was

---

[2] This appears to be the reason why the current access road to the site--known as the "Mitchell Farm Road"--is not included within Berks Products' permitted area (T. 25).

going to be used for (T. 76). Apparently, both Mr. Sentz and Mr. Rooff relied heavily on the fact that Berks Products had filed a permit application which listed the road as a "haul road," and which would encompass the road within Berks Products' permit area, in reaching their decision to issue the compliance order (T. 37, 45-46, 72, 75-76).

Based upon the evidence, it appears that the road in question should be characterized as a common use road. If a road which provides access to a mine and a farm (or residence) is exempt from permit requirements--which appears to have been the basis for exempting the current access road--then so should a road which provides access to a mine and non-regulated commercial activities. So long as the road will be used on a regular basis for non-regulated purposes, we see no basis for distinguishing commercial uses from residential uses. In this case, in addition to providing access to the quarry, the road will be used to provide access to Berks Products' blacktop plant, its concrete plant, and its headquarters for all of its commercial activities. Thus, the road in question must be considered a common use road.

The conclusion reached in the previous paragraph is buttressed by a pragmatic evaluation of the rationale for including "haul roads" within permit areas. As DER's witnesses testified, haul roads generally must be reclaimed after mining is completed; thus, bonds to guarantee such reclamation are necessary.[3] (T. 23-24, 73-74). Clearly, this is because in many cases haul roads raise the same concerns regarding erosion and pollution as other mining-related activities. See 25 Pa. Code §87.160. These concerns do not apply to the instant access road, which will be paved and has every appearance

---

[3] This point is also supported by reviewing DER's regulations governing coal mining, which provide for the proper design of haul roads to prevent pollution, and for restoration of haul roads after mining is completed. See 25 Pa. Code §§87.160, 87.166.

of being a permanent fixture. Thus, the bonding of this road to guarantee its reclamation is unnecessary.

In retrospect, we can certainly understand why DER's employees relied heavily upon Berks Products' permit application, which sought authority to construct the "haul road," in concluding that Berks Products must be ordered to cease constructing the road. However, the facts at the hearing demonstrated that the situation is more complex than DER initially recognized, and that the access road is not subject to DER's permit requirements. Therefore, we conclude that Berks Products is likely to succeed on the merits of its appeal in that DER did not appear to have authority to order a halt in construction of the road.

Since it appears that DER lacked jurisdiction to enter the instant order, we need not determine whether Berks Products demonstrated irreparable injury to itself or the likelihood of injury to the public. Ny-Trex, Inc. v. DER, 1980 EHB 355, WABO Coal Co. v. DER, 1986 EHB 71.

ORDER

AND NOW, this 10th day of October, 1989, it is ordered that the Petition for Supersedeas filed by Berks Products Corporation is granted, and that the compliance order issued by the Department of Environmental Resources on August 28, 1989 is superseded pending disposition of the merits of this appeal.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: October 10, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Norman Matlock, Esq.
Eastern Region
For Appellant:
Bradley Davis Miller, Esq.
Reading, PA

nb

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

M. DIANE SMITH
SECRETARY TO THE E

SAMUEL B. KING	:	
	:	
v.	:	**EHB Docket No. 87-111-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 11, 1989**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A Motion for Summary Judgment which seeks the final disposition of an appeal will not be entered when the record is insufficient to enable the Board to conclude as a matter of law that DER did not abuse its discretion. Partial summary judgment will be entered on the issue of the statutory and regulatory violations charged by DER since the Appellant does not contest that portion of the case.

OPINION

This appeal was initiated by Samuel B. King (Appellant) on March 23, 1987, contesting an Order issued by the Department of Environmental Resources (DER) on March 12, 1987. The Order recited factual allegations that Appellant was unlawfully storing and openly burning tires on his farm in Providence Township, Lancaster County, and directed Appellant to cease such activities and take corrective action. Appellant's principal objection, as set forth in his Notice of Appeal, is to the reasonableness of that part of DER's Order

relating to the disposal of the tires. This objection was deemed sufficient to survive a DER Motion to Dismiss according to a Board Opinion and Order issued July 2, 1987.

The parties filed pre-hearing memoranda and the appeal was placed on the list of cases to be scheduled for hearing. On March 14, 1989, however, DER filed A Motion for Summary Judgment. Appellant filed his response on May 3, 1989. It should be noted that Appellant has proceeded pro se except for the period August 3, 1987, to March 22, 1989, during which he was represented by legal counsel.

In its Motion, DER asserts that all of the material facts are undisputed and establish Appellant's violations of, and duty to take remedial actions under, the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq.; the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq.; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; and the rules and regulations promulgated thereunder. Therefore, DER is entitled to judgment as a matter of law.

Once again, DER misconceives the thrust of Appellant's appeal. He is not denying the storage and open burning of tires on his farm. He admits to these activities and, at least tacitly, acknowledges that they constituted violations of the APCA, SWMA, CSL and the rules and regulations of DER. What he objects to in this appeal is DER's mandates on the manner in which the remaining tires are to be disposed of and the time within which the disposal is to be accomplished. This objection charges DER with an abuse of discretion.

The skeleton record existing at this stage of the proceedings is insufficient to enable us to rule as a matter of law that DER did not abuse its discretion. Accordingly, we cannot enter summary judgment for DER and terminate the appeal. Since Appellant obviously concedes the violations, however, we can enter partial summary judgment on that issue.

ORDER

AND NOW, this 11th day of October, 1989, it is ordered as follows:

1. The Motion for Summary Judgment, filed by DER on March 14, 1989, is granted to the extent that it concerns Appellant's violations of the APCA, SWMA, CSL and rules and regulations adopted thereunder, but is denied as to all other issues.

2. At the hearing on the merits, Appellant's evidence shall be limited to the issue of whether or not DER abused its discretion when it set the manner and time limits for disposing of the remaining tires on Appellant's property.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: October 11, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Norman G. Matlock, Esq.
Eastern Region
For Appellant:
Samuel B. King, Esq.
Willow Street, PA

Courtesy copy:
Kenneth R. Covelens, Esq.
Intercourse, PA

sb

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

M. DIANE SMITH
SECRETARY TO THE BOA

ROBERT D. and ELIZABETH CROWLEY	:	
	:	
V.	:	EHB Docket No. 88-221-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 11, 1989

OPINION AND ORDER
SUR
AMENDED MOTION FOR SUMMARY JUDGMENT

Synopsis

Summary judgment is entered in favor of DER when it appears from the stipulated facts that the Appellants waived the 120-day time period for DER's action on an Official Plan Revision under 25 Pa. Code §71.16 (c) and (d).

OPINION

Following an Opinion and Order issued by the Board on January 9, 1989, denying Motions for Summary Judgment filed by both parties, the parties entered into a Stipulation and filed it with the Board on April 21, 1989. On the same date, the Department of Environmental Resources (DER) filed an Amended Motion for Summary Judgment, supported by an affidavit and legal memorandum. Robert D. and Elizabeth Crowley (Appellants) filed a response and supporting brief in opposition to DER's Amended Motion on May 10, 1989.

The threshold legal issue is whether an Official Plan Revision of Liberty Township, Adams County, pertaining to the Middle Creek Conference and Retreat Center, was deemed approved under 25 Pa. Code §71.16(d) because of DER's failure to take appropriate action within 120 days. The Board was

unable to resolve this legal issue, as discussed in its previous Opinion and Order, because of the absence of certain necessary facts. The Stipulation subsequently filed narrows the knowledge gap to the point where we are now able to proceed.

Paragraph 4 of the Stipulation states that the Official Plan Revision for Liberty Township was "submitted" to DER on November 4, 1986. If the quoted word is used by the parties to mean that DER "received" the document on that date, Walsh v. Tucker, 8 Pa. Cmwlth. 181, 302 A.2d. 522 (1973), affirmed, 454 Pa. 175, 312 A.2d 11 (1973), then DER's initial response on March 10, 1987, was beyond the 120-day period allowed for DER's action and the Liberty Township Official Plan Revision would be deemed approved. Subsequent actions by Appellants change this result, however.

DER's March 10, 1987, letter advised Appellants that (1) proof of adoption by Freedom Township needed to be submitted, (2) comments of the Adams County Planning Commission needed to be submitted, and (3) the 120-day review period would not commence until these submissions were made. Paragraph 13 of the Stipulation makes clear that the development plan for the Middle Creek Conference and Retreat Center cannot be segmented between the two municipalities. That being the case, DER's insistence upon proof of adoption by Freedom Township before acting upon Liberty Township's revision was entirely proper. If it had been communicated to Appellants within the 120-day period, it would have been effectual to toll the running of that period.

Even though the communication was not timely, Appellants voiced no objection to obtaining and submitting the additional material. According to paragraph 11 of the Stipulation, Appellants' engineer repeatedly advised DER of Appellants' efforts to obtain Freedom Township's approval and requested DER not to disapprove Liberty Township's Revision in the meantime. These actions

are completely inconsistent with any intent to hold DER to the precise time limits set forth in the regulations (see the cases cited on this point in our previous Opinion and Order) and constitute an after-the-fact waiver of those time limits. This vitiates the deemed approval of the Liberty Township Revision that otherwise would prevail.

Since the development plan is an integrated plan that cannot be segmented along township lines and since Appellants, following a year of diligent efforts, still had not obtained Freedom Township's approval, DER was fully justified in disapproving the Liberty Township Revision.

Since no disputes exist as to any material facts and DER is entitled to judgment as a matter of law, summary judgment may properly be entered in favor of DER: Pa. R.C.P. No. 1035(b).

ORDER

AND NOW, this 11th day of October, 1989, it is ordered as follows:

1. The Amended Motion for Summary Judgment, filed by DER on April 21, 1989, is granted.

2. Summary judgment is entered in favor of DER and the appeal of Robert D. and Elizabeth Crowley is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: October 11, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
John R. McKinstry, Esq.
Central Region
For Appellant:
Clayton R. Wilcox, Esq.
Gettysburg, PA

sb

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

M. DIANE SMIT
SECRETARY TO THE B

WILLARD M. CLINE	:	**EHB Docket No. 88-491-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 16, 1989

OPINION AND ORDER SUR
MOTION TO DISMISS AS MOOT

Synopsis

An appeal of the Department of Environmental Resources' order to the operator of oil wells to submit bonds is dismissed as moot where the operator has satisfied the bonding requirements of the Oil and Gas Act, the Act of December 19, 1984, P.L. 1140, as amended, 58 P.S. §601.101 *et seq.* The Board can grant no relief regarding the operator's claims that it was the subject of discriminatory enforcement or that it is entitled to monetary damages as a result of the alleged discriminatory enforcement.

OPINION

This matter was initiated with the December 2, 1988, filing of a notice of appeal by Willard M. Cline, seeking the Board's review of a November 3, 1988, order of the Department of Environmental Resources (Department). The order, which was issued pursuant to the Oil and Gas Act, the Act of December 19, 1984, P.L. 1140, as amended, 58 P.S. §601.101 *et seq.* (the Oil and Gas Act), directed Cline to provide bonds for 33 wells in various locations in

McKean County or to cease operation of the wells and plug them. As grounds for his appeal, Cline contended, *inter alia*, that it was impossible to obtain a surety bond, that he did not have the cash available for a collateral bond, and that the order was discriminatory.

A petition for supersedeas was filed with the notice of appeal, and the Board, by order dated December 9, 1988, denied the petition for failure to conform to the requirements of 25 Pa.Code §21.77. The Board's order gave Cline leave to refile the petition, and another petition for supersedeas was filed on January 5, 1989. The parties advised the Board in a January 11, 1989, telephone conference call that the scheduling of a supersedeas hearing would be unnecessary.

On March 20, 1989, the Department filed a motion to dismiss Cline's appeal as moot, since Cline had provided a fee in lieu of bond and, thus, had satisfied the requirements of the Department's November 3, 1988, order.[1] The Department also alleged that the order would have no collateral effect, since the Oil and Gas Act did not mandate the issuance of a civil penalty in circumstances such as Cline's, nor could the issuance of the order form the basis for future permit denials under the Oil and Gas Act. Finally, the Department argued that the Board could not grant Cline any relief with respect to his claims of discriminatory enforcement and his request for award of damages.

Cline responded to the Department's motion on April 10, 1989, contending that his appeal was not moot because the issue of discriminatory enforcement was outstanding.

---

[1] Subsequent to filing the motion to dismiss, the Department filed a motion for stay and protective order, which motion was granted by the Board's order of March 27, 1989.

An appeal before the Board becomes moot when an event occurs during the pendency of the appeal which deprives the Board of the ability to provide effective relief.[2] Swatara Township and the Swatara Township Authority et al. v. DER and the Harrisburg Sewerage Authority, 1988 EHB 333, and Borough of Dickson City v. DER, EHB Docket No. 88-510-W (Opinion issued August 15, 1989). Under the circumstances presented herein, we must hold that this matter is moot because there is no effective relief that we can grant to Cline.

Cline's only objection to the Department's motion is that the matter is not moot because the Board must determine whether he was the victim of discriminatory enforcement. This argument of discriminatory enforcement is fleshed out in Cline's pre-hearing memorandum, and we will quote it here to aid in analyzing this issue:

> 1. Statement of Facts.
>
> On November 3, 1988, an Order, a copy of which is attached to the Memorandum was filed against Willard M. Cline. On November 30, 1988 Willard M. Cline appealed from said Order, a copy of the Notice of Appeal being attached hereto, indicating, among other things, that the order was discriminatory against Willard M. Cline. The facts upon which the claim of discrimination is based are as follows:
>
> (1) There is believed to be several hundred violations of said Act (Oil and Gas Act, Act of 1984, P.L. 1140), which are similar to Appellant Cline.
>
> (2) Appellant Cline has been very vocal as the legislative chairman of the Pennsylvania Independent Petroleum Producers (PIPP) against this Act, as has Nancy Cubbon, the secretary of PIPP.

---

[2] There are exceptions to the mootness doctrine, Bethayres Reclamation Corporation v. DER and Lower Moreland Township, 1988 EHB 220, but because Cline does not argue that he falls within any of the exceptions, we will not address them in this opinion.

(3) Attached to this pre-hearing memorandum are copies of Interrogatories and Requests for Production filed against DER for the purpose of determining the exact numbers upon which these facts are based.

Because of the present state of this matter, the only thing to be brought before the Board is a hearing to determine whether or not there has been discriminatory application of this Act against Appellant Cline, and whether or not this case should be dismissed against Appellant Cline, and damages be awarded to him as a result of this discriminatory application of this Act by DER.

(emphasis added)

In essence, Cline is suggesting that evidence relating to the Department's actions regarding similar violations of the Oil and Gas Act by other operators will be presented to substantiate his claim of discriminatory enforcement.

Even assuming that Cline would satisfy his heavy burden in demonstrating that he was wrongfully singled out for enforcement action by the Department,[3] we do not know what relief could be granted to Cline. Section 215 of the Oil and Gas Act requires that a bond be posted for any well that continues to be operated after April 18, 1985, the effective date of the Oil and Gas Act. Even if we were to find that the Department engaged in discrimitory enforcement against Cline, there is no relief we could grant. We could not very well reverse the Department's order, for there is no question that Cline did not provide the required bond and, therefore, the Department's order was justified under the Oil and Gas Act. And, if we were to find that the Department had engaged in discriminatory enforcement, we could not award

---

[3] The Commonwealth Court noted the difficulty of substantiating such a claim, especially at the outset of an enforcement program, in Medusa Corporation v. Commonwealth, 51 Pa.Cmwlth 520, 415 A.2d 105 (1980). The practical difficulties of bringing a discriminatory enforcement claim before the Board were discussed in Sechan Limestone Industries v. DER et al., 1986 EHB 134, 167-168.

damages to Cline, for we have no such authority under the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. ___, No. 94, 35 P.S. §7511 *et seq.*, or any other related statute. Wray Vernon Carey v. DER and Zappone Construction Company, 1987 EHB 971.

O R D E R

AND NOW, this 16th day of October , 1989, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of Willard Cline is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: October 16, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Zelda Curtiss, Esq.
Western Region
For Appellant:
Richard W. Mutzabaugh, Esq.
MUTZABAUGH, MUTZABAUGH, SAUNDERS & MATTE
Bradford, PA

bl

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

M. DIANE SMITH
SECRETARY TO THE BOARD

NEWLIN CORPORATION, SOMERSET OF VIRGINIA INCORPORATED, DAVID EHRLICH and RICHARD WINN	:	**EHB Docket No. 83-237-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 18, 1989

ADJUDICATION

By Maxine Woelfling, Chairman

Synopsis

An appeal of an order issued pursuant to the Clean Streams Law and the Solid Waste Management Act is sustained in part and dismissed in part. The Board finds that a joint venture held a proprietary interest in a landfill at the time of issuance of the order and was, therefore, liable under §316 of the Clean Streams Law for surface and groundwater contamination emanating from the landfill. Two of the joint venturers were, consequently, held liable under §316 of the Clean Streams Law. The Board rules that the Department failed to establish that the joint venture, and, therefore, the joint venturers, unlawfully allowed violations of the Solid Waste Management Act at a landfill leased to another entity and that, as a result, the issuance of the order under the Solid Waste Management Act was an abuse of discretion. The Board refuses to hold the corporate officers of one of the joint venturers individually liable under either a piercing the corporate veil theory or an actual participation theory.

INTRODUCTION

This matter was initiated with the October 21, 1983, filing of a notice of appeal by Strasburg Landfill, Strasburg Associates, Strasburg Landfill Associates, Newlin Corporation (Newlin), Somerset Strippers of Virginia, Inc. (Somerset), Eco-Waste, Inc., David Ehrlich, Earle Hart, and Richard Winn seeking review of a September 21, 1983, order from the Department of Environmental Resources (Department). The order, which was issued pursuant to §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. 510-17; the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (the Clean Streams Law); and the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (the Solid Waste Management Act), concerned alleged surface and groundwater contamination resulting from solid waste disposal at the Strasburg Landfill in Newlin Township, Chester County.[1] It directed the parties to perform groundwater monitoring, undertake a hydrogeologic study to assess the extent of soil and groundwater contamination, initiate remedial activities, and to remove and treat leachate generated by the landfill.

The matter remained inactive until May 14, 1986, when the Board issued a rule to show cause why the appeal should not be dismissed for inactivity, or, in the alternative, mootness. Newlin, Somerset, Ehrlich and Winn responded to the rule, and the Board issued further pre-hearing orders. The

---

[1] The Strasburg Landfill was the subject of two previous appeals before the Board - Newlin Township v. DER, 1979 EHB 33 (appeal of the Department's approval of agreements between Strasburg Landfill Associates and Strasburg Associates), rev'd on appeal, Strasburg Associates v. Newlin Township, 52 Pa.Cmwlth 514, 415 A.2d 1014 (1980), and Strasburg Associates v. DER, 1984 EHB 423 (appeal of an order suspending Strasburg Associates' solid waste permit and a civil penalty assessment).

Board attempted again to ascertain the intentions of Strasburg Landfill,[2] Strasburg Landfill Associates, Strasburg Associates, Eco-Waste, Inc., and Earle Hart to proceed with their appeal by directing them in a February 2, 1987, order to advise the Board of their intentions by March 2, 1987. When copies of the order were returned to the Board stamped "Moved, Left no Address," the Board, by order dated March 19, 1987, dismissed the appeals of these five parties for lack of prosecution.

On April 7, 1988, Newlin, Somerset, Ehrlich, and Winn filed a motion for summary judgment, contending that as of April 14, 1986, they no longer had any interest in Strasburg Landfill Associates, having conveyed their 50% interest in the joint venture to M. H. Properties, Inc. Ehrlich and Winn maintained that they could not be held personally liable for abatement of pollution, since neither they nor the corporations were ever listed as a permittee and they were not the current landowners. In defense of this claim, Ehrlich and Winn contended there was no positive proof of their intentional neglect or misconduct, no evidence to support piercing the corporate veil, and no evidence establishing that their sale of their interests in Strasburg Landfill Associates was not a valid and binding transaction.

The Department responded to the motion on May 12, 1988, arguing, *inter alia*, that Newlin and Somerset were liable as landowners under the statutes enumerated in the order, that the Board's review was limited to the facts as existed at the time of the order's issuance, that the transfer of interest by Newlin and Somerset was fraudulent, for inadequate consideration and made only to avoid liability as property owners, and that there was ample evidence to pierce the corporate veil of Newlin and Somerset.

---

[2] We have not been provided with any details concerning this particular appellant. It may be that it was simply the name under which Strasburg Associates operated.

The Board denied the motion in an October 21, 1988, opinion and order (1988 EHB 976), citing the existence of disputed material facts concerning the chain of title, role of the corporate officers, and use of the corporate form.

A hearing on the merits was held on November 22, 1988. The parties stipulated to the Department's findings of fact in Paragraphs 1-3, 5, 6, and 8-16 of the September 21, 1983, order and the relief mandated in Paragraphs A-F of the order and agreed that the issue upon which the appeal turned was the liability of Newlin, Somerset, Ehrlich, and Winn (N.T. 10).

The Department's post-hearing brief was filed on January 9, 1989, and on February 1, 1989, Appellants filed a motion to strike or quash the Department's post-hearing brief as a result of numerous, allegedly improper, references to matters outside the record, including a deposition of Richard Winn and ancillary proceedings in Pennsylvania and New Jersey. The Department responded to the motion on February 21, 1989, and the Board granted Appellants' motion in an April 25, 1989, opinion and order striking all portions of the Department's brief dealing with matters outside the record in this proceeding.[3] Appellants thereafter filed their post-hearing brief on May 19, 1989.

Appellants filed a petition for supersedeas on August 3, 1989, and a hearing on the petition was held on August 9, 1989. The petition was denied by Board order dated August 11, 1989.

The Department argued in its post-hearing brief that Appellants bore the burden of proof under 25 Pa.Code §21.101(d) and (e) in light of their stipulation to the findings of the order. Regarding the corporations, the Department contended that Newlin and Somerset were liable as landowners/land

---

[3] The Department made no argument regarding the possible *res judicata* effect of findings in those ancillary proceedings.

occupiers under §316 of the Clean Streams Law, and that because Newlin and Somerset permitted the disposal of solid waste at the Strasburg Landfill, they were, therefore, liable under the Solid Waste Management Act. The Department claimed that Winn and Ehrlich were personally liable as officers, shareholders, and directors of Newlin Corporation because of gross non-feasance and fraudulent use of the corporate form.

The Appellants argued that the Department had the burden of proof under 25 Pa.Code §21.101(b)(3) and had failed to meet that burden. They also contended that the corporations could not be held liable under either the Clean Streams Law or the Solid Waste Management Act and that Ehrlich and Winn could not be held individually liable under either a participation theory or a piercing the corporate veil theory.

We will deem the parties to have abandoned all arguments not raised in their post-hearing briefs. Lucky Strike Coal Company and Louis J. Beltrami v. Department of Environmental Resources, ___ Pa.Cmwlth ___, 546 A.2d 447 (1988).

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

FINDINGS OF FACT

1. Appellants are Newlin, Somerset, and David Ehrlich and Richard Winn (Ehrlich Dep. at 9;[4] N.T. 91-93).

2. The Department is the agency of the Commonwealth empowered to administer and enforce the provisions of §1917-A of the Administrative Code, the Clean Streams Law, the Solid Waste Management Act, and the rules and regulations promulgated thereunder.

---

[4] The Ehrlich deposition was admitted into evidence as a stipulated exhibit (N.T. 12).

3. During the time relevant to this proceeding, Strasburg Associates was a joint venture of two Pennsylvania limited partnerships, Strasburg Associates I and Strasburg Associates II, both of which had Earle Hart as the sole general partner (Parties' stipulation;[5] Ex. A-2).

4. Newlin is a Pennsylvania business corporation formed by Ehrlich and Winn as a closely held, Subchapter S corporation in April, 1978. Ehrlich and Winn own all of the stock equally. Ehrlich serves as Secretary and Winn as President (N.T. 90, 92; Ehrlich Dep. at 9; Ex. A-7).

5. Somerset is a Virginia corporation named Somerset of Virginia, Inc., authorized to do business in Pennsylvania under the name Somerset Strippers of Virginia, Inc. (Ex. S-1B).

6. Eco-Waste, Inc. is a Pennsylvania business corporation owned by Earle Hart and Marion Hart and operated as a Subchapter S corporation (Ex. S-1B).

7. On September 15, 1975, the Department issued to Strasburg Associates Solid Waste Management Permit No. 101038 which authorized the disposal of municipal waste at a landfill in Newlin Township, Chester County, known as the Strasburg Landfill (Nov. 1988 Stip.).

8. The Strasburg Landfill was operated by Strasburg Associates until May 11, 1983, when the Department suspended Solid Waste Permit No. 101038 (Nov. 1988 Stip.).

9. In 1978, Earle Hart, who owned the Strasburg Landfill through his ownership of Strasburg Associates, was seeking investors to help alleviate his poor financial condition (N.T. 15, 17-18).

10. Through the efforts of Earle Hart, a joint venture known as Strasburg Landfill Associates, was formed on May 23, 1978, by Newlin,

---

[5] Hereinafter, "Nov. 1988 Stip."

Somerset, and Eco-Waste, Inc. (N.T. 15; Ex. 1 to Ehrlich Dep.).

11. The Joint Venture Agreement (JVA) stated the purpose of Strasburg Landfill Associates to be the acquiring, owning, improving and operating of a sanitary landfill on the site of the Strasburg Landfill; the JVA also contained a clause authorizing Strasburg Landfill Associates to lease the landfill property to a lessee who would operate the landfill (Ex. 1 to Ehrlich Dep. at p.3, Para. 3).

12. Newlin and Somerset each had a 25% interest in Strasburg Landfill Associates, while Eco-Waste, Inc. held a 50% interest (Ex. 1 to Ehrlich Dep. at p.5, Para. 7).

13. A comprehensive financing arranagement for the Strasburg Landfill was consummated on October 11, 1978. The essential elements of the transaction were the following:

> (a) A Loan Agreement among Strasburg Landfill Associates, Chester County Industrial Development Authority (CCIDA), and American Bank and Trust Co. of Pennsylvania (American), whereby American agreed to lend to CCIDA the sum of $883,000 to be secured in various ways (Ex. S-4);
>
> (b) a Deed from Strasburg Associates I and Strasburg Associates II conveying the Strasburg Landfill real estate to CCIDA for $2,700,000 (Ex. S-6);
>
> (c) a Promissory Note of CCIDA payable to American in the full amount of $883,000 and secured by a first mortgage lien on the Strasburg Landfill real estate (Ex. S-5);
>
> (d) an Installment Sales Agreement between CCIDA and Strasburg Landfill Associates, providing for the installment sale of the Strasburg Landfill real estate by CCIDA to Strasburg Landfill Associates for a sale price of $883,000 (Exs. S-2 and S-3);
>
> (e) a Lease of a portion of the Strasburg Landfill real estate by Strasburg Landfill Associates to Strasburg Associates for the purpose of operating the landfill pursuant to the permit from DER (Ex. A-2); and
>
> (f) an Employment Agreement between Strasburg Associates and Ehrlich employing Ehrlich as Supervisor of Landfill Operations (Ex. C-1).

14. The financing arrangement was structured in such a way that the fixed rentals paid by Strasburg Associates would be at least sufficient to enable Strasburg Landfill Associates to make the installment payments to CCIDA and to enable CCIDA to make the mortgage payments to American. American received assignments of the rights and benefits accruing under the Installment Sales Agreement and the Lease (Exs. A-2, S-2, S-3, S-4 and S-5).

15. As part of the overall financing arrangement, Strasburg Landfill Associates also issued a promissory note to Strasburg Associates I and Strasburg Associates II,[6] secured by a second mortgage lien on the Strasburg Landfill real estate granted by CCIDA (Ex. S-2).

16. The financing arrangement contemplated that, after the loan from American had been paid in full, the Strasburg Landfill real estate would be conveyed by CCIDA to Strasburg Landfill Associates, subject to the second mortgage lien. In the meantime, Strasburg Landfill Associates would have possession of the real estate and Strasburg Associates would continue to operate the landfill with Ehrlich as Supervisor of Operations (Exs. A-2, C-1, S-2, S-3, S-4 and S-5).

17. Strasburg Associates operated the Strasburg Landfill as agreed in the Lease with Strasburg Landfill Associates (N.T. 45, 76).

18. Although Strasburg Associates had nominal control of the landfill, in that it was the lessee, no real control or financial benefit inured to Earle Hart or Strasburg Associates; rental under the Lease included all of Strasburg Landfill Associates' fixed debt, real estate taxes, public assessments, insurance, and utility costs, as well as an additional rental payment of 75% of all net operating revenues (Ex. A-2).

---

[6] The amount was not introduced as evidence. It might have been for that portion of the $2,700,000 purchase price for the real estate not covered by the $883,000 loan from American.

19. To the extent that Strasburg Associates received any profit from the Lease, it was to be set off against Eco-Waste Inc.'s share of profits in Strasburg Landfill Associates (Ex. S-1B).

20. No evidence was presented at the hearing on the merits as to whether all payments provided for in the Installment Sales Agreement were completed as of September 21, 1983.

21. The Department issued an order on September 21, 1983, to Strasburg Associates, Strasburg Landfill Associates, Eco-Waste, Inc., Earle Hart, Newlin, Somerset, Ehrlich, and Winn directing them to take action to eliminate soil, groundwater, and surface water pollution and to remove leachate from the Strasburg Landfill. The order also required groundwater and soil studies and a pollution abatement program (Notice of Appeal).

22. The Strasburg Landfill generated and is continuing to generate leachate, a contaminated liquid produced by the interaction of precipitation, surface water and groundwater with the solid waste disposed of at the landfill (Nov. 1988 Stip.).

23. Department sampling on August 1, 1983, and September 6, 1983, at a groundwater monitoring well downgradient of the landfill and near a tributary to the West Branch of the Brandywine Creek indicated that leachate from the landfill had penetrated to groundwater, resulting in contamination of the groundwater with volatile organic compounds, e.g. chloromethane, 1,2-dichloropropane, chloroethene, chloroethane, trichlorofluoromethane, dichloromethane, 1,1-dichloroethene, 1,1-dichloroethane, 1,2-dicholoroethene, 1,2-dichloroethane, 1,1,1-trichloroethane, trichloroethene, benzene, tetrachloroethene, and toluene at concentrations varying between 1 part per billion and 65 parts per billion (Nov. 1988 Stip.).

24. Sampling conducted by the Department on September 6, 1983, indicated that leachate contamination had spread to and had entered the tributary to the West Branch of Brandywine Creek (Nov. 1988 Stip.).

25. None of the parties to whom the Department had issued the September 21, 1983, order possessed a permit authorizing the discharge of leachate from the Strasburg Landfill into the waters of the Commonwealth (Nov. 1988 Stip.).

26. The original draft of the JVA provided for Ehrlich to serve as the manager of Strasburg Landfill Associates; his compensation for serving as manager was to be four percent of gross operating revenues, in addition to his distributive share of the joint venture's earnings and profits accruing to Newlin (Ex. S-1-B).

27. Although under the JVA Strasburg Landfill Associates was to own and operate the landfill with Ehrlich as manager, the sale-leaseback arrangement changed that concept (N.T. 76-77).

28. Despite the fact that the sale-leaseback arrangement provided for Ehrlich's employment by Strasburg Associates as Supervisor of Landfill Operations, Ehrlich never managed the landfill (N.T. 77).

29. Ehrlich's October 11, 1978, Employment Agreement with Strasburg Associates was terminated in March or April of 1979 by mutual agreement of Ehrlich and Hart (N.T. 82-83).

30. Ehrlich visited the landfill office during this period on perhaps three occasions; twice prior to the site opening and once since 1979. At no time did he observe the physical condition of the site (N.T. 29-30; Ehrlich Dep. at 54).

31. Pursuant to his status as manager of Strasburg Landfill Associates, Ehrlich solicited customers and reviewed operators' statements,

revenue receipts, and disbursements submitted by Strasburg Associates. No disbursement or distribution was made during the ten months of his employment (Ehrlich Dep. at 18; N.T. 84).

32. Ehrlich received $12-13,000 as compensation for services rendered (Ehrlich Dep. at 29).

33. There was no document formally terminating Ehrlich's management responsibilities under the JVA (N.T. 40).

34. Newlin was formed with an initial investment of $400,000 (N.T. 91-93; Ehrlich Dep. at 9).

35. Newlin was formed for the purpose of making real estate investments and operating a sanitary landfill (Ehrlich Dep. at 12; Ex. A-2).

36. Newlin maintained corporate books and periodically held corporate meetings (Ehrlich Dep. at 11).

37. A distribution to Newlin's stockholders was made when Newlin received a $25,000 payment from Strasburg Landfill Associates as a result of Strasburg Associates making a revenue payment under the lease; no other distributions have occurred (N.T. 66, 68, 135; Ex. A-2).

38. Winn and Ehrlich put approximately $1,000,000 into Newlin since the issuance of the Department's order (N.T. 93-94).

39. This money was used to fund the compliance measures mandated by the Department's order (N.T. 131-133).

40. Although Winn gave money to Newlin by means of a check payable to Newlin, there was no formal note evidencing an indebtedness (N.T. 93-96).

41. Ehrlich was a 35% stockholder and secretary of Environmental Management Services (EMS), which provided administrative services to the landfill from the time it began operations until May, 1982 (Ehrlich Dep. at 41-42).

42. EMS wrote checks on the Strasburg Associates account (Ehrlich Dep. at 45). Specifically, Ehrlich's signature was authorized to appear on these checks (Ehrlich Dep. at 46).

43. Ehrlich's attempts in 1982 to reach Hart and inquire about revenue payments that were not being made under the Lease were unsuccessful (N.T. 35, 36, 46).

44. Ehrlich did not take any steps toward firing Earle Hart when it became apparent that there were problems with the landfill because Hart did not work for Newlin or Strasburg Landfill Associates and, therefore, Ehrlich did not have the authority to fire him (N.T. 41-42).

45. Winn recalls being at the landfill site only once in 1978 prior to its opening (N.T. 91).

46. Winn was not concerned when Strasburg Landfill Associates was not receiving payments under the Lease from Strasburg Associates, since Strasburg Associates was making the loan payments to American and there were a lot of expenses involved in pursuing the permit expansion, the main purpose of the JVA, which otherwise consumed the profits from the landfill (N.T. 121, 128).

47. Winn became alarmed in 1983 when he received a letter from a Richard Romejko advising Winn that he had run out of money, that Hart was nowhere to be found, and that leachate was building up at the landfill and about to overflow (N.T. 109-110, 123).

48. Winn attempted to contact Hart by telegram after receiving the September, 1983 order (N.T. 109-110).

49. When Hart failed to respond to the telegram, Winn unsuccessfully attempted to telephone Hart at the landfill and at his office (N.T. 110-111).

50. Winn then went to Hart's home where he found Hart hiding behind a couch; a meeting with Hart in counsel's office was arranged for that same afternoon, but Hart failed to appear at the meeting (N.T. 110-111).

DISCUSSION

Generally, when the Department orders a party to undertake affirmative action to abate pollution, it has the burden of proof to establish by a preponderance of evidence that its order was not an abuse of discretion. 25 Pa.Code §21.101(b)(3) and Dale A. Torbert et al. v. DER, EHB Docket Nos. 86-217-M and 86-218-M (Adjudication issued July 27, 1989). However, because the parties have stipulated to the provisions of the September 21, 1983, order which establish that leachate from the landfill is contaminating surface waters and groundwater, the Department urges us to apply 25 Pa.Code §§21.101(d) and (e) and shift the burden of proof to the Appellants.

The Department's argument is flawed primarily because it is contrary to the intent of the rule. These two subsections of 25 Pa.Code §21.101 were intended to address situations where environmental damage was the critical issue in an appeal and the party allegedly causing such damage was, for whatever reason, in possession or should have been in possession of the facts relating to the environmental damage. However, as acknowledged by all parties, environmental damage is not at issue in this appeal. Thus, applying this rule in the manner urged by the Department would result in shifting the burden of proof by reason of an issue which is not even relevant to this appeal. This is both illogical and unfair.

Having disposed of this issue, we turn next to the substantive issues in the appeal. The threshold issue for determination is whether Newlin and Somerset, as participants in the JVA, may be held liable for the activities of Strasburg Landfill Associates. If so, we must then determine whether Newlin

and Somerset, through their participation in the Strasburg Landfill Associates, are liable under either the Clean Streams Law or the Solid Waste Management Act for the environmental degradation emanating from the Strasburg Landfill. And, finally, we must resolve whether Winn and Ehrlich, as corporate officers of Newlin, may be held liable under either statute by reason of their participation in the violations or their fraudulent use of the corporate form (i.e. the piercing the corporate veil theory).

At the outset, we must determine the rights and liabilities of Newlin and Somerset as participants in the joint venture of Strasburg Landfill Associates. There is not a great deal of law[7] in Pennsylvania on joint ventures;[8] what law exists is concisely summarized in Snellbaker v. Herrmann, 315 Pa.Super. 520, 526-527, 462 A.2d 713, 716 (1983):

> A joint venture is not a status created or imposed by law; it is a relationship voluntarily assumed and arising wholly from contract. *2 Williston on Contracts 557, §318A (3rd ed.1959).* Whether persons have engaged in it must depend primarily upon their agreement and the construction they have placed upon it. "To constitute a joint venture certain factors are essential: (1) each party to the venture must make a contribution, not necessarily of capital, but by way of services, skill, knowledge, materials or money; (2) profits must be shared among the parties; (3) there must be a 'joint proprietary interest and right of mutual control over the subject matter' of the enterprise; (4) usually, there is a single business transaction rather than a general and continuous transaction." *McRoberts v. Phelps*, 391 Pa. 591, 599, 138 A.2d 439, 443-444 (1958). A joint venture partakes in many ways of a partnership, the principal difference being that it usually, though not necessarily, applies to a single transaction instead of being formed

---

[7] Neither party has directed us to any law on the subject, and the Department has merely broadly asserted that the joint venturers are liable.

[8] They are also referred to as "joint adventures."

> for the conduct of a continuing business. *West v. Peoples First National Bank & Trust Co.*, 378 Pa. 275, 281-181, 106 A.2d 427, 431 (1954).
>
> (emphasis in original)

It has been held that while a joint venture is not identical to a partnership, they are so similar that the rights of the parties to a joint venture are governed by practically the same rules as govern partnerships, Fraim v. Lapp, 63 Lanc.Rev. 337 (1972). Since §327 of the Uniform Partnership Act, 59 Pa. C.S.A. §327(2), provides that a partner is liable jointly for the obligations of the partnership, a joint venturer is liable jointly for the obligations of the joint venture.

The definitional sections of the two statutes at issue in this appeal broadly define "person" to include a "partnership" under §1 of the Clean Streams Law and a "partnership...co-operative enterprise...or any other legal entity whatsoever which is recognized by law as the subject of rights and duties" in the case of §103 of the Solid Waste Management Act. Since we have analogized the joint venture to a partnership and partners are liable for the obligations of the partnership, we conclude that the individual joint venturers are liable for the joint venture's violations of the Clean Streams Law and the Solid Waste Management Act.

The Department argues that Strasburg Landfill Associates, as a landowner/occupier, must be held accountable for the conditions created by its lessee, Strasburg Associates, during the course of its operation of the Strasburg Landfill. Appellants deny that Strasburg Landfill Associates was a landowner or occupier of the Strasburg Landfill, as it never had a proprietary interest in the landfill. They further assert that at the time of the order's issuance CCIDA held title to the landfill pursuant to the Installment Sales Agreement.

Section 316 of the Clean Streams Law provides in relevant part that:

> Whenever the Department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth, the Department may order the landowner or occupier to correct the condition in a manner satisfactory to the Department.... For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights.

We have recently interpreted the nature of the interest in land sufficient to support an order under §316 of the Clean Streams Law in Western Pennsylvania Water Co. v. DER, 1988 EHB 715, aff'd ___ Pa.Cmwlth ___, 560 A.2d 905 (1989), wherein we held that an easement for the purpose of laying a water pipe line was an interest in land sufficient to bring the water company within the scope of Section 316 of the Clean Streams Law. There, the water company, in the course of laying a water pipe line, encountered oil-contaminated soil resulting from the improper plugging of an oil well. The Board held it responsible for clean-up of the site. We noted that the Department's exercise of its authority under §316 of the Clean Streams Law depended little upon the owner or occupier's responsibility for causing the condition giving rise to the pollution. National Wood Preservers, Inc. v. DER, 489 Pa. 221, 414 A.2d 27 (1980), appeal dismissed, 449 U.S. 803 (1980). Like the water company, Strasburg Landfill Associates had a sufficient proprietary interest in the Strasburg Landfill to subject it to §316 of the Clean Streams Law.

Newlin and Somerset place a great deal of emphasis on the Installment Sales Agreement with CCIDA to insulate Strasburg Landfill Associates from any liability under §316 of the Clean Streams Law. Although CCIDA acquired title to the Strasburg Landfill property under the Installment Sales Agreement, Strasburg Landfill Associates took possession of the property upon execution of the Installment Sales Agreement (Finding of Fact 16). Furthermore, Stras-

burg Landfill Associates then leased the Strasburg Landfill property to Strasburg Associates. Obviously, Strasburg Landfill Associates had some sort of proprietary interest in the Strasburg Landfill by virtue of its taking possession of the landfill property and its leasing of the property to Strasburg Associates.

Our conclusion that Strasburg Landfill Associates had a proprietary interest in the Strasburg Landfill property is buttressed by the Commonwealth Court's decision in Hahnemann Medical College and Hospital of Philadelphia v. Commonwealth, 52 Pa.Cmwlth 558, 416 A.2d 604 (1980). While the central issue in the Hahnemann decision was whether a transaction between Hahnemann and the Pennsylvania Higher Education Facilities Authority (PHEFA) was subject to realty transfer taxes under the Fiscal Code, the Commonwealth Court's holding turned upon the nature of the transaction between Hahnemann and PHEFA:

> A mortgage is in essence a defeasible deed, requiring the grantee to reconvey the property held as security to the grantor upon satisfaction of the underlying debt or the fulfillment of established conditions. *Payne's Administrator v. Patterson's Administrator*, 77 Pa. 134, 137 (1874). The stipulation of facts, now our own findings of fact, reveal that the transaction between Hahnemann and PHEFA falls squarely within this concept. Simply put, PHEFA provided funds to Hahnemann, in return for which Hahnemann conveyed title to certain property to PHEFA. The deed given by Hahnemann to PHEFA expressly incorporated by reference and made the deed subject to a lease between Hahnemann and PHEFA. The lease in turn explicitly requires PHEFA to reconvey the properties to Hahnemann upon repayment by Hahnemann of the monies loaned to it by PHEFA. The fact that the defeasance--the requirement of reconveyance upon satisfaction of the debt--is set forth in a document incorporated by reference into the deed does not alter the fact that the transaction between Hahnemann and PHEFA was in form and in substance a mortgage. *Pearce v. Wilson*, 111 Pa. 14, 21-22, 2 A. 99, 101-02 (1885).

> The Commonwealth argues, however, that the deed on its face is absolute and cannot now be converted into a mortgage. Our discussion above evidences our disagreement with this contention. Nevertheless, even if the Commonwealth's contention that the deed is absolute on its face is accepted, the transaction between Hahnemann and PHEFA would still be a mortgage. A deed absolute on its face may be transformed into a mortgage by a defeasance which is in writing, signed and delivered by the grantee in the deed to the grantor. Act of June 8, 1881, P.L. 84, §1, as amended, 21 P.S. §951. See also *Ladner, supra* at §12.11. The lease existing between Hahnemann and PHEFA providing, *inter alia*, for defeasance of the property in question upon repayment of monies, satisfies the Act of June 8, 1881, thus rendering the deed a mortgage.
>
> 416 A.2d at 607 (footnotes omitted)

We see little difference between the CCIDA/Strasburg Landfill Associates transaction and the PHEFA/Hahnemann transaction. CCIDA, as we found in Finding of Fact 16, acquired title to the landfill property and held it until Strasburg Landfill Associates performed the covenants of the Installment Sales Agreement; this is, in essence a mortgage. While title to property is in a mortgagee (here, CCIDA) as between the mortgagee and the mortgagor, so far as is necessary to render the mortgage an effective security, as to all other persons, the mortgagor (here, Strasburg Landfill Associates) is to be regarded as the owner, P.L.E. Mortgages, §87 and Eastgate Enterprises, Inc. v. Bank and Trust Company of Old York Road, 345 A.2d 279, 236 Pa.Super. 503 (1975). Thus, Strasburg Landfill Associates was to be regarded as the owner of the Strasburg Landfill property at the time of the order's issuance and, therefore, issuance of the order pursuant to §316 of the Clean Streams Law was not an abuse of discretion. It follows then, as discussed *supra*, that Newlin and Somerset, as joint venturers in Strasburg Landfill Associates, were liable under §316 of the Clean Streams Law.

Liability of Newlin and Somerset Under the Solid Waste Management Act

The Department makes sweeping assertions that Newlin and Somerset are liable under the Solid Waste Management Act for Strasburg Landfill Associates' alleged violations of that statute at the Strasburg Landfill site. The Commonwealth Court recently considered a similar argument in Dep't of Environmental Resources v. O'Hara Sanitation Co., ___ Pa.Cmwlth ___, 562 A.2d 973, 976-977 (1989), wherein it stated that:

> Finally, DER argues that the O'Haras should be held responsible for violations of the Act that occurred on their property. We have concluded that the Act was not violated. Had we reached a different conclusion we would still affirm the Chancellor's order striking the O'Haras as defendants because DER relied only on the fact that the O'Haras owned the land at the time of the hearing. In doing so DER disregarded the requirements of the Act's provisions. DER offered no evidence that the O'Haras had any knowledge of the operations occurring on their land, that the operations did or may constitute dumping of solid waste or storage, treatment or processing of solid waste, or that the O'Haras had given OSC any permission to undertake such operations.
>
> (footnote omitted)

Applying the Commonwealth Court's reasoning to this appeal, Strasburg Landfill Associates' status as a landowner is not sufficient grounds to impose liability upon it for the violations which occurred at the Strasburg Landfill, as the Solid Waste Management Act contains no provision which is analagous to §316 of the Clean Streams Law. Evidence would have to be produced which established that Strasburg Landfill Associates was aware of the violations and actively condoned them. No such evidence was produced on the record here, and we cannot hold Strasburg Landfill Associates and, therefore, Newlin and Somerset, liable for violations of the Solid Waste Management Act at the Strasburg Landfill.

Individual Liability of Winn and Ehrlich

Generally, a corporate officer may be found liable for violations of the corporation under one of two theories--piercing of the corporate veil or participation by the officer in the wrongful act of the corporate entity. Wicks v. Milzoco Builders, Inc., 503 Pa 614, 470 A.2d 86 (1983). Under the participation theory, evidence of the corporate officer's actual participation in misconduct or intentional neglest must be presented. John E. Kaites v. Dep't of Environmental Resources, 108 Pa.Cmwlth 267, 529 A.2d 1148 (1987). A corporate officer will be found liable under the piercing the corporate veil theory if the finder of fact determines that the corporation is a "sham" which exists solely to avoid personal liability of the officers. In order to pierce the corporate veil under this theory, the Department must present evidence of the sort summarized in U.S. v. Pisani, 646 F.2d 83 (3d Cir. 1981) as:

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

The Department's post-hearing brief alleges that Newlin is the alter ego of Ehrlich and Winn, that Newlin is undercapitalized, that there was intermingling of Ehrlich and Winn's personal funds with those of Newlin without a note evidencing indebtedness, and that Newlin never paid a dividend. The Department also urges us to disregard the actual participation theory and apply a looser standard, inasmuch as the precedent in Kaites applies, the Department argues, only to matters arising under the Clean Streams Law and the Coal Refuse Disposal and Control Act.

The Department has sought to impose liability on Newlin pursuant to §316 of the Clean Streams Law. So, Ehrlich and Winn could only be held liable under that section. Section 316 of the Clean Streams Law imposes liability without fault on landowners and land occupiers; we are aware of no appellate court decisions regarding the liability of corporate officers under §316 where the corporation is liable as a property owner or occupier. This issue completely eludes the Department and is only lightly touched upon by Appellants Winn and Ehrlich, mainly in the context of the argument that since Strasburg Landfill Associates was not a landowner or occupier, Newlin was not, and, therefore, Winn and Ehrlich could not be, liable individually under §316. We do not believe that the General Assembly intended §316 to be so broad as to apply to individual corporate officers where the corporation was, solely as a landowner or occupier, the recipient of an order under §316 of the Clean Streams Law. We believe the appropriate standard to be applied in holding individual corporate officers personally liable under §316 of the Clean Streams Law is whether the corporation was a sham to avoid individual liability. Obviously, the participation theory of individual officer liability has no meaning where the statute otherwise imposes liability without fault. However, since the Department is also seeking to hold Winn and Ehrlich individually liable under the Solid Waste Management Act, our conclusions regarding liability under both theories are applicable to the Solid Waste Management Act and our conclusion regarding individual liability under the piercing the corporate veil theory is applicable to §316 of the Clean Streams Law.

Piercing the Corporate Veil

While Newlin's officers have admitted Newlin was formed solely to invest in land at the Strasburg site (N.T. 13), this does not in and of itself

imply Newlin was established to perpetrate a fraud or further an illegitimate corporate purpose. Limiting personal liability is a traditional reason for establishing corporate status and without proof of intent to avoid specific liability, there is no fraud, Zubik v. Zubik, 384 F.2d 267 at 270, n.2 (3rd Cir. 1967, cert. denied, 390 U.S. 988 (1968).

The Department implies that Ehrlich and Winn, by personally funding Newlin without any note formally evidencing indebtedness, have illegally intermingled personal and corporate funds. While the Department questioned Newlin's officers at length during deposition (Ehrlich Dep. at 11, 32-37) and at the hearing (N.T. 136, 128-133) regarding loans and methods of accounting employed by Newlin, the Department did not produce Newlin's accountant or its corporate records. The Department presented no evidence that the monies invested by Ehrlich and Winn were to be considered loans. The only evidence presented indicates these monies were capitalization for Newlin. Winn testified that, "It was just money that we were investing into Newlin to fund it. How it's handled is really a question for the accountants." (N.T. 136). Winn further testified that neither he nor Ehrlich have siphoned funds out of Newlin as repayment of loans, return of capital, or salaries, stating, "On the contrary, it siphoned us. It siphoned a great deal of money out of us, and we have never taken one dime in the way of salary, dividends..." (N.T. 136). Hence, there was no evidence of funds being siphoned or corporate formalities, such as maintaining separate books and records, not being observed.

The Department argued that Newlin was undercapitalized, and yet, it presented no evidence that Newlin was undercapitalized when formed. Winn testified that he and Ehrlich initially invested $185,000 in Newlin and an

additional $200,000 shortly thereafter (N.T. 128-129). In the absence of any testimony relating to adequate capitalization for an entity of this sort, we cannot conclude that Newlin was undercapitalized.

Finally, the Department claimed that Newlin never paid a dividend. Winn testified that Newlin did not pay a dividend, but did make a distribution of $25,000 that it received from the lease payment from Strasburg Landfill Associates (N.T. 135; Winn Dep. at 66). Ehrlich, too, admitted no dividend had been paid (N.T. 66; Ehrlich Dep. at 17), but explained that in a Subchapter S corporation, which Newlin is, all income and losses flow directly to the individual and no dividends are required to be made (N.T. 66-67; Ex. A-7, 26 U.S.C. §§1361-1379). The Department did not counter this Subchapter S explanation at hearing or in its argument in its post-hearing brief.

Because the Department has failed to affirmatively establish any of the theories it advances as justification for piercing the corporate veil, we must conclude there is no basis for doing so.

Participation Theory

The second theory advanced by the Department for holding Ehrlich and Winn personally liable for the environmental damage that occurred at the Strasburg Landfill site is the participation theory. The Commonwealth Court held in Kaites that evidence of actual participation in misconduct or intentional neglect is necessary to impose individual liability on corporate officers under the participation theory. The Department's belief that the Commonwealth Court wrongfully decided Kaites, in the absence of a Pennsylvania Supreme Court decision to that effect, is not sufficient grounds for the Board to disregard a binding precedent from the Commonwealth Court. Furthermore, the Department's assertion that Kaites is only applicable to matters arising under the Clean Streams Law and the Coal Refuse Disposal and Control Act must

be rejected in light of the broad language of the decision.[9]

When we analyze the degree of participation of Ehrlich and Winn, it is impossible to find, based upon the evidence currently before us, that either Ehrlich or Winn actually participated in or furthered the violations at the landfill site.[10] Ehrlich's role as a shareholder, officer and director of Newlin and EMS does not meet the requisite degree of participation in the actual wrongdoing here. His role as manager for a short period was practially non-existent and his dealings with Strasburg Associates via EMS were financial in nature. Similarly, Winn's role in Newlin entailed primarily funding. Although Ehrlich and Winn did not do anything to improve deteriorating conditions at the landfill and seemed to be completely unaware of them, according to Kaites, mere non-feasance is not a basis for imposing personal liability.

CONCLUSIONS OF LAW

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

2. The Department has the burden of proving by a preponderance of the evidence that its issuance of the September 21, 1983, order to Appellants was not an abuse of discretion.

3. The provisions of 25 Pa.Code §21.101(d) and (e) do not operate to shift the burden of proof under 25 Pa.Code §21.101(b)(3) away from the Department where environmental damage is not an issue in an appeal.

---

[9] The Commonwealth Court, albeit in an unreported decision, applied the Kaites precedent in affirming our decision in Novak Sanitary Landfill, Inc. et al. v. DER, 1987 EHB 680, an appeal arising under the Solid Waste Management Act.

[10] Since we have held that Newlin did not violate the Solid Waste Management Act, we could simply conclude that Winn and Ehrlich are not liable, in any event, as corporate officers.

4. Leachate was being discharged from the Strasburg Landfill in violation of the Clean Streams Law.

5. Joint venturers are liable for the obligations of the joint venture under the Clean Streams Law and the Solid Waste Management Act.

6. Strasburg Landfill Associates had a proprietary interest in the Strasburg Landfill property at the time of issuance of the Department's order.

7. The Department's issuance of the September 21, 1983, order to Newlin and Somerset pursuant to §316 of the Clean Streams Law was not an abuse of discretion.

8. The Department's issuance of the September 21, 1983, order to Newlin and Somerset pursuant to §602 of the Solid Waste Management Act was an abuse of discretion where the Department failed to establish that Strasburg Landfill Associates had caused or allowed violations of the statute at the Strasburg Landfill.

9. The Department failed to establish by a preponderance of the evidence that the corporate veil of Newlin should be pierced to hold David Ehrlich and Richard Winn personally liable under §316 of the Clean Streams Law and §602 of the Solid Waste Management Act.

10. The Department failed to establish by a preponderance of the evidence that Winn and Ehrlich had actually participated in the violations of the Solid Waste Management Act at the Strasburg Landfill.

O R D E R

AND NOW, this 18th day of October, 1989, it is ordered that:

1) The Department's order of September 21, 1983, is sustained as it applies to Newlin and Somerset and the appeal of Newlin and Somerset is dismissed; and

2) The Department's order of September 21, 1983, is reversed as it pertains to David Ehrlich and Richard Winn and the appeal of David Ehrlich and Richard Winn is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: October 18, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kenneth A. Gelburd, Esq.
Eastern Region
For Appellants:
Hershel J. Richman, Esq.
COHEN, SHAPIRO, POLISHER,
SHIEKMAN & COHEN
Philadelphia, PA
and
John A. Yacovelle, Esq.
Somerdale, NJ
and
Bruce L. Thall, Esq.
ABRAMSON, COGAN, KOGAN,
FREEDMAN & THALL
Philadelphia, PA

bl

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

M. DIANE SMITH
SECRETARY TO THE BOARD

FRANCIS NASHOTKA, SR., et al.	:	
v.	:	**EHB Docket No. 88-216-M**
	:	**(consolidated appeals)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 18, 1989**

OPINION AND ORDER
SUR
MOTION FOR SANCTIONS

Synopsis

In appeals in which DER has the burden of proving that the Appellants engaged in unlawful conduct and that the amounts of civil penalties assessed against them are appropriate, DER is entitled to request the production of business and financial documents. When the Appellants in such a case operate through a number of corporations, DER is entitled to request the production of corporate and financial documents for each such corporation. A supplemental request for production of documents, if made prior to hearing, must be honored.

OPINION

These consolidated appeals relate to actions taken by the Department of Environmental Resources (DER) in May 1988 to halt what DER contends is the unlawful disposal of septic tank pumpings (sometimes called "septage") on the surface of the ground in Sterling Township, Wayne County, and Madison Township, Lackawanna County. Francis Nashotka, Sr. (Nashotka), the owner of

the Sterling Township property, is the appellant in docket number 88-216-M. Lawrence Hartpence (Hartpence), who with his wife Imogene Knoll (Knoll) owns or controls the Madison Township property, is the appellant in docket numbers 88-218-M and 88-219-M. Hydro-Clean, Inc., a corporation under the control of Hartpence, is the appellant in docket number 88-217-M.

DER charged Nashotka and Hydro-Clean, Inc. with the unlawful disposal of septage on the Sterling Township property. They both were ordered to cease such activities and to pay civil penalties of $1,500 (Nashotka) and $13,500 (Hydro-Clean, Inc.). Hartpence was accused of the unlawful disposal of septage on the Madison Township property. He was ordered to halt such activities and to pay a civil penalty of $13,500. Hartpence's application for a Solid Waste Disposal Permit for the disposal of septage on a property in Salem Township, Wayne County, was denied because of Hartpence's history of violations with respect to the Sterling Township and Madison Township properties.

In his Notice of Appeal, Nashotka, inter alia, denied DER's allegations and claimed exemption from permit requirements under 25 Pa. Code §75.32 and §271.101(b)(1), the agricultural utilization of septage. Hydro-Clean, Inc. also denied DER's allegations and indicated that its only connection with the Sterling Township property was the lease of certain equipment and machinery to Nashotka without any information on the use Nashotka made of them. Hartpence denied DER's allegations regarding the Madison Township property and claimed the same agricultural utilization exemption referenced by Nashotka. Hartpence objected to DER's denial of his permit application as being based upon activities that were not unlawful. Both Nashotka and Hartpence complain that DER's actions are discriminatory and, in effect, part of a vendetta against Hartpence.

Discovery proceedings have produced constant battles between the parties from the outset. In an effort to resolve these disputes and move the appeals to hearing, the Board has issued two prior opinions and six prior orders. Nonetheless, the battles go on unabated.

Before us for disposition at this time is a Motion for Sanctions filed by DER on September 7, 1989, the fourth request for sanctions presented by DER in a space of four months. This latest Motion is based upon the failure of Hartpence and Knoll to produce certain documents at their scheduled depositions on August 29, 1989. Deposition notices dated August 21 and 23, 1989 had requested Hartpence and Knoll to bring with them and produce for inspection and copying a number of documents pertaining to Hartpence, Knoll, Hydro-Clean, Inc., Hartpence Farms, Hartpence Enterprises, Tri-Cycle, Inc. and Eagle Utilities, Inc. Appellants on August 28, 1989, filed Objections to the production of certain of these documents and moved for a Protective Order. The Board denied the Motion on that same date and issued a confirming order on August 29, 1989. When Hartpence and Knoll appeared for their depositions on that date, they repeated their objections and refused to produce the documents. DER's Motion for Sanctions followed.

Hartpence was requested to produce the following: [1]

1. annual financial statements and tax returns for Hartpence Farms, 1980 to present;

2. annual financial statements and tax returns for Hartpence Enterprises, 1980 to present;

3. documentary evidence of transactions of Hartpence, Knoll, Hydro-Clean, Inc. and/or their representatives, with sewage treatment plants

---

[1] The precise language of the notices is not quoted, but is paraphrased.

or others, relating to the disposal of sewage or septage, 1985 to present, unless previously produced;

4. documentation relating to storage tanks used by Hydro-Clean, Inc. to store sewage or septage;

5. corporate articles, by-laws and minutes of Hydro-Clean, Inc.; and

6. corporate articles, by-laws and minutes of Eagle Utilities, Inc.

Knoll was requested to produce the same documents requested of Hartpence plus the following:

1. annual financial statements and tax returns for Tri-Cycle, Inc., 1980 to present; and

2. corporate articles, by-laws and minutes of Tri-Cycle, Inc.

In their Motion for Protective Order, Appellants asserted that the production of financial statements and tax returns for Hartpence Farms and Hartpence Enterprises and the production of corporate articles, by-laws and minutes of Eagle Utilities, Inc. and Tri-Cycle, Inc. "is not reasonably calculated to lead to the discovery of admissible evidence and is sought in bad faith, would cause unreasonable annoyance, burden and expense and would require the making of an unreasonable investigation in violation of Pa. R.C.P. 4003(a)(1) and 4011." The same objection was made to the production of documentary evidence of the transactions involving the disposal of sewage or septage. Finally, Appellants averred that the corporate records of Hydro-Clean, Inc. had been produced previously. No objection was made to the production of annual financial statements and tax returns for Tri-Cycle, Inc. or of documentation relating to Hydro-Clean's storage tanks.

At the deposition on August 29, 1989, Appellants restated the legal positions expressed in the Motion for Protective Order but included, for the first time, an objection to producing the annual financial statements and tax

returns for Tri-Cycle, Inc. They also contended that they had no obligation to produce any documentary evidence of transactions involving the disposal of sewage or septage that occurred subsequent to May 23, 1989; and represented that there were no documents relating to Hydro-Clean's storage tanks.

Prior discovery in these consolidated appeals and the contents of other documents filed with the Board over the past 16 months have made it apparent that Hartpence and Knoll control a number of corporate entities, some or all of which may be involved in the disposal of waste materials. While there is nothing inherently wrong in setting up and operating a multitude of corporations, it is common knowledge that this device sometimes is used to mask illegal activities. DER's Orders were directed to Nashotka, Hartpence and Hydro-Clean, Inc., persons and entities that denied the conduct charged and claimed exemption from permit requirements. DER, which has the burden of proof in these proceedings (25 Pa. Code §21.101(b)), must be given the opportunity to discount the possibility that the conduct was that of another corporate entity not named in the Orders.[2] Discovery for these purposes must be allowed into the corporate and financial records of all entities controlled by Hartpence and/or Knoll. The annual financial statements, tax returns, corporate articles, by-laws and minutes requested by DER are basic documents that should be readily available and easy to produce.

In addition, DER has assessed civil penalties against Nashotka, Hartpence and Hydro-Clean, Inc. pursuant to section 605 of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.605. That section mandates that DER consider, in determining the amount

---

[2] This, in fact, is the specific objection Hartpence and Knoll have made in the appeal docketed at 89-033-M. While that appeal has not been consolidated into 88-216-M, it involves the same general subject matter.

of the penalty, the (1) willfulness of the violation, (2) damage to the environment, (3) cost of restoration, (4) savings resulting to the violator, and (5) other relevant factors. Into this final category falls the matter of deterrence: DER v. Jefferson Township, 1978 EHB 134. Many of these considerations require the production of evidence available only in the financial books and records of the violator: DER v. Lawrence Coal Co., 1988 EHB 561, affirmed by Commonwealth Court in an unreported opinion dated July 12, 1989, at No. 1891 C.D. 1988. In order to carry the burden of showing that the amounts of the civil penalties are justified, DER must have access to this material. When the alleged violator operates through a plethora of corporations, DER is entitled to review the financial records of all of them.

Obviously, DER is subject to the same limitations of reasonableness that apply to all discovery (Pa. R.C.P. No. 4011). The documents requested here were minimal and pertained only to entities already identified with Hartpence and Knoll. In our judgment, this was clearly reasonable and formed the basis for our denial of Appellants' Motion for a Protective Order. Appellants' refusal to produce them was unjustified.

Appellants' objection to the production of documentary evidence on transactions involving sewage or septage also was unjustified. Appellants produced some such documentation on July 3, 1989, in response to a Board Order of May 23, 1989. They now take the position that they have no duty to produce any documentation regarding transactions subsequent to that date even though they were called upon to do so on August 23, 1989, during the period when discovery was still open. Pa. R.C.P. No. 4007.4(3) clearly authorizes a party to request another party to supplement prior discovery responses at any time before trial. DER's August 23, 1989, request for production of these documents, therefore, was within the scope of permissible discovery.

Here again, DER had to act reasonably and in good faith (Pa. R.C.P. No. 4011). The documents requested were clearly relevant to the subject matter of the appeals. They were identical to those previously requested and supposedly produced by Appellants up to May 23, 1989. Certainly, the production of documents for the subsequent three-month period cannot be viewed as burdensome. Nonetheless, Appellants challenged the reasonableness of DER's discovery request in their Motion for Protective Order. When the Board denied that Motion, Appellants had the duty to produce the documents.

With respect to documents relating to Hydro-Clean's storage tanks, Appellants stated that there were none. Since this does not constitute a refusal to produce, sanctions are not appropriate.

We have gone to great lengths in explaining our reasons for making our discovery decisions in the hope of securing Appellants' compliance with the Rules of Civil Procedure and the orders of this Board. We intend to give them one more chance to accomplish this. If they fail to comply with the Order attached to this Opinion, sanctions will be imposed in the form of dismissal of their appeals. Action on DER's Motion for Sanctions, therefore, is deferred.

ORDER

AND NOW, this 18th day of October, 1989, it is ordered as follows:

1. Lawrence Hartpence and Imogene Knoll each shall produce, at the office of DER identified in the Amended Notices of Deposition dated August 23, 1989, at such time and date within a period of 30 days following the date of this Order as is mutually agreeable to the parties, the documents listed in the Amended Notices of Deposition dated August 23, 1989, except those involving Hydro-Clean's storage tanks and those previously produced.

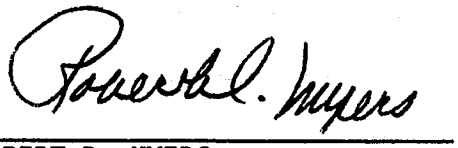
2. Lawrence Hartpence and Imogene Knoll each shall make himself or herself available for deposition, on the date agreed upon for the production of documents and on such later date or dates to which the deposition may be continued, to provide deposition testimony related to the documents produced and the business and financial affairs covered thereby. Such deposition shall be concluded, in all events, within 60 days following the date of this Order.

3. If either Lawrence Hartpence or Imogene Knoll fails to comply with the provisions of this Order, or fails to cooperate in scheduling the dates for document production and deposition, or unreasonably refuses to answer deposition questions propounded to him or her, the appeals at docket numbers 88-217-M, 88-218-M and 88-219-M shall be dismissed for failure to comply with a Board Order.

4. The appeal at docket number 88-216-M, in which Francis Nashotka, Sr. is the appellant, shall be unaffected by this Order.

5. Action on the Motion for Sanctions, filed by the Department of Environmental Resources on September 7, 1989, is deferred.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: October 18, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Amy Putnam, Esq.
Nels Taber, Esq.
Central Region
For Appellant:
Stephen Saunders, Esq.
Andrew Hailstone, Esq.
Scranton, PA

sb

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

M. DIANE SMITH
SECRETARY TO THE BO

LAWRENCE HARTPENCE AND IMOGENE KNOLL	:	
	:	
V.	:	**EHB Docket No. 89-033-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 18, 1989**

OPINION AND ORDER
SUR
MOTIONS FOR SANCTIONS

Synopsis

In an appeal in which DER has the burden of proving that the Appellants engaged in unlawful conduct and that the amounts of civil penalties assessed against them are appropriate, DER is entitled to request the production of business and financial documents. When the Appellants in such a case operate through a number of corporations, DER is entitled to request the production of corporate and financial documents for each such corporation.

OPINION

This appeal was filed on February 8, 1989, by Lawrence Hartpence *Hartpence) and Imogene Knoll (Knoll), challenging a January 6, 1989 Order and Assessment of Civil Penalty issued by the Department of Environmental Resources (DER). The Order charged Appellants and Hydro-Clean, Inc. (a corporation controlled by one or both Appellants) with the unlawful disposal and burning of solid waste (furniture, appliances and other household waste, demolition waste and ash-like materials) on the surface of Appellants' properties in Madison and Covington Townships, Lackawanna County. Appellants

were ordered, inter alia, to cease such activities and to pay civil penalties totalling $81,000.

In their Notice of Appeal, Appellants raised numerous objections to DER's actions. Essentially, they denied that they or Hydro-Clean, Inc. engaged in the conduct charged against them, and indicated that Tri-Cycle, Inc. which did engage in some of the conduct, was exempt from permit requirements under 25 Pa. Code §271.101(b)(4), dealing with recycling activities. They also claimed that DER's action was discriminatory and part of a vendetta being carried out against them.

Discovery disputes, which have bogged down proceedings involving these same parties at docket number 88-216-M, spread over into this appeal as well. A DER Motion for Sanctions, filed on July 13, 1989, was denied in an Opinion and Order dated August 11, 1989, in which the Board admonished the parties about the consequences of impeding discovery. Another Motion for Sanctions is now before us, filed by DER on September 7, 1989. This latest Motion is based upon the failure of Appellants to produce certain documents at their scheduled depositions on August 29, 1989.

Deposition notices dated August 24, 1989, had requested Hartpence and Knoll to bring with them and produce for inspection and copying a number of documents pertaining to Hartpence, Knoll, Hydro-Clean, Inc., Hartpence Farms, Hartpence Enterprises and Tri-Cycle, Inc. Appellants on August 28, 1989, filed Objections to the production of certain of these documents and a Motion for a Protective Order. The Board denied the Motion on that same date and issued a confirming order on August 29, 1989. When Hartpence and Knoll

appeared for their depositions on that date, they repeated their objections and refused to produce the documents. DER's Motion for Sanctions followed.

Hartpence was requested to produce the following:[1]

1. annual financial statements and tax returns for Tri-Cycle, Inc., 1980 to present;

2. documentary evidence of transactions of Hartpence, Knoll, Hydro-Clean, Inc., Tri-Cycle, Inc., Hartpence Farms, Hartpence Enterprises and/or their representatives, with any persons or entities, relating to the recycling, storage or disposal of waste, 1985 to present; and

3. corporate articles, by-laws and minutes of Tri-Cycle, Inc.

Knoll was requested to produce these same documents plus all documents referenced in questions or answers to DER's 1st or 2nd set of Interrogatories.

In their Motion for Protective Order, Appellants asserted that the production of documents concerning Hartpence Farms and Hartpence Enterprises "is not reasonably calculated to lead to the discovery of admissible evidence and is sought in bad faith, would cause unreasonable annoyance, burden and expense and would require the making of an unreasonable investigation in violation of Pa. R.C.P. 4003(a)(1) and 4011." The same objection was made to the production of documents referenced in the Interrogatories, except for certain documents Appellants already had promised to bring to the depositions. No objection was made to the production of annual financial statements, tax returns, corporate articles, by-laws and minutes of Tri-Cycle; or to the production of documentary evidence of transactions of Hartpence, Knoll, Hydro-Clean, Inc. and Tri-Cycle, Inc.

---

[1] The precise language of the notice is not quoted, but is paraphrased.

At the deposition on August 29, 1989, Appellants restated the legal positions expressed in the Motion for Protective Order but included, for the first time, an objection to producing the requested documents of Tri-Cycle, Inc. They also contended that they had no obligation to produce any documentary evidence of transactions involving the recycling, storage or disposal of waste that occurred subsequent to May 23, 1989.

Prior discovery in this appeal and the appeals consolidated at docket number 88-216-M have made it apparent that Hartpence and Knoll control a number of corporate entities, some or all of which may be involved in the disposal of waste materials. While there is nothing inherently wrong in setting up and operating a multitude of corporations, it is common knowledge that this device sometimes is used to mask illegal activities. DER's Order was directed to Hartpence and Knoll, persons who specifically denied the conduct charged and indicated that Tri-Cycle, Inc. was responsible for some of it, acting under a permit exemption. DER, which has the burden of proof in these proceedings (25 Pa. Code §21.101(b)), must be given the opportunity to probe this specific defense and to discount the possibility that some of the conduct was that of one or more of Appellants' other corporate entities. Discovery for these purposes must be allowed into the corporate and financial records of all entities controlled by Hartpence and/or Knoll. The annual financial statements, tax returns, corporate articles, by-laws and minutes requested by DER are basic documents that should be readily available and easy to produce. Production of transaction documents requested with respect to Tri-Cycle, Inc. - the entity specifically mentioned by Appellants - also cannot be considered burdensome.

In addition, DER has assessed civil penalties against Hartpence and Knoll pursuant to section 605 of the Solid Waste Management Act (SWMA), Act of

July 7, 1980, P.L.380, as amended, 35 P.S. §6018.605. That section mandates that DER consider, in determining the amount of the penalty, the (1) willfulness of the violation, (2) damage to the environment, (3) cost of restoration, (4) savings resulting to the violator, and (5) other relevant factors. Into this final category falls the matter of deterrence: DER v. Jefferson Township, 1978 EHB 134. Many of these considerations require the production of evidence available only in the financial books and records of the violator: DER v. Lawrence Coal Co., 1988 EHB 561, affirmed by Commonwealth Court in an unreported opinion dated July 12, 1989, at No. 1891 C.D. 1988. In order to carry the burden of showing that the amounts of the civil penalties are justified, DER must have access to this material. When the alleged violator operates through a plethora of corporations, DER is entitled to review the financial records of all of them.

Obviously, DER is subject to the same limitations of reasonableness that apply to all discovery (Pa. R.C. No. 4011). The documents requested here were minimal and pertained only to entities already identified with Hartpence and Knoll. In our judgment, this was clearly reasonable and formed the basis for our denial of Appellants' Motion for a Protective Order. Appellants' refusal to produce the documents was unjustified.

Appellants' objection to the production of documentary evidence on transactions involving the recycling, storage or disposal of waste was equally unjustified. They represented that they had previously produced such documentation for Hydro-Clean, Inc. up through May 23, 1989, and had no duty to go beyond that date. With respect to the other entities, they raised the same objection that we have just discussed and found meritless. The May 23, 1989, date has significance because it was the date of a Board Order in the cases consolidated at 88-216-M, directing Appellants to produce certain

documents. The Order had no applicability to the present appeal and was concerned only with transactions involving sewage or septage. DER's request here deals with transactions involving the recycling, storage or disposal of any kind of waste material. Appellants have a duty to produce such documentation for all of the persons and entities named.

We have gone to great lengths in explaining our reasons for making our discovery decisions[2] in the hope of securing Appellants' compliance with the Rules of Civil Procedure and the orders of the Board. We intend to give them one more chance to accomplish this. If they fail to comply with the Order attached to this Opinion, sanctions will be imposed in the form of dismissal of their appeal. Action on DER's Motion for Sanctions, therefore, is deferred.

ORDER

AND NOW, this 18th day of October, 1989, it is ordered as follows:

1. Lawrence Hartpence and Imogene Knoll each shall produce, at the office of DER identified in the Notices of Deposition dated August 24, 1989, at such time and date within a period of 30 days following the date of this Order as is mutually agreeable to the parties, the documents listed in the Notices of Deposition dated August 24, 1989, except those previously produced.

2. Lawrence Hartpence and Imogene Knoll each shall make himself or herself available for deposition, on the date agreed upon for the production of documents and on such date or dates to which the deposition may be continued, to provide deposition testimony related to the documents produced and the business and financial affairs covered thereby. Such deposition shall be concluded, in all events, within 60 days following the date of this Order.

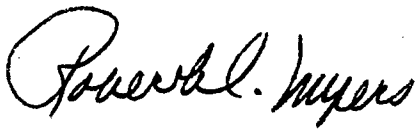
---

[2] Production of the documents referenced in the Interrogatories has not been raised as an issue and, therefore, has not been discussed.

3. If either Lawrence Hartpence or Imogene Knoll fails to comply with the provisions of this Order, or fails to cooperate in scheduling the dates for document production and deposition, or unreasonably refuses to answer deposition questions propounded to him or her, this appeal shall be dismissed for failure to comply with a Board Order.

4. Action on the Motion for Sanctions, filed by the Department of Environmental Resources on September 7, 1989, is deferred.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: October 18, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Nels J. Taber, Esq.
Central Region
For Appellant:
Stephen Saunders, Esq.
Andrew Hailstone, Esq.
Scranton, PA

sb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

DOROTHY E. HENDRICKSON et al.	:	
	:	
v.	:	**EHB Docket No. 89-154-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 19, 1989**

OPINION AND ORDER
SUR
MOTION TO STRIKE

Synopsis

A Motion to Strike, pursuant to Pa. R.C.P. 1017(b)(2) is ill-suited to challenge the contents of a Notice of Appeal, because of significant differences between that document and a civil complaint. A Motion for Partial Summary Judgment, pursuant to Pa. R.C.P. 1035, is preferable to attack irrelevant issues in a Notice of Appeal. A matter will not be considered irrelevant if it is included in the DER order forming the basis of the appeal. A legal objection to DER's action will not be dismissed as irrelevant in the early stages of a proceeding when the Board has before it only the conclusory allegations of a Motion.

OPINION

This appeal was filed on June 5, 1989, contesting a May 8, 1989, Order and Civil Penalty Assessment (Order) of the Department of Environmental Resources (DER). Instead of using the Board's official Notice of Appeal form, Appellants filed a paragraph by paragraph response to DER's Order, similar to an answer a litigant would file to a complaint in a civil matter. Under the

heading New Matter, Appellants made averments concerning a $10,000 bond allegedly filed with DER by Energy Conversion Systems (ECS) in connection with a Solid Waste Permit issued by DER to ECS on March 15, 1985. On June 27, 1989, DER filed a Motion to Strike Appellants' New Matter, pursuant to Pa. R.C.P. 1017(b)(2), because it contains "impertinent matter." After some delay necessitated by a change of legal counsel, Appellants responded to DER's Motion on October 5, 1989.

We should note initially our concern about the applicability of a Motion to Strike when it is addressed to a Notice of Appeal. R.C.P. 1017(b)(2) refers to striking a "pleading." While the Notice of Appeal is similar to a complaint in the sense that it serves to initiate the proceeding, it differs from a complaint in significant ways. A complaint is to be limited to averments of fact (Pa. R.C.P. 1019(a)); conclusions of law are surplusage. A Notice of Appeal may contain both (25 Pa. Code §21.51(e)); in fact, a legal or factual objection is waived if it is not specifically mentioned. The averments of fact in a complaint must be specifically denied by the opposing party or they are deemed to be admitted (Pa. R.C.P. 1029). The opposing party is not required to file any response to a Notice of Appeal unless ordered to do so by the Board (25 Pa. Code §21.64(c)).

For these reasons, we believe that a Motion to Strike is ill-suited to challenge the contents of a Notice of Appeal. If the opposing party is convinced that the Notice of Appeal contains objections that are irrelevant, he may file a Motion for Partial Summary Judgment on those issues pursuant to Pa. R.C.P. 1035. The Board, in the past, occasionally has entertained Motions to Strike with respect to Notices of Appeal. As a result, we will not summarily deny this one without considering it.

DER argues that matters pertaining to ECS's permit and bond are totally irrelevant to this proceeding which deals solely with Appellants' violations of law. As such, they are impertinent and should be stricken. Without getting into a discussion of what constitutes impertinent matter under Pa. R.C.P. 1017(b)(2), we note that DER's Order contains a finding of fact expressly dealing with ECS and the Solid Waste Permit issued to it. If those matters are totally irrelevant to Appellants' appeal, the Board wonders why DER felt the need to incorporate them in its Order.

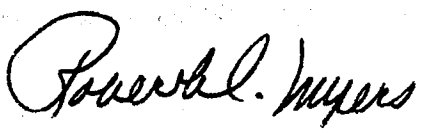
Moreover, Appellants are required to raise in their Notice of Appeal all factual and legal objections they have to DER's action. At this stage of the proceedings, with nothing before us but the conclusory allegations of the Motion to Strike, we are unwilling to decide that matters relating to ECS's bond are totally irrelevant.

ORDER

AND NOW, this 19th day of October, 1989, it is ordered as follows:

1. The Motion to Strike, filed by DER on June 27, 1989, is denied.
2. Discovery shall be completed by November 30, 1989.
3. Appellants shall file their pre-hearing memorandum on or before December 15, 1989.
4. All other provisions of Pre-Hearing Order No. 1, dated June 7, 1989, shall remain in effect.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: October 19, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
J. Robert Stoltzfus, Esq.
Eastern Region
For Appellant:
David A. Baun, Esq.
Doylestown, PA
sb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

HERALD PRODUCTS	:	
	:	
V.	:	**EHB Docket No. 89-280-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 23, 1989

OPINION AND ORDER
DISMISSING APPEAL FOR LACK OF JURISDICTION

Synopsis

The Board, upon its own motion, raises the question of jurisdiction and dismisses an appeal. The appellant's mistaken belief that the thirty-day appeal period was tolled while it attempted to negotiate a settlement with the Department does not provide a sufficient basis for allowing an appeal to be filed nunc pro tunc.

OPINION

This is an attempted appeal nunc pro tunc by Herald Products (Herald) from an order of the Department of Environmental Resources (DER) dated June 30, 1989.[1] In its order, DER ordered Herald to take various steps to remove and dispose of hazardous waste on a site which Herald either owned or leased

[1] Herald is requesting leave to file its appeal nunc pro tunc, because the appeal was filed more than thirty days after Herald received notice of DER's order (Herald received the order on July 3, 1989; the appeal was filed on August 23, 1989). The Board's regulations require that appeals be filed within thirty days. 25 Pa. Code §21.52(a).

from January 1, 1981 to December 14, 1983 in the Borough of Penndel, Bucks County.[2]

Herald filed a petition for supersedeas along with its appeal, and DER filed a response to this petition. It is not necessary to address the arguments raised in the petition, however, because, as we will explain below, Herald has not alleged sufficient grounds for an appeal nunc pro tunc.[3]

In support of its request for leave to file its appeal nunc pro tunc, Herald alleges that the reason why the appeal was not filed within thirty days was because it was cooperating with DER and attempting to negotiate a settlement of this dispute. More specifically, Herald contends that it met with representatives of DER at the site on July 26, 1989, and that it believed this meeting was part of a dispute resolution process which stayed the period within which Herald was obliged to file an appeal. Finally, Herald alleges that it did not contact counsel until after the appeal period expired, and that it then followed counsel's advice and filed the instant appeal nunc pro tunc.

The general rule is that the Board only has jurisdiction to decide appeals which are filed within thirty days after the party has received notice of DER's action. 25 Pa. Code §21.52(a), Rostosky v. Commonwealth, DER, 26 Pa. Commw. 478, 364 A.2d 761 (1976). The Board may, however, grant leave to file an appeal nunc pro tunc when "good cause" is shown. 25 Pa. Code §21.53(a).

---

[2] DER's order was also addressed to Mr. and Mrs. Edward Shults, Apex Financial Investments, Inc., and Mr. Larry Williams. These parties were not listed as appellants on the notice of appeal form.

[3] DER has not filed a motion to dismiss, but questions of jurisdiction may be raised by the Board sua sponte. See, Thomas Fahsbender v. DER, 1988 EHB 417, New Hanover Corp. v. DER, EHB Docket No. 89-122-W (Opinion and Order issued September 29, 1989).

What constitutes good cause is defined by common law standards for nunc pro tunc cases. Id. Pennsylvania appellate courts have held that an appeal nunc pro tunc will normally be permitted only in extraordinary circumstances, namely, when there is fraud or some breakdown in the processes of the court or agency receiving the appeal. West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975). Neglect or a mistake by the appellant or appellant's counsel will not excuse the failure to file a timely appeal. State Farm Mutual Automobile Insurance Co. v. Schultz, 281 Pa. Super. 212, 421 A.2d 1224, 1227 (footnote 7) (1980). Specifically, the Board has held that untimely appeals will not be excused where the appellant alleges that it was attempting to negotiate a settlement with DER during the appeal period. Grand Central Sanitary Landfill, Inc. v. DER, 1988 EHB 738, Altmire v. DER, 1988 EHB 1022.

Applying these principles to the instant case, it is clear that Herald's request for leave to file its appeal nunc pro tunc must be denied. The fact that Herald mistakenly believed the appeal period was stayed while it negotiated with DER is not a sufficient basis for allowing an untimely appeal. Grand Central, Altmire. As we stated in Grand Central, the accepted practice in these situations is to file a protective appeal and then to attempt to settle the dispute. 1988 EHB at 740.

Since the reasons given by Herald for allowing its appeal to be filed nunc pro tunc are insufficient as a matter of law, we must dismiss the appeal for lack of jurisdiction. Rostosky, Borough of Bellefonte et al. v. DER, EHB Docket No. 88-458-F (Opinion and Order issued May 3, 1989).

ORDER

AND NOW, this 23rd day of October, 1989, it is ordered that:

1) The request of Herald Products, Inc. for leave to file its appeal nunc pro tunc is denied.

2) The appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

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

DATED: October 23, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Anderson Lee Hartzell, Esq.
Eastern Region
For Appellant:
Michael M. Goss, Esq.
Philadelphia, PA
nb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

MUNICIPAL AUTHORITY OF THE TOWNSHIP OF UNION	:	
V.	:	**EHB Docket No. 86-422-M**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 25, 1989**

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

By Robert D. Myers, Administrative Law Judge, Member

Synopsis

1974 and 1981 NPDES permits issued with respect to a municipally-owned sewage treatment plant, receiving both municipal and industrial wastes, had contained average monthly effluent levels for BOD and SS higher than what is generally required for secondary treatment plants. When the 1986 NPDES permit was issued, DER imposed the more stringent requirements, and the Authority's request for an upward adjustment of the levels was refused. Equipment and process changes made by the Authority's primary industrial customer, coupled with a decline in production, had enabled the treatment plant to meet the BOD and SS levels for secondary treatment on a consistent basis. The Board held that the Authority had not presented sufficient data to establish a claim for an upward adjustment of the levels.

Procedural History

This appeal was instituted on August 27, 1986, by Municipal Authority of the Township of Union (Authority). It contests the average monthly discharge limits for biochemical oxygen demand (BOD) and suspended solids (SS) set forth in National Pollutant Discharge Elimination System (NPDES) Permit No. PA 0024708, issued to the Authority by the Department of Environmental Resources (DER) on July 24, 1986 (1986 NPDES Permit).

A hearing was held in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, on February 21, 1989, at which the parties presented a partial Stipulation of Facts and 8 witnesses. The Authority's post-hearing brief, containing proposed findings of fact and conclusions of law (as required by 25 Pa. Code §21.116(b)), was filed on April 14, 1989. DER's post-hearing brief, also containing proposed findings and conclusions, was filed on May 18, 1989. The record consists of the partial Stipulation of Facts, a hearing transcript of 194 pages and 16 exhibits.

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

Findings of Fact

1. The Authority, a joint water and sewer authority, has its office at P.O. Box 5625, Belleville, Mifflin County, Pennsylvania 17004 (N.T. 116; Appellant's Exhibit No. 3).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL); section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations adopted pursuant to said statutes. DER also administers the NPDES permit program

established by the Federal Clean Water Act, 33 U.S.C.A. §1251 et seq., in accordance with the provisions of 33 U.S.C.A. §1342(b) and (c).

3. The Authority owns and operates a sewage treatment plant (Plant) located in Union Township, Mifflin County, from which the effluent is discharged to Kishacoquillas Creek (N.T. 72-73; Appellant's Exhibits Nos. 3 and 4).

4. The Plant was designed and built in the early 1970s to meet DER-established average monthly effluent limits of 80 milligrams per liter (mg/l) BOD and 52 mg/l SS, and these effluent limits were incorporated into the first NPDES permit issued in May 1974 (1974 NPDES Permit). During construction of the Plant, revised effluent limits established for secondary treatment plants by the U.S. Environmental Protection Agency (EPA) made the Plant's design obsolete (N.T. 17-18, 40-42, 112; Appellant's Exhibits Nos. 1 and 6).

5. NPDES Permit No. 0024708, issued to the Authority by DER on May 26, 1981 (1981 NPDES Permit), set average monthly effluent limits of 77 mg/l BOD and 52 mg/l SS (Stipulation, paragraph b; N.T. 8-10, 112-113; Appellant's Exhibit No. 5).

6. Fairmont Products (Fairmont), a processor of dairy products, has been the primary industrial user of the Plant since its construction. Fairmont contributed $165,000 in capital costs and shares about 50% of the annual operating costs of the Plant. Of the Plant's designed capacity of 300,000 gallons per day (gpd), Fairmont currently uses 100,000 gpd and has another 100,000 gpd in reserve (N.T. 12, 108-110, 114-115).

7. Fairmont's principal product is cottage cheese but it also produces ice cream mix, yogurt, sour cream and condensed cream. Production operations and cleaning operations generate an effluent high in organic matter and suspended solids (N.T. 59, 92-95).

8. Over the past ten years, Fairmont has made the following changes in its equipment and production methods:

(a) the installation of a mechanical clarifier in 1980-1981 to remove SS from the cottage cheese washwater, which accounts for 20%-25% of the daily volume of effluent (N.T. 91-92);

(b) the installation of modern processing equipment for cottage cheese in 1983, that reduces the volume of washwater and increases the recovery of whey and fines (N.T. 93, 96-99);

(c) the installation of flow equalization tanks in 1985 to regulate the flow of effluent and eliminate surges (N.T. 53, 92-93, 100-102, 104).

9. The installations mentioned in Finding of Fact 8(a) and 8(b) have reduced the levels of BOD and SS in the effluent from Fairmont's facility. The installation mentioned in Finding of Fact 8(c) has enabled the Plant to treat the effluent more effectively (N.T. 53-54, 59, 98-99, 105-106).

10. Cottage cheese production reached a peak in 1983 and then declined during the following years up to and including the fiscal year ended June 30, 1988 (N.T. 94).

11. The processing and equipment changes at Fairmont's facility, coupled with the decline in the production of cottage cheese, have changed the average annual BOD levels in its effluent from 1708 pounds per day in 1982 to 1534 pounds per day in 1983, to 1616 pounds per day in 1984, to 1477 pounds per day in 1985, to 1148 pounds per day in 1986 (Stipulation, paragraphs c and d; N.T. 30-31, 55, 80-82).

12. When the Authority applied for a renewal of the 1981 NPDES Permit in November 1985, the effluent from the Plant consistently was meeting average monthly limits of 30 mg/l for both BOD and SS (N.T. 19-20, 140; Appellant's Exhibit No. 3; DER's Exhibits Nos. 3 and 4).

13. On the basis of this historical data, DER issued a draft 1986 NPDES Permit in April 1986, containing average monthly effluent limits of 30 mg/l for BOD and SS (N.T. 146, 150).

14. Upon receipt of the draft 1986 NPDES Permit, the Authority formally requested an upward adjustment of the effluent limits, pursuant to 40 CFR §133.103(b), to 86 mg/l for BOD and 44 mg/l for SS (N.T. 10, 13-14, 150-151; Appellant's Exhibit No. 1).

15. DER denied the Authority's request, on the ground that the Plant had demonstrated its ability to achieve the more stringent limitations, and issued the 1986 NPDES Permit on July 24, 1986, containing the 30 mg/l average monthly effluent limits for BOD and SS (Stipulation, paragraph a; N.T. 10, 151, 155-156, 164-166; Appellant's Exhibit No. 4; DER's Exhibit No. 14).

16. EPA expressed no objection to the BOD and SS effluent limits contained in the 1986 NPDES Permit (N.T. 157-158; DER's Exhibit No. 15).

17. In processing requests for upward adjustment of effluent limits, pursuant to 40 CFR §133.103(b), DER considers the factors in the Federal regulation, as well as:

(a) whether the treatment plant is being operated and maintained at peak efficiency; and

(b) the degree of treatment the treatment plant is capable of achieving, based on historical data
(N.T. 153-154, 184-185).

18. Fairmont contributes more than 10% of the flow into the Plant (N.T. 12-14).

19. No evidence was submitted to DER or to the Board as to what effluent limits Fairmont would have to meet if it directly discharged into waters of the Commonwealth (N.T. 185-186).

20. Kishacoquillas Creek is capable of handling discharges from the Plant in excess of the 30 mg/l average monthly limits for BOD and SS set forth in the 1986 NPDES Permit. There is no evidence that the receiving stream has been degraded by prior discharges from the Plant that exceeded the 30 mg/l level (N.T. 33-35, 142-143; DER's Exhibit No. 4).

21. The Plant's ability to achieve the 30 mg/l average monthly effluent limits for BOD and SS depends upon the BOD and SS levels of flows into the Plant. These levels have been down since 1982 but are expected to rise in the near future as Fairmont's cottage cheese production picks up and as new customers (residential and industrial) hook onto the Authority's sewer system (N.T. 20-33, 40, 85-86, 94-96, 117-120; Appellant's Exhibit No. 2).

22. If the Plant cannot consistently meet the 30 mg/l average monthly limits for BOD and SS, the Authority would have to install additional equipment and structures at a cost of at least $500,000. Fairmont would have the option of contributing to these additional costs or constructing its own treatment facilities (N.T. 43-47, 63).

23. Monthly Discharge Monitoring Reports submitted by the Authority to DER reveal that, except for 1 or 2 instances when the Authority was having difficulty obtaining sludge disposal sites, the Plant has met the 30 mg/l average monthly effluent limits for BOD and SS from the time the 1986 NPDES Permit was issued up to the end of 1988 (N.T. 61-63, 158-161, 175-181; DER's Exhibits Nos. 12, 13, 16 and 17).

24. If the BOD and SS levels of the flows into the Plant increase in the future to the point where the Plant cannot consistently meet the 30 mg/l average monthly effluent limits, the Authority can re-apply for an upward adjustment of those limits (N.T. 161).

DISCUSSION

As the party asserting the affirmative of the issue, the Authority has the burden of proof in this appeal: 25 Pa. Code §21.101(a). It must prove by a preponderance of the evidence that DER's action in setting the effluent limits for BOD and SS and in refusing the Authority's request for an upward adjustment of such limits was a violation of law or an abuse of discretion.

DER's rules and regulations applicable to its administration of the NPDES program generally provide in 25 Pa. Code §92.31 that no NPDES permit will be issued unless the proposed discharge complies with the applicable technology-based or water quality-based effluent limits established under sections 301, 302, 303, 306, and 307 of the Federal Clean Water Act, 33 U.S.C.A. §1311, §1312, §1313, §1316, and §1317.

Pursuant to its statutory authority in §301 of the Federal Clean Water Act, EPA has promulgated regulations setting technology-based effluent levels to be attained by publicly owned treatment works (POTW) through the application of secondary treatment. According to 40 CFR §133.102, the minimum average monthly effluent level for BOD and SS is 30 mg/l except as provided for in §133.103. Section 133.103(b) provides as follows:

> Industrial wastes. For certain industrial categories, the discharge to navigable waters of BOD5 and SS permitted under sections 301(b)(1)(A)(i), 301(b)(2)(E) or 306 of the Act may be less stringent than the values given in §§133.102(a)(1), 133.102(a)(4)(i), 133.102(b)(1), 133.105(a)(1), 133.105(b)(1), and 133.105(e)(1)(i). In cases when wastes would be introduced from such an industrial category into a publicly owned treatment works, the values for BOD5 and SS in §§133.102(a)(1), 133.102(a)(4)(i), 133.102(b)(1), 133.105(a)(1), 133.105(b)(1) and 133.105(e)(1)(i) may be adjusted upwards provided that: (1) The permitted discharge of such pollutants, attributable to the industrial category, would not be greater than that which would be permitted under sections 301(b)(1)(A)(i), 301(b)(2)(E) or 306 of the Act if such industrial category were to discharge directly into

> the navigable waters, and (2) the flow or loading of such pollutants introduced by the industrial category exceeds 10 percent of the design flow or loading of the publicly owned treatment works. When such an adjustment is made, the values for BOD5 or SS in §§133.102(a)(2), 133.102(a)(4)(ii), 133.102(b)(2), 133.105(a)(2), 133.105(b)(2), and 133.105(e)(1)(ii) should be adjusted proportionately.

DER has incorporated 40 CFR Pt. 133 by reference at 25 Pa. Code §95.2(b)(1). In issuing the 1986 NPDES Permit, DER inserted the minimum average effluent levels of 40 CFR §133.102 and denied the Authority's request for an upward adjustment of these levels authorized by 40 CFR §133.103(b).

It is obvious that DER had the discretion to grant or deny an upward adjustment of the effluent levels. Before the Authority can challenge the manner in which that discretion was exercised, however, it must show that it comes within the parameters of section 133.103(b). Adequate evidence was presented to prove that Fairmont contributes more than 10% of the flows going into the Plant, but no evidence whatsoever was presented to DER or to the Board to establish what technology-based effluent limits Fairmont would have to meet if it discharged directly into Kishacoquillas Creek. This would necessitate an analysis of production and waste loading at Fairmont. In this case, a direct discharge by Fairmont, according to sections 301(b)(1)(A)(i) and 301(b)(2)(E)[1], would have to reflect the best practicable control technology (BPT) and the best conventional control technology (BCT). Since the effluent limits Fairmont would have to meet if it were a direct discharger are essential in determining both the maximum permissible adjustment allowable to the Authority, as well as the proportionate adjustment, the absence of such data makes it virtually impossible for DER to perform the analysis required by 40 CFR §133.103(b).

---

[1] Section 306 is not applicable here because it applies only to new sources.

Not having presented sufficient data to satisfy the threshold requirements of 40 CFR §133.103(b), the Authority has no basis for complaining about DER's failure to grant an upward adjustment of the BOD and SS levels. Even if the data had been presented, we would be hesitant to charge DER with abusing its discretion in setting effluent limits the Plant is capable of meeting.

CONCLUSIONS OF LAW

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

2. The Authority has the burden of proving by a preponderance of the evidence that DER's action in setting the effluent limits for BOD and SS in the 1986 NPDES Permit and in refusing the Authority's request for an upward adjustment of such limits was a violation of law or an abuse of discretion.

3. NPDES permits issued under DER's rules and regulations at 25 Pa. Code §92.31 must contain discharge limits which comply with applicable effluent limitations established under the Federal Clean Water Act, 33 U.S.C.A. §1251 et seq., or pursuant to the CSL.

4. Technology-based effluent limits for a POTW, set by EPA pursuant to section 301 of the Federal Clean Water Act, 33 U.S.C.A. §1311, include average monthly levels of 30 mg/l for BOD and SS (40 CFR §133.102).

5. An upward adjustment of the 30 mg/l average monthly levels of BOD and SS may be made by DER pursuant to 40 CFR §133.103(b) when the applicant seeking such as an adjustment demonstrates that (i) contributions by industrial dischargers exceed 10% of the design flow of a POTW, and (ii) the discharges of BOD and SS would not exceed the effluent levels required for direct industrial dischargers.

6. The Authority did not present sufficient evidence to show that the industrial discharges into the Plant fulfilled the requirements of 40 CFR §133.103(b).

7. In the absence of such evidence, DER was justified in denying the Authority's request for an upward adjustment of the BOD and SS levels.

ORDER

AND NOW, this 25th day of October, 1989, it is ordered that the appeal of Municipal Authority of the Township of Union is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: October 25, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Mary Young, Esq.
Eastern Region
For Appellant:
Joseph E. Sikorsky, Esq.
Lewistown, PA

sb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

HARBISON-WALKER REFRACTORIES	:	
	:	
V.	:	EHB Docket No. 88-403-W
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 26, 1989

OPINION SUR PETITION FOR SUPERSEDEAS

Synopsis

The Board denies a petition for supersedeas where the petitioner fails to establish the requisite elements for issuance of a supersedeas. The possibility that petitioner may be subject to civil penalties for violation of the order it seeks to supersede does not constitute irreparable harm. Petitioner failed to demonstrate its likelihood of success on the merits where there was a reasonable connection between the petitioner's mining activities and the discharges which were the subject of the groundwater study order.

OPINION

This matter was initiated by the October 5, 1988, filing of a notice of appeal by Harbison-Walker Refractories (Harbison-Walker) seeking review of a September 2, 1988, order of the Department of Environmental Resources (Department) concerning Harbison-Walker's clay mining operations at a site in Stewart Township, Fayette County, known as the Smith mine. The Smith mine, which is located within the boundaries of Ohiopyle State Park, was authorized by Mine Drainage Permit 2969BSM24. Mining operations were conducted by

Harbison-Walker and its predecessor, Union Fire Brick, from 1954 to 1972. Three distinct sets of acid mine discharges, Groups A, B, and C, emanate from the mine; Group A is presently being treated by Harbison-Walker. The Department's order required Harbison-Walker to submit a written, detailed history of its operations at the Smith mine and to develop and implement, upon Department approval, a monitoring plan which would define the hydrogeology of the Smith mine and identify the source of the acid mine discharges from the site.

In its notice of appeal Harbison-Walker contended that the Department's order was arbitrary and capricious, in that it was an unlawful attempt by the Department to evade its responsibility, as owner of Ohiopyle State Park, to investigate and abate the discharges; that there was no causal connection between the discharges and Harbison-Walker's mining activities, since the discharges existed prior to Harbison-Walker's 1954 acquisition of mineral rights at the Smith mine; that §316 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (the Clean Streams Law) was inapplicable to Harbison-Walker because its mining operations were conducted prior to January 1, 1966; and that the Department was estopped from issuing the order because of its lengthy knowledge of and acquiescence to conditions at the Smith mine.

Thereafter, on October 20, 1988, Harbison-Walker filed a petition for a supersedeas of the Department's order. The Department responded to the petition on November 7, 1988, requesting the Board to dismiss Harbison-Walker's petition. Hearings on the petition for supersedeas were held on November 9 and 16, 1988.

On November 22, 1988, Harbison-Walker moved to consolidate this matter with its appeals at Docket Nos. 85-361-W and 85-362-W. Harbison-

Walker's appeal at Docket No. 85-361-W concerned the Department's denial of surface mining permit application No. 18820104, while its appeal at Docket No. 85-362-W concerned the Department's denial of surface mining permit application No. 17820115. The Board granted Harbison-Walker's motion by order dated November 30, 1988, and the three appeals were consolidated at Docket No. 88-403-W.

The parties requested the opportunity to file additional memoranda in support of their respective positions; Harbison-Walker filed its memorandum on December 9, 1988, and the Department filed its memorandum on January 13, 1989. Harbison-Walker filed a reply on February 2, 1989.

The Board denied Harbison-Walker's petition for supersedeas by order dated April 17, 1989, with an opinion to follow. This opinion explains the reasons for that order.

A party seeking a supersedeas has the burden of demonstrating that it meets the criteria set forth in 25 Pa. Code §21.78(a). Pennsylvania Fish Commission and Little Clearfield Watershed Association v. DER and Al Hamilton Contracting Co., EHB Docket No. 86-338-W (Opinion issued May 23, 1989). In evaluating the evidence relating to the criteria in 25 Pa. Code §21.78(a), the Board performs a balancing test. Chambers Development Company et al. v. DER et al., 1988 EHB 68. Harbison-Walker has failed to demonstrate that it will suffer irreparable harm as a result of the Department's order, has presented no evidence relating to the likelihood of injury to the public or other parties, and has not shown a reasonable likelihood of success on the merits of its claims. As a result, its petition for supersedeas must be denied.

Harbison-Walker must demonstrate that unless a supersedeas is granted, it will suffer irreparable harm as a result of the Department's order. 25 Pa. Code §21.78(a)(1). Citizens for Upper Dauphin et al. v. DER,

Washington Township and Upper Dauphin School District, EHB Docket No. 89-034-M (Opinion issued June 16, 1989). Although Harbison-Walker claimed in its petition for supersedeas that it would suffer irreparable harm because the cost of the study would be expensive, it produced no evidence at the hearing to substantiate that claim. It did produce evidence relating to the cost of abatement, but abatement is not germane to the matter before us.

Harbison-Walker's claims of irreparable harm essentially boil down to an assertion that it will suffer irreparable harm because it will be subject to the assessment of civil penalties if it fails to comply with the order at issue in this appeal and does not receive a supersedeas from the Board. As support for this argument, Harbison-Walker alleged that the Department's October 31, 1988, issuance of an order to Harbison-Walker for its failure to comply with the September 2, 1988, order would lead to the imposition of a civil penalty of $750 per day. Harbison-Walker presented no other evidence or claims relating to irreparable harm.

The Board has long held that the possibility of being subject to civil penalties for violation of an order during the pendency of an appeal does not constitute irreparable harm. DER v. Crucible Incorporated, EHB Docket No. 73-342-CP-B (Opinion issued December 5, 1973). The Crucible case, as Harbison-Walker points out, was decided before the advent of mandatory civil penalties in the mining regulatory program. Its holding on the irreparable harm issue centered around the speculative nature of the Department's future exercise of enforcement remedies. Although the imposition of civil penalties in the mining regulatory program is now not a matter of speculation in certain areas, we still cannot equate the imposition of civil penalties with irreparable harm. It remains that the General Assembly has conferred an array of enforcement powers upon the Department to be used

separately, or in concert with each other. The possibility that the Department may subsequently utilize one of these remedies cannot operate, in and of itself, to stay an earlier exercise of enforcement.

Similarly, although Harbison-Walker contended in its petition for supersedeas that there would be no likelihood of harm to the public if a supersedeas was issued, because the pollutional discharges have been continuing for a long period of time, the Board has much argument from counsel and little evidence on the record to substantiate this claim. The evidence on this issue is quite weak and is counter-balanced by the fact that this condition of alleged pollutional discharges is within the confines of a public natural resource, a state park.

Finally, we must consider Harbison-Walker's likelihood of prevailing on the merits in this matter. Harbison-Walker has made much of the Department's potential liability as a landowner under §316 of the Clean Streams Law. However, we are concerned here not with liability for abatement of the discharges but rather with identifying their source. Nor are we concerned with whether, as a matter of public policy or otherwise, the Department, as owner of Ohiopyle State Park, should be engaged in some sort of co-operative effort with Harbison-Walker to identify the source of the discharges. Our task is to determine whether, in light of the circumstances, the issuance of this order was an abuse of discretion.

The order in question here was issued pursuant to §§5, 316, 402, and 610 of the Clean Streams Law, the Act of June 22, 1937, PL 1987, as amended, 35 P.S. §§691.5, 691.316, 691.402, and 691.610 (Clean Streams Law) and §§4.2 and 4.3 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1985, P.L. 1198, as amended, 52 P.S. §s1396.4b and 1396.4c (Surface Mining Act).

The issue of the Department's authority under the Clean Streams Law to issue orders to conduct studies was examined in Ernest C. and Grace Barkman v. DER, 1988 EHB 454,[1] wherein we held:

> The Pennsylvania Supreme Court, the Commonwealth Court, and this Board have all broadly construed the Clean Streams Law to authorize the issuance of orders requiring testing by the appellants under the Department's supervision to determine the extent of pollution, as well as performance of abatement measures. The landmark case of National Wood Preservers v. Com., 489 Pa. 221, 414 A.2d 37 (1980), upheld this Board's adjudication ordering appellants to conduct drilling and water sampling to identify the nature and extent of a groundwater contamination problem and then to remove it to be a valid exercise of the police power in light of the existence of a pollutional condition in the form of pentachloraphenol and fuel oil in the ground and surface waters of the area. Indeed, the Commonwealth Court has held in A. H. Grove & Sons, Inc. v. DER, 70 Pa. Cmwlth. 34, 452 A.2d 586 (1982), that circumstantial evidence of a pollutional problem will support an order to perform testing. Furthermore, it is unnecessary to await concrete, irrefutable evidence of contamination prior to the issuance of a testing or inspection order where there is a danger of pollution. COA Pallets, Inc. v. DER, 1979 EHB 267.
>
> 1988 EHB at 459-460.

Thus, to sustain the Department's order under the Clean Streams Law, we must find evidence of a pollutional condition and some nexus between Harbison-Walker and that condition. We believe that the record contains ample evidence of such so as to defeat Harbison-Walker's petition for supersedeas. The following facts emerge from the evidence adduced at the supersedeas hearing.

Union Fire Brick Company obtained the right to explore for and mine flint clay, soft clay, and coal immediately above the fire clay on the lands now referred to as the Smith mine from Brackett A. Smith, Claud B. Smith, Mary

---

[1] Although the Barkman appeal involved an order directing the appellants to allow the Department to come onto their property and perform certain tests, the legal issues involved were analogous. See footnote 2 at 1988 EHB 460.

Louise Smith, and Kitty H. Smith by leases dated July 2, 1951 and May 11, 1954 (App. Ex. 1, 2). Union Fire Brick mined clay at the Smith Mine until it assigned the leases to Harbison-Walker in 1954 (N.T. 23-24, 49, 117, 143; Ap. Ex. 3, 6). Thereafter, Harbison-Walker resumed clay mining at the Smith Mine (App. Ex. 10). The surface lands upon which the Smith Mine is situated were conveyed on May 11, 1962 to the Western Pennsylvania Conservancy, subject to the mineral leases assigned to Harbison-Walker (App. Ex. 4). The Western Pennsylvania Conservancy, in turn, conveyed those surface lands to the Commonwealth on May 3, 1963, subject to the leases assigned to Harbison-Walker (App. Ex. 5).

Harbison-Walker conducted its operations at the Smith Mine pursuant to Mine Drainage Permit No. 2969BSM24, issued November 26, 1969, and Mining Permit No. 266-3, issued December 15, 1963 (App. Ex. 7, 9). Although the Smith Mine comprises 575 acres in total, Harbison-Walker mined only two areas, a 9.3 acre area and an 18.6 acre area (App. Ex. 6). Harbison-Walker utilized a clay impoundment to collect mine drainage prior to its conveyance to a treatment plant on the Smith Mine (N.T. 59-60); this holding basin remained in place after Harbison-Walker backfilled the Smith Mine (N.T. 60). Clay barriers were placed at 200 feet intervals in the 18.6 acre area. Active clay mining operations at the Smith Mine were discontinued by Harbison-Walker in 1972 (N.T. 27).

Harbison-Walker was aware of discharges on the Smith Mine as early as 1954 (N.T. 49), and its 1969 application for a mine drainage permit identified acid mine drainage discharges in the vicinity of the Smith Mine (App. Ex. 6). The overburden at the Smith Mine had a propensity for producing acid mine drainage because it was high in sulfur and low in neutralization potential (N.T. 174, 217, App. Ex. 10). As a result, Harbison-Walker's

operations at the Smith Mine produced acid mine drainage (N.T. 143).

There are three distinct areas of discharges at the Smith Mine--Group A, Group B, and Group C (N.T. 20-21, 47, 128, 222-224, 235). All exhibit qualities of acid mine drainage (N.T. 54, 143). Harbison-Walker collected data regarding the locations of the discharges in 1982 and 1983; these locations did not exactly correspond with the locations of the discharges identified in the 1969 permit application (N.T. 52-53, 139-140, 244).

The Group A discharges are immediately downslope of the 18.6 acre area mined by Harbison-Walker and the 18.6 acre area is within the recharge area of the Group A discharges (N.T. 222). Harbison-Walker has been treating these discharges since 1972 (N.T. 59). The Group B discharges are downslope of the 18.6 acre area at the western end of the Smith Mine and flow as a diffuse zone of seepage ranging in elevation from 1530 to 1475 feet, with a combined flow of 40 gpm (N.T. 21, 214, 225). The Group C discharges are in a stream valley downslope of the 18.6 acre area mined by Harbison-Walker and in spoil mined by the previous operator (N.T. 20, 214, 235). Some of the Group C discharges receive recharge from areas mined by Harbison-Walker, while others don't (N.T. 235, 238-240). Harbison-Walker is not treating the Group B or C discharges (N.T. 28).

The Department's purpose in issuing the order was to verify whether downward migration of water from the 18.6 acre mined area contributed to the Group B discharges (N.T. 235, 242-243) and to establish the source of the Group C discharges (N.T. 240, 242-243). We believe that there was some nexus between Harbison-Walker's mining activities and the Group B and C discharges, given the production of acid mine drainage from Harbison-Walker's mining, the removal of clay in the pit floor above the Lower Kittanning seam and the existence of acid mine drainage problems at an adjacent mine as a result of

pit floor leakage. Furthermore, the existing data collected by Harbison-Walker is dated and does not adequately assess groundwater flow (e.g., it equates groundwater divide with the surface water divide (N.T. 240)). On this basis, we cannot conclude that there is an insufficient nexus between Harbison-Walker's mining activity and the Group B and C discharges.

In order to buttress its claim that it is likely to succeed on the merits, Harbison-Walker claims that the Department's order is invalid because §316 of the Clean Streams Law does not apply to mining activity initiated before January 1, 1966. Harbison-Walker's reading of §316 is not correct. The Department clearly has authority to issue an order under the section to a mine operator, regardless of when mining activity was initiated, if the mine operator has a proprietary interest in the land on which the pollutional condition exists, as does Harbison-Walker in this case; the January 1, 1966 deadline in the statute only relates to the manner in which expenses of abating the condition are calculated for purposes of recovery by the Department. And, even if we were to hold that §316 was inapplicable to Harbison-Walker in this circumstances, the Department still had ample authority under §§5, 402, and 610 of the Clean Streams Law to issue the order.[2]

Harbison-Walker also contends that the Department was barred from issuing the order by virtue of its long-standing tolerance of the conditions at the Smith Mine. This contention was rejected by the Commonwealth Court in Lackawanna Refuse Removal, Inc. v. Department of Environmental Resources, 65

---

[2] We will not analyze the Department's authority to issue the subject order under the Surface Mining Act. As clay is defined as a mineral subject to the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 et seq., it is curious that §11 of this statute was not cited in the Department's order.

Pa. Cmwlth 372, 442 A.2d 423 (1982). Similarly, to the extent that equitable estoppel may be applicable in this case, Harbison-Walker has not proven the necessary elements.

ORDER

AND NOW, this 26th day of October, 1989, it is ordered that:

1) The Board's order of April 17, 1989, denying Harbison-Walker's petition for supersedeas is affirmed;

2) All discovery in this matter shall be completed on or before January 19, 1990; and

3) Harbison-Walker shall file its pre-hearing memorandum on or before January 31, 1990.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: October 26, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Michael E. Arch, Esq.
Western Region
For Appellant:
John P. Krill, Esq.
Ronald L. Kuis, Esq.
Pittsburgh, PA

nb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

ROBERT F. STERRETT	:	
	:	**EHB Docket No. 84-358-G**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 31, 1989

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

By the Board

Synopsis

An appeal of the Department of Environmental Resources' (Department) assessment of civil penalties for violations of regulations promulgated under the Solid Waste Management Act is sustained where the Department has failed to establish the violations for which the penalties were assessed.

INTRODUCTION

This matter was initiated by the October 17, 1984, filing of a notice of appeal by Robert F. Sterrett seeking review of the Department's issuance of a $2150 civil penalty assessment. The assessment alleged that Sterrett caused or allowed 138,000 gallons of sewage sludge, which was obtained as a result of a sewage sludge give-away program operated by the Borough of Grove City (Grove City), to be spread on his farmland in a manner

which violated §§201(a), 610(1), 610(4), and 610(9)[1] of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§6018.201(a), 610(1), 610(4), and 610(9) (SWMA), and the regulations promulgated thereunder at 25 Pa.Code §75.32(c)(1), (5), and (6).

Sterrett claimed in his notice of appeal that he neither caused nor allowed an excess of 1000 gallons per acre per year to be spread, in violation of 25 Pa.Code §75.32(c)(1), but merely gave his permission to Grove City to spread its sludge on his farmland in accordance with the give-away program guidelines. Sterrett further argued that he did not violate §201(a) of the SWMA because it was Grove City, not he, which disposed of the sludge; that there had been no violation of 25 Pa.Code §75.32(a), and, therefore, no permit was required for the agricultural use of sludge during the normal course of farming; that he consulted soil survey maps which indicated that the soil on his farm was regarded by the Department as suitable for sludge disposal; and that the setback requirements in 25 Pa.Code §75.32(c)(5) had been met. Sterrett also denied any violation of §610(4) of the SWMA.

A hearing on the merits was held in front of former Board Member Edward Gerjuoy on January 30-31, 1986. Mr. Gerjuoy resigned from the Board before preparing an adjudication; therefore, we will issue this adjudication after review of a "cold record," Lucky Strike Coal Company and Louis J. Beltrami v. Department of Environmental Resources, ___ Pa.Cmwlth ___, 546 A.2d 447 (1988).

The Department filed its post-hearing brief on May 2, 1986, arguing that it had proven, by a preponderance of the evidence, that Sterrett had committed the violations of the SWMA and the regulations promulgated thereunder

---

1 Although the assessment lists a violation of 35 P.S. §6018.610(a), we believe it should have read 35 P.S. §6018.610(9).

cited in the civil penalty assessment, and, therefore, its assessment of a civil penalty was reasonable. The Department also argued that as a landowner, Sterrett was responsible for conditions on his property regardless of fault, and that, in any event, Sterrett had knowledge of and gave his permission for the disposal of sludge on his farmland.

On May 19, 1986, Sterrett filed his post-hearing brief, arguing, *inter alia*, that the Department had failed to prove that the 1000 gallons per acre per year limitation in 25 Pa.Code §75.32(c)(1) was exceeded; that sludge was spread approximately 180 feet from a spring, not within 100 feet, as alleged by the Department; that according to a Pennsylvania Geologic Survey Map, the soil in question met the requirements for sludge disposal; that tile drains were installed on the land to ensure the water table was maintained at the required level; that the Department acted arbitrarily and capriciously in issuing a civil penalty assessment to Sterrett; that in calculating the civil penalty, the Department used a proposed draft regulation; and, that Sterrett was not negligent in any way. Sterrett requests that the penalty be overturned, or alternatively, that it be reduced.

We will regard any issue that was not raised in the parties' post-hearing briefs as waived. DER v. Lucky Strike Coal Company and Louis J. Beltrami, 1987 EHB 234.

After a full and complete review of the record, the Board makes the following Findings of Fact.

FINDINGS OF FACT

1. Appellant is Robert F. Sterrett who resides at Sterrett Road, Grove City, Mercer County.

2. Appellee is the Department, the agency empowered to administer the SWMA, and the regulations promulgated thereunder.

3. Mr. Sterrett owns farmland in Wolf Creek and Worth Townships, Mercer County, and Irwin Township, Venango County. (N.T. 170)

4. Sterrett has farmed this land for 45 years. (N.T. 170)

5. Sterrett was, at the time of the hearings, the Chairman of the Board of Directors of the Venango County Soil and Water Conservation District. (N.T. 171)

6. A portion of Sterrett's land previously had been permitted by the Department for sludge disposal by Nytrex pursuant to Solid Waste Permit No. 601160. (DER Ex. B)

7. On August 2, 1983, the Department approved a sewage sludge give-away program for Grove City. (App. Ex. A)

8. The sewage sludge give-away program was subject to the conditions that the application of sewage sludge was limited to 1000 gallons per acre annually, the application of sewage sludge was prohibited within 100 feet of a stream, and Grove City was responsible for assuring that 25 Pa.Code §75.32 and the Department's Interim Guidelines for Sewage Waste Use on Agricultural Lands were followed. (App. Ex. A and B)

9. The Department terminated the Grove City give-away program in a letter dated August 26, 1983. (N.T. 75; Board Ex. 2, App Ex. C)

10. Jeffrey McKee, the Grove City Supervisor of Water and Waste Treatment, visited Sterrett in early August, 1983, to inquire about spreading sewage sludge on Sterrett's land pursuant to the give-away program. (N.T. 97, 171)

11. Mr. McKee showed the give-away program instruction sheet to Mr. Sterrett and discussed its contents with him. (N.T. 97, 172)

12. Sterrett did not sign an instruction sheet. (N.T. 97)

13. Mr. Sterrett agreed to the disposal of Grove City sludge after reviewing the instruction sheet with Mr. McKee and determining that the conditions could be met; however, Mr. Sterrett conditioned his agreement to the give-away program on Grove City's being responsible for meeting the conditions. (N.T. 98, 173)

14. Mr. Sterrett showed Mr. McKee the fields on which sludge was to be spread. (N.T. 173)

15. Ja-Bet Trucking Company (Ja-Bet) was hired by Grove City to haul and spread sludge on several farms, including Sterrett's. (N.T. 68)

16. Ja-Bet used two 6000 gallon trucks to haul and spread the sludge. (N.T. 67)

17. Mr. Sterrett told Mr. McKee and Jack McLaughlin of Ja-Bet to first spread the sludge on a 25 acre, rectangular field (primary field), then on an eight acre, backward-C shaped field (secondary field) and then on the remaining 175 acres whenever the proper gallonage was spread on the primary and secondary fields. (N.T. 33-34, 173, 178, 196)

18. On August 24-26, 1983, approximately 133,000-138,000 gallons of sewage sludge were hauled from the Grove City treatment plant by Ja-Bet. (N.T. 64, 77; DER Ex. J)

19. Records kept at the Grove City sewage treatment plant indicate that the sludge was taken to Sterrett's farm. (N.T. 77; DER Ex. G)

20. Four loads of sludge, or 24,000 gallons, were spread on the 25 acre primary field between August 24 and 26, 1983. (N.T. 33, 177-178, 227)

21. The Department did not call as witnesses the truck drivers who spread the sludge on Sterrett's farmland.

22. Mr. McLaughlin was present on the first day sludge was spread and only for the spreading of one load. (N.T. 65, 67-69)

23. It is unclear whether all of the sludge was spread on the two fields or on other portions of the farm. (N.T. 69)

24. In response to a complaint, Gary Wozniak of the Department conducted an inspection on August 26, 1983. (N.T. 12-13)

25. Wozniak inspected the areas identified by the complaints - the primary and secondary fields. (N.T. 33; DER Ex. A)

26. During the course of his August investigation, Mr. Wozniak observed a spring originating 60 feet from the lower edge of the secondary field. (N.T. 16, 188; DER Ex. A)

27. Mr. Wozniak also visited the Sterrett farm on September 9, 1983, September 15, 1983, and October 27, 1983. (N.T. 9, 18-19, 21)

28. Mr. Wozniak gave no testimony on the distance from the spring sludge was spread. (N.T. 9, 18-19, 21)

29. Mr. Wozniak used his August 26, 1983, inspection as the basis for determining that the setback requirement in 25 Pa.Code §75.32 had been violated by Sterrett. (N.T. 46-47)

30. Mr. Wozniak did not observe any visible signs of sludge during the course of the October 27, 1983, inspection. (N.T. 45)

31. Steven Socash, another Department employee who conducted an inspection of the site on October 27, 1983, observed sludge residue 50-100 feet from the spring. (N.T. 233)

32. Mr. Sterrett did not observe sludge in the fields when he harvested alfalfa in early October. (N.T. 179-180, 218)

33. Neither Grove City nor Sterrett tested the soil on Sterrett's farmland prior to the sludge disposal. (N.T. 101, 180-186)

34. Mr. Sterrett assumed that the soils on his farm were suitable for sewage sludge disposal after consulting "Glacial Deposits of Northwestern Pennsylvania," a Pennsylvania Geologic Survey Map. (N.T. 180-185; App. Ex. F)

35. At least 10% of the area where sludge had been disposed, investigated by Socash on October 27, 1983, had unacceptable soil, namely Ravenna silt loam. (N.T. 132-133)

36. The Department's regulation at 25 Pa.Code §75.32(c)(6)(iii) requires that there be a minimum of 20 inches to the seasonal high water table in soils where sludge is spread; the Grove City give-away program instruction sheet No. 11 incorporated this regulation in its requirement that, "Soils are to have a well developed solum with a minimum depth of 20 inches to bedrock and/or to seasonal high water tables." (App. Ex. B)

37. The seasonal high water table is determined by the location of soil mottling which, in turn, indicates that the water table, at some time, reached that level. (N.T. 139)

38. The indication of the seasonal high water table does not change with the time of the year. (N.T. 138-139)

39. Auger borings taken by Department personnel on Sterrett's farmland indicated areas where the depth of the seasonal high water table was less than 20 inches. (N.T. 142)

40. Approximately 10-20% of the primary and secondary fields had less than the minimum 20 inches of depth to the seasonal high water table . (N.T. 142)

41. Tile drains were present on the area on which sludge was spread which did not have a minimum depth of 20 inches to the seasonal high water table. (N.T. 186)

42. The tile drains were installed in 1965. (N.T. 187, 212)

43. Tile drains may lower the seasonal high water table level, but in and of themselves, do not make the area suitable for sludge disposal or ensure proper water table levels. (N.T. 144-145)

44. The Department assessed Sterrett a civil penalty of $2150. (N.T. 86, DER Ex. I)

45. Guy McUmber, the Department employee who calculated the assessment, based the calculation on violations of the 1000 gallons per acre per year limit, the setback requirements, and the soil requirements. (N.T. 89)

46. Mr. McUmber calculated the penalty using a draft document entitled "Calculation of Act 97 Solid Waste Civil Penalties." (N.T. 84; DER Ex. H)

47. Mr. McUmber's calculation of the civil penalty was broken down in this fashion:

a) Degree of severity - $1000
b) Costs incurred by the Commonwealth - $150
    i) Samples - $50
    ii) September 8, 1983 investigation - $20
    iii) October 27, 1983 investigation - $80
c) Degree of willfullness (negligent) - $1000

(N.T. 85-86; DER Ex. I)

48. The Department presented no evidence regarding harm to the waters of the Commonwealth or savings to the alleged violator.

DISCUSSION

The Department has the burden of proving, by a preponderance of the evidence, that its issuance of the civil penalty assessment was not an abuse of discretion or an arbitrary exercise of its power. 25 Pa.Code §21.101(b)(1); Chrin Brothers v. DER and Save Our Lehigh Valley Environment, EHB Docket No. 84-283-F (Adjudication issued August 7, 1989).

In reviewing this civil penalty assessment, we must first consider whether Sterrett committed the violations which are alleged in the assessment and, if so, decide whether the penalty is reasonable in light of the violations. For reasons discussed below, we hold that the Department failed to meet its burden of proving the violations for which it assessed the civil penalty, and, accordingly, we will vacate the assessment. Inman v. DER, 1988 EHB 613. Before discussing the alleged violations, we will address Sterrett's argument that he was not responsible for the sludge disposal activities occurring on his land.

The Department has alleged that Sterrett violated §§201(a), 610(1), 610(4), and 610(9) of the SWMA.[2] We fail to see the relevance of §201(a) to this matter, as sewage sludge does not fall within the definition of "municipal waste." However, the language in §§610(1), 610(4), and 610(9) is broad enough to emcompass the complained-of conduct. In particular, §610(1) provides that is unlawful to:

> Dump or deposit, or permit the dumping or depositing, of any solid waste onto the surface of the ground or underground or into the waters of the Commonwealth, by any means, unless a permit for the dumping of such solid wastes has been obtained from the department; provided, the Environmental Quality Board may by regulation exempt certain activities associated with normal farming operations as defined by this act from such permit requirements.
>
> (emphasis added)

"Normal farming operations" are defined in §103 of the SWMA to include the agricultural utilization of sludge. Given the evidence presented to the

---

2 We find it curious that the Department failed to allege that Sterrett had violated §302 of the SWMA, as sewage sludge is included within the definition of "residual waste" in §103 of the statute.

Board, it can hardly be said that Mr. Sterrett was an innocent and ignorant landowner upon whose property Grove City surreptitiously disposed of sludge. The sludge was disposed of upon the Sterrett property with the knowledge and acceptance of Mr. Sterrett. Consequently, he is potentially liable for violations of §610 of the SWMA and subject to the civil penalty provisions of §605 of the statute. We will proceed now to discuss the individual violations cited by the Department in its civil penalty assessment.

I. 1000 Gallons Per Acre Per Year Limitation

The Department alleged that Sterrett caused or allowed 138,000 gallons of sewage sludge to be disposed of on 33 acres of his farmland, in violation of 25 Pa.Code §75.32(c)(1), which states:

> (c) Agricultural utilization as part of a normal farming operation shall conform with the following:
>
> (1) The sewage sludge application shall be made at rates consistent with Departmental guidelines.

This regulation must be interpreted in the context of 25 Pa.Code §75.32(g)(4)(i) which states:

> A maximum of 1000 gallons per acre is permitted to be given a site annually for disposal. This rate may be changed as determined by the Department dependent upon the chemical characteristics of the particular sludge.

This 1000 gallon per acre rate was incorporated in the instruction sheet used in the Grove City sludge give-away program (App. Ex. B).

The Department has failed to meet its burden to prove that Sterrett caused or allowed more than 1000 gallons of sewage sludge per acre per year to be spread on his farm. Jeffrey McKee, Supervisor of Water and Waste Treatment for the Borough of Grove City, testified that Sterrett agreed to allow Grove City to dispose of sludge on his farm (N.T. 97) and that load slip records in-

dicate that 138,000 gallons of Grove City sludge was hauled by Ja-Bet to the Sterrett farm (N.T. 100). However, Mr. McKee had no direct knowledge of where on the farm the sludge was spread. (N.T. 104). These load slips were not produced; rather, the Department introduced a typewritten sheet which indicated that a total of 138,000 gallons of sludge had been sent to Sterrett's farm (DER Ex. J), and copies of notes taken during a Department review of the plant's records (DER Ex.G).

Jack McLaughlin, owner of Ja-Bet Trucking, stated that his company hauled between 133,000 and 138,000 gallons of sludge to Sterrett's farm from the Grove City sewage treatment plant between August 24-26, 1983 (N.T. 64). Upon further examination, Mr. McLaughlin stated that while he accompanied the driver to the site on the first day and observed sludge being spread on the secondary field, he was not on site the second or third day and did not have direct knowledge concerning where, on the Sterrett's farm, sludge was disposed after the first day (N.T. 65, 68-69). Mr. McLaughlin testified that the driver was concerned and confused about on which field he spread the sludge and on which field the sludge should be spread (N.T. 68).

Sterrett claimed that he saw four sets of truck tracks on the primary field; therefore, in his opinion, four truckloads of sludge, 6000 gallons each, were spread on the primary field (N.T. 178). He also asserted that he saw indications of sludge in other fields as well (N.T. 200-203). Certainly, his farm was large enough to accommodate the entire 138,000 gallons, if properly spread (see Finding of Fact 17). The Department countered this testimony by asserting that even if four truckloads of 6000 gallons each were spread, Sterrett exceeded the 1000 gallons per acre per year limit, since the 24,000 gallons were not evenly spread on the 25 acre field, as evidenced by gaps in the sludge, indicating separate loads (N.T. 178, 240).

The Department pointed out in its post-hearing brief that Sterrett admitted, during a meeting with Department personnel on September 6, 1983, that 138,000 gallons of sludge was spread on 33 acres of his land. Sterrett asserted that if he did say this at the September 6, 1983, meeting, he had no direct knowledge of this and was repeating what was told to him (N.T. 216). He also claimed that he did not inform the Department officials that sludge had been spread on fields other than the primary and secondary fields because these two fields were the areas that the Department concentrated on in the civil penalty assessment and because he did not want to anger the Department officials since he wanted the give-away program, which had been stopped, reinstated (N.T. 204). The Department also urges the Board to draw an adverse inference in response to Sterrett's failure to adequately refute allegations that the 1000 gallons per acre per year limit was exceeded. However, the Department has the burden of proof regarding this issue, and after a review of Mr. McUmber's testimony regarding the September 6, 1983, meeting, a portion of which (N.T. 78-80) is cited by the Department in support of this allegation, it is clear that Mr. Sterrett emphatically denied the violations and his liability for them (N.T. 80-81). Furthermore, the Department failed to call the Ja-Bet driver who spread the sludge, the individual who could definitively testify as to the location and amount of sludge spread, or to produce the load slips indicating where the sludge was taken.

We do not believe that the Department met its burden to prove by a preponderance of the evidence that Sterrett caused or allowed more than 1000 gallons per acre of sludge to be disposed on his property. The only facts proven by the Department are that 133,000-138,000 gallons of sludge left the Grove City sewage treatment plant and were hauled by Ja-Bet to Sterrett's farm. There was no proof that all of the sludge was spread on only the two

fields mentioned (a total of approximately 33 acres out of several hundred acres of farmland). The evidence which has been presented is inconclusive regarding the amount and location of sludge spread and the parties have offered contradictory testimony concerning these issues.

II. Sludge Disposal Within 100 Feet from Stream

The civil penalty assessment was also based, in part, on an alleged violation of 25 Pa.Code §75.32(c)(5)(i), which prohibits the application of sewage sludge within 100 feet of a stream. There is no dispute between the parties regarding the fact that a spring is located 60 feet from the lower edge of the secondary field. The dispute arises over where the sewage sludge was applied on the secondary field. Mr. Sterrett argued that sludge was spread 120 feet from the edge of the secondary field, 180 feet from the spring (N.T. 188). He also claimed that when he harvested the field in early October, 1983, he did not observe any sludge residue on the fields (N.T. 180, 187-188).

Gary Wozniak, Solid Waste Specialist for the Department, testified that he was on the site in August, 1983, to inspect the Sterrett farm in response to a complaint involving the disposal of the sludge and that the distance between the lower edge of the secondary field and the stream was about 60 feet (N.T. 16). However, Mr. Wozniak did not testify regarding the distance of sludge from the spring, although he stated that he determined that the setback requirement was violated as a result of his inspection (N.T. 46-47).

Steven Socash, Soil Scientist for the Department, referring to his field notes taken during an October 27, 1983, visit to the site, testified

that there was sludge residue 50-100 feet from the spring (N.T. 233). But, Mr. Wozniak, who was also present during the October site visit, testified that there were no visible signs of the sludge on that day (N.T. 45).

While there seems to be agreement that the spring originates approximately 60 feet from the lower edge of the secondary field, there is no agreement regarding where, on that field, sludge was spread. While Mr. Socash's testimony deserves great weight, since, as a soil scientist involved in approximately 100 sewage sludge disposal sites, he is aptly qualified to recognize sludge residue (N.T. 119), his testimony was based on a visit to the site two months after the alleged violation. Mr. Wozniak, the Department inspector, was on the site contemporaneously with the alleged incident (N.T. 9) and three times thereafter (N.T. 10-14, 21), provided no testimony regarding the location of the sludge, and even stated that there was no visible sign of sludge on October 27, 1983. This is consistent with Sterrett's testimony that he observed no signs of sludge when he harvested alfalfa in early October, 1983. Sterrett has farmed the land in question for 45 years and has had sewage sludge disposed on his property pursuant to the Nytrex permit.[3] Thus, presumably, he, too, can recognize sludge residue. Because of the conflict in the testimony of the Department's witnesses, we must hold that the Department failed to prove, by the preponderance of the evidence, that sludge had been disposed of within 100 feet from the stream.

III. Soil Characteristics

Sterrett has been assessed a penalty, in part, for violation of 25 Pa.Code §75.32(c)(6)(i), which states:

> Site characteristics for agricultural utilization are as follows:

---

3 Testimony indicates that sludge had previously been applied to Sterrett's land under a Nytrex Solid Waste Permit, No. 601160.

> (i) Suitable soils shall be those that fall within the USDA textural classes of sandy loam, loam, sandy clay loam, silty clay loam, and silt loam. All other materials must be approved by the Department.

Both Jeffrey McKee and Robert Sterrett testified that neither Grove City nor Sterrett had conducted soil testing prior to sludge disposal to determine whether the soil was acceptable under the regulation (N.T. 107, 110, 188). Sterrett claimed to have determined that the soil was suitable by referring to a Pennsylvania Geologic Survey Map (N.T. 183; App. Ex. F). He also emphasized that the Department previously permitted sludge disposal on Ravenna silt loam under Nytrex Permit 601160 (N.T. 193-196).

The accuracy of maps used to determine the soil type on the Sterrett property was an issue. Steven Socash determined that the Soil Conservation Service Map was inaccurate, listing much of the area as unacceptable Ravenna soil, while it was acceptable Canfield soil (N.T. 128). The accuracy of the Pennsylvania Geologic Survey Map, used by Sterrett, was not questioned.

Mr. Socash performed augering on the Sterrett farm, but only one of the 11 auger holes he dug was within either the primary or secondary field (DER Ex. A). No evidence was produced regarding the results of this augering. Furthermore, much of his testimony appeared to be related to the Nytrex permit, which is not at issue in this proceeding. We cannot find on the basis of this confusing and irrelevant testimony that the soils on the primary and secondary fields were unsuitable for sludge disposal. Indeed, the only uncontradicted evidence we have is that the soil mapping on the Soil Conservation Service Map erroneously indicated that the soil was unacceptable. Therefore, we cannot find a violation of 25 Pa.Code §75.32(c)(6)(i).

IV. Depth to the Seasonal High Water Table

The civil penalty assessment was also based, in part, on an alleged violation of 25 Pa.Code §75.32(c)(6)(iii), which states:

> (6) Site characteristics for agricultural utilization are as follows:
>
> (iii) A minimum depth of 20 inches to seasonal high water tables shall exist.

The seasonal high water table is determined by the location of soil mottling which is indicative of how high the water table was at some point during the year. This measurement is the same, regardless of the time of year it is taken (N.T. 138-139).

The Department's evidence on this issue is based on Mr. Socash's auger borings. Some of the borings were less than 20 inches in depth, and although these borings were taken on an area where sludge was spread (N.T. 142-143), only one boring was taken on the two fields in question (DER Ex. A). The Department did not produce the soil boring test results to substantiate this testimony.[4] When asked whether he had some concrete evidence regarding the boring results, Socash claimed to have his field notes. But, these notes were not introduced into evidence.

As with the evidence relating to soil types, it appears that much of Socash's testimony was directed to areas which were not the subject of the assessment. Since there is no evidence that the depth to the water table in the primary and secondary fields was less than 20 inches, the Department has failed to satisfy its burden on this issue.

V. <u>Disposal Without a Permit</u>

The Department alleged in its assessment that Sterrett violated

---

4 Normally, soil auger borings are not kept; rather, the borings are taken, the depth of the soil mottling is measured, and then the samples are discarded (N.T. 142).

25 Pa. Code §75.32(a), which states:

> A permit shall be required of any person, municipality, state agency, or authority proposing to use or continue to use their land or any other land as a sewage sludge disposal area except that no permit shall be required of farmers for the agricultural utilization of sewage sludge as a part of a normal farming operation when such utilization is accomplished according to the provisions of subsection (c). Any agricultural utilization in variance to the provisions of subsection (c) shall be considered land disposal and shall require a permit according to subsection (d).

Since we have found no violations of 25 Pa.Code §75.32(c), we cannot hold that the Department properly cited Sterrett for disposing of sewage sludge without a permit.

VI. Civil Penalty Assessment

Having determined that the Department failed to satisfy its burden of proof in establishing the violations alleged in the civil penalty assessment, we have no choice but to sustain Sterrett's appeal and reverse the Department's assessment. Technic, Inc. v. DER, EHB Docket No. 87-459-F (Adjudication issued August 30, 1989).

CONCLUSIONS OF LAW

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

2. Sterrett caused or allowed sewage sludge, a solid waste, to be disposed on his land by giving his permission to Grove City to spread sludge on his farm.

3. The Department has the burden of establishing, by the preponderance of the evidence, that the violations alleged in the civil penalty assessment occurred and that the penalty assessed for those violations was not an abuse of discretion.

4. The Department failed to meet its burden of proving that Sterrett caused or allowed an excess of 1000 gallons per acre per year of sewage sludge to be spread on his farmland, in violation of 25 Pa.Code §§75.32(c)(1) and 75.32(g)(4)(ii).

5. The Department failed to meet its burden of proving that Sterrett caused or allowed sewage sludge to be spread within 100 feet of a stream, in violation of 25 Pa.Code §75.32(c)(5)(i).

6. The Department failed to meet its burden of proving that Sterrett caused or allowed sewage sludge to be spread on unsuitable soil, in violation of 25 Pa.Code §75.32(c)(6)(i), and on soil not having the minimum depth to the seasonal high water table, in violation of 25 Pa.Code §75.32(c((6)(iii).

7. This Board may substitute its discretion for that of the Department if it finds the Department abused its discretion.

8. The Department abused its discretion in assessing civil penalties where no violations of the SWMA and the rules and regulations adopted thereunder were established.

O R D E R

AND NOW, this 31st day of October, 1989, it is ordered that the Department of Environmental Resources' September 18, 1984, civil penalty assessment to Robert F. Sterrett is reversed and the appeal of Robert F. Sterrett is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: October 31, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Theresa Grencik, Esq.
Western Region
For Appellant:
Karen Frymaire Clark, Esq.
Harrisburg, PA

bl

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

M. DIANE SMI
SECRETARY TO THE E

NEWTOWN TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 88-490-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 31, 1989**
and BUCKS COUNTY SEWER AND WATER	:	
AUTHORITY, Permittee	:	
and NESHAMINY SEWER COMPANY, INC.,	:	
and NORTHAMPTON MUNICIPAL AUTHORITY,	:	
Intervenors	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A Motion to Dismiss an appeal is denied when the Board's construction of the terms of an agreement (1) establishes that the appellant municipality has the right to challenge the manner in which a county authority exercised its discretion, and (2) concludes that the joinder in the agreement of the municipality's authority did not diminish the rights of the municipality.

OPINION

This appeal was filed by Newtown Township (Newtown) on December 1, 1988, challenging the November 2, 1988 issuance by the Department of Environmental Resources (DER) of Sewerage Permit No. 0988444 (Permit), authorizing Bucks County Water and Sewer Authority (BCWSA) to construct a 30" sewer interceptor parallel to an existing 18" sewer interceptor along Neshaminy Creek in Middletown Township, Bucks County (Neshaminy Interceptor).

Newtown, which is served by the existing 18" interceptor and also will be served by the 30" interceptor (along with Newtown Borough and Northampton Township) maintains that a 24" interceptor is all that is needed to alleviate the overload in the 18" interceptor. On April 26, 1989, BCWSA and Neshaminy Sewer Company, Inc. (NSC), Intervenor, filed a Motion to Dismiss Newtown's appeal, to which Newtown filed an Answer on May 16, 1989.

The Motion to Dismiss is premised on the language of (1) a September 9, 1975 Agreement (1975 Agreement) among BCWSA, the County of Bucks, Newtown, Newtown Borough and the Newtown, Bucks County, Joint Municipal Authority (Newtown Authority),[1] and (2) a July 7, 1988 Agreement (1988 Agreement) among BCWSA, Newtown Authority, the Northampton, Bucks County, Municipal Authority (Northampton Authority) and NSC. According to movants, these two Agreements eliminate any right on Newtown's part to contest the issuance of the Permit. Newtown, of course, disagrees.

The 1975 Agreement provided essentially for the construction by BCWSA of the Neshaminy Interceptor and for Newtown and Newtown Borough to connect their sewage collection systems to it. BCWSA would convey the sewage through the Interceptor, for a fee, to an appropriate site for treatment and disposal. Section 4 of the 1975 Agreement provides as follows:

> Section 4. Extension, Additions and Improvements.
>
> The [Bucks County] Authority reserves the right to make such extensions, additions and improvements to the Neshaminy Sewage System as it may from time to time deem necessary or advisable, including, without limitation, additions to the Neshaminy Interceptor, alternate or additional treatment and disposal facilities, and such changes or additions as may be necessary to comply with any judicial, administrative or legislative orders or regula-

[1] Newtown Authority is a municipality authority formed jointly by Newtown and Newtown Borough.

> tions. The Municipality[2] understands and agrees that such extensions, additions and improvements may alter the basis for the computation of the [Bucks County] Authority's service rates as hereinafter provided, however, no extensions, additions or improvements which will increase the [Bucks County] Authority's service rates as hereinafter provided shall be made unless first approved by a majority of the participating Municipalities.

BCWSA and NSC argue that, by this language, Newtown vested absolute discretion in BCWSA to determine the necessity for, and the details of, any additions to the Neshaminy Interceptor. Accordingly, they submit, Newtown is estopped from contesting BCWSA's decision to construct a 30" parallel interceptor. This argument does not deal with the last sentence of section 4, because the construction of the 30" parallel interceptor will not necessarily increase BCWSA's service rates.

If it is the position of BCWSA and NSC that the quoted language of the 1975 Agreement gives BCWSA unlimited power with respect to additions to the Neshaminy Interceptor, they are mistaken. Similar language in a trust instrument was held in Forrish v. Kennedy, 377 Pa. 370, 105 A.2d 67 (1954), to require the exercise of good faith and reasonable judgment. All actions of governmental agencies (a term that includes BCWSA) must be taken without fraud, collusion, bad faith or arbitrary conduct equating an abuse of discretion: Weber v. City of Philadelphia, 437 Pa. 179, 262 A.2d 297 (1970). Thus, even though Newtown agreed that BCWSA could make additions to the Neshaminy Interceptor without Newtown's consent (so long as the service rates would not be increased), Newtown could still challenge BCWSA's decision as an abuse of discretion. Newtown's Notice of Appeal does so.

Section 15 of the 1975 Agreement reads as follows:

---

[2] This term is defined to include Newtown, Newtown Borough and Newtown Authority.

Section 15. Joinder of Municipality Authority or Similar Agency.

> Nothing in this Agreement shall prevent the Municipality[3] from causing or permitting (by delegation, agreement or otherwise) any of the obligations of the Municipality hereunder or the financing, construction, maintenance, operation, ownership or occupancy of its Collection System to be undertaken, performed, be or be done by any municipality authority or similar agency having the legal right and capacity to do so, but such municipality authority or similar agency shall first join in this Agreement either, at the option of the [Bucks County] Authority, by execution of a joinder hereon or by the execution of a separate instrument of joinder in form satisfactory to the [Bucks County] Authority. Upon such joinder, such municipality authority or similar agency shall be entitled to all of the rights and benefits and shall assume all of the obligations and responsibilities of the Municipality hereunder and shall, jointly and severally with the named Municipality, be deemed to be included within the meaning of the word "Municipality" as used herein (unless the context makes such meaning clearly inappropriate), provided, however, that no such joinder shall in any way operate to relieve the named Municipality from its joint and several obligation hereunder.

On the last page of the 1975 Agreement, beneath the signatures of officials of BCWSA, Bucks County, Newtown and Newtown Borough, is the following:

> **JOINDER**
>
> Pursuant to Section 15 of the foregoing Agreement, and with the effect therein provided, the undersigned municipality authority, organized by the above named Municipalities, hereby joins in said Agreement.
>
> NEWTOWN, BUCKS COUNTY, JOINT MUNICIPAL AUTHORITY
>
> By/S/Chairman Attest/S/Secretary

BCWSA and NSC argue that, by permitting the joinder of Newtown Authority, Newtown effectively delegated to Newtown Authority all of Newtown's rights under the 1975 Agreement and authorized Newtown Authority to act on its

---

[3] Defined as indicated in footnote 2.

behalf in all matters pertaining to the 1975 Agreement. Accordingly, Newtown has surrendered any rights it may have possessed to challenge the construction of the 30" parallel interceptor. Reaching that conclusion is not as simple as BCWSA and NSC represent.

Newtown Authority's "joinder" is puzzling because this authority is identified as one of the parties at the beginning of the 1975 Agreement and is specifically included (along with Newtown and Newtown Borough) in the term "Municipality." If Newtown Authority was a party, why did it not sign as a party instead of "joining"? Apparently, it was to bring the provisions of section 15 into operation. Those provisions are far from clear, however. Does the joinder effect the substitution of Newtown Authority for Newtown and Newtown Borough or does it simply make the Authority another constituent of the group making up the term "Municipality"? The language immediately following "Upon such joinder" seems to suggest the former conclusion but the words "jointly and severally" suggest the latter. The proviso at the end makes clear that, joinder or not, Newtown and Newtown Borough will remain liable for their joint and several obligations.

Taking the Agreement as a whole, as we are required to do, Pines Plaza Bowling, Inc. v. Rossview, Inc., 394 Pa. 124, 145 A.2d 672 (1958), we conclude that the joinder of Newtown Authority was not intended to supplant Newtown and Newtown Borough or to alter any of their rights and obligations. It was intended, instead, to add the Authority as one more element to the collective term "Municipality," endowing the Authority with the same rights and obligations already possessed, jointly and severally, by Newtown and Newtown Borough. As the Authority's joinder was not intended to reduce the obligations of these municipalities, it also was not intended to diminish the rights of these municipalities. Based on this construction of section 15, we

hold that Newtown has not surrendered its rights, as a party to the 1975 Agreement, to challenge BCWSA's exercise of discretion in deciding to construct the 30" parallel interceptor.

The 1988 Agreement among BCWSA, Newtown Authority, Northampton Authority and NSC specifically provides for the construction of the 30" parallel interceptor and the manner in which the construction will be funded. BCWSA and NSC argue that, since Newtown Authority is a party to that Agreement, Newtown is estopped from contesting the project or any of its details. This argument also stems from the position of BCWSA and NSC that Newtown Authority completely displaced Newtown from the 1975 Agreement. Our construction of section 15, as already noted, reaches a different conclusion. As a result, Newtown Authority's participation in the 1988 Agreement has no limiting effect on Newtown's rights.[4]

On the state of the record before us, we can find no basis for dismissing Newtown's appeal.

---

[4] We express one reservation about this conclusion. The actions of the parties to a contract are an important aid to construction, Fenestra, Inc. v. John McShain, Inc., 433 Pa. 137, 248 A.2d 835 (1969). If, by an established course of conduct, Newtown made clear that it considered Newtown Authority to have supplanted it as a party to the 1975 Agreement or held the Authority out to others as having the power to bind Newtown in matters related to the 1975 Agreement, our conclusion would be different. We have not been presented with any allegations or facts involving such a course of conduct and, therefore, cannot consider it.

ORDER

AND NOW, this 31st day of October 1989, it is ordered as follows:

1. The Motion to Dismiss, filed by BCWSA and NSC on April 26, 1989, is denied.

2. Any party that has not yet filed a pre-hearing memorandum shall do so on or before November 15, 1989.

3. Upon the filing of the remaining pre-hearing memoranda, the appeal shall be placed on the list of cases to be scheduled for hearing.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: October 31, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Vincent Pompo, Esq./Eastern
Martha Blasberg, Esq./Eastern
For Appellant:
Stephen B. Harris, Esq.
Warrington, PA
For Permittee:
Edward Rubenstone, Esq.
Mark Goldberg, Esq.
Bensalem, PA
For Intervenors:
William Eastburn, II, Esq./Neshaminy Sewer Company
John A. VanLuvanee, Esq.
Doylestown, PA
Donald McCoy, Esq./Northampton Municipal Authority
Newtown, PA

sb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

LANCASTER SEWER AUTHORITY	:	
	:	
V.	:	**EHB Docket No. 89-279-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 31, 1989

OPINION AND ORDER SUR
REQUEST FOR LEAVE TO FILE
NUNC PRO TUNC

Synopsis

A petition for allowance of an appeal nunc pro tunc is denied where appellant's only justifications for untimely filing are alleged failures by the Postal Service or the Board. Receipt of the appeal by the Department of Environmental Resources within the 30-day appeal period does not constitute receipt by the Board and, therefore, does not establish the Board's jurisdiction.

OPINION

This matter was initiated with the August 24, 1989, filing of a notice of appeal by the City of Lancaster Sewer Authority (Authority) contesting the Department of Environmental Resources' (Department) June 2, 1989 denial of a state subsidy under the Act of August 20, 1953, P.L. 1217, as amended, 35 P.S.§701 et seq., commonly referred to as Act 339. Along with its appeal, the Authority filed a request pursuant to 25 Pa. Code §21.53 for leave to file the appeal nunc pro tunc based on the fact that the appeal was timely

filed with the Department, but the Board's copy was somehow lost or mislaid by either the Board or the Postal Service.

On September 11, 1989, the Department objected to the Authority's request, arguing that the Board lacks jurisdiction to hear the appeal and that the Authority has failed to assert unique and compelling facts to justify a late appeal. On October 3, 1989, the Authority replied to the Department's objections, asserting that any error here was due to a non-negligent failure, was promptly corrected and would not result in any prejudice if the appeal is permitted, since the Department was put on notice when it received its copy of the appeal in a timely manner.

The Board's rules of practice and procedure at 25 Pa. Code §21.52 state:

> (a) Except as specifically provided in §21.53 of this title (relating to appeal nunc pro tunc), jurisdiction of the Board shall 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 such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin unless a different time is provided by statute, and is perfected in accordance with subsection (b).

See also Rostosky v. Department of Environmental Resources, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). The Board will allow an appeal nunc pro tunc where fraud or breakdown of the Board's procedures was the cause of the untimely filing of the appeal. Lancaster Press, Inc. v. DER, EHB Docket No. 88-410-W, (Opinion issued March 24, 1989) and Borough of Bellefonte v. DER, EHB Docket No. 88-458-F (Opinion dated May 3, 1989). Neglect or mistake by the appellant or his counsel will not excuse the failure to file a timely appeal. State Farm Mutual Automobile Insurance Co. v. Schultz, 281 Pa. Super. 212, 421 A.2d 1224, 1227 (n. 7) (1980).

The Authority, in its reply, relies upon the holdings in Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979) and Perry v. Unemployment Compensation Board of Review, 74 Pa. Cmwlth. 388, 459 A.2d 1342 (1983). In Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979), the Supreme Court held that a non-negligent failure of counsel to file an appeal would constitute grounds for an appeal nunc pro tunc when the error was quickly discovered and the party promptly requested leave to appeal nunc pro tunc. As we stated in Lancaster Press, supra, the Pennsylvania intermediate appellate courts have since limited the holding in Bass to cases involving non-negligent happenstance and unique and compelling facts. See In Re Interest of C. K., 369 Pa. Super. 445, 535 A.2d 634 (1987), and Guat Gnoh Ho v. Unemployment Compensation Board of Review, 106 Pa. Cmwlth. 154, 525 A.2d 874 (1987). The Authority has failed to present such unique and compelling circumstances.

The circumstances surrounding this appeal are analogous to those which occurred in the Lancaster Press case. Lancaster Press alleged that it prepared its appeal for filing and mailed it and could not discover what became of the envelope thereafter. The only justification Lancaster Press offered was speculation that the mail services or the Board itself was responsible for the untimely filing; it produced no return receipts, postmarked envelopes or other evidence establishing that the appeal was ever sent to the Board. In the Lancaster Press decision, we cited Getz v. Pennsylvania Game Commission, 83 Pa Cmwlth. 59, 475 A.2d 1369 (1984), wherein the Commonwealth Court held that speculation regarding the operation of the Postal Service was not sufficient to satisfy the requisite burden for allowance of an appeal nunc pro tunc.

Similarly here, the Authority has neither specifically alleged nor established fraud or breakdown in the operations of the Board or the Postal

Service. The Authority merely alleges that on June 28, 1989, it mailed a copy of its appeal form to the Department's Office of Chief Counsel, the officer in the Administrative Services Section who took the action being appealed, and to the Board, all by first-class mail. The Authority has produced no return receipts, postmarked envelopes or other evidence establishing that the appeal was ever mailed to the Board.[1] Without any evidence that the Postal Service or the Board was somehow responsible for the untimely filing or evidence otherwise of unique and compelling circumstances, the Authority has failed to establish grounds for allowance of its appeal nunc pro tunc. The Board is without jurisdiction to hear this appeal and, accordingly, it must be dismissed.

---

[1] Because the Department and the Board are separate entities, mailing a copy of an appeal to the Department instead of the Board does not establish a basis for allowing an appeal nunc pro tunc. See generally, Cubbon Lumber Company v. DER, EHB Docket No. 88-507-R (Opinion and Order issued January 27, 1989).

ORDER

AND NOW, this 31st day of October, 1989, it is ordered that the City of Lancaster Sewer Authority's Request for Leave to Appeal Nunc Pro Tunc is denied and its appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: October 31, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Lisa E. Comer, Esq.
Central Region
For Appellant:
Frank P. Mincarelli, Esq.
Lancaster, PA

nb

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

M. DIANE SMI
SECRETARY TO THE E

JOHN BOWER	:	
	:	
V.	:	**EHB Docket No. 89-430-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 31, 1989**

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Synopsis

A Petition for Supersedeas is denied when the owner of a private dump fails to show a likelihood of prevailing on the merits and the unlikelihood of injury to the public. DER's insistence that the solid waste be removed to an approved facility cannot be considered an abuse of discretion when the evidence shows that burning the combustible material and burying the residue are not appropriate disposal methods for the site.

OPINION

This appeal was filed by John Bower (Appellant) on September 25, 1989, contesting an August 23, 1989 Order of the Department of Environmental Resources (DER), directing him to cease dumping solid waste on his property in Loyalsock Township, Lycoming County, and to clean up the solid waste dumped there previously. With the Notice of Appeal, Appellant filed a Petition for Supersedeas. DER filed an Answer to the Petition on October 10, 1989. A

hearing on the Petition was held in Harrisburg on October 12, 1989, before Administrative Law Judge Robert D. Myers, a Member of the Board. Both parties were represented by legal counsel.

In his Petition, Appellant alleged the following:

1. A private dump has existed on Appellant's farm for 70 to 80 years, long before the passage of environmental legislation;

2. Appellant is willing to stop using the private dump and to clean it up by means of incineration, burial and removal at an estimated cost of $5,000 - $7,000;

3. Such methods had been used previously, with DER approval, in a Lycoming County program to close as many private dumps as possible;

4. DER has rejected Appellant's proposal and has insisted that all of the solid waste be removed to an approved landfill;

5. Removing the solid waste is not practical because of steep slopes that would prohibit the use of trucks;

6. Removing the solid waste, even if possible, would cost an estimated $15,000; and

7. There is no evidence of stream pollution or other health hazards associated with the private dump.

DER denied most of Appellant's allegations, asserted that the private dump is in the floodplain of Loyalsock Creek and maintained that removal of the solid waste is the only appropriate action in such circumstances.

Evidence produced at the hearing revealed that Appellant owns and operates a 234-acre dairy farm that has been in his family for 5 generations. A steep cliff 150 to 200 feet high exists on the farm overlooking the valley of Loyalsock Creek. At least for the past 70 to 80 years and perhaps longer, solid waste has been dumped over this cliff, forming a pile that currently

climbs to within 80 feet of the top of the cliff. The land at the base of the cliff is in the 100-year floodplain of Loyalsock Creek. The Creek Channel is located about 100 to 150 yards from the cliff, but an intermittent tributary that flows along the base in wet weather passes through the solid waste deposited there.

Solid waste currently visible in the dump consists of appliances, rubber tires, metal drums, scrap wood and a wide variety of plastic, paper and cardboard items. Some of this waste was produced by the dairy farm. While Appellant stated that he has not permitted others to use the dump, he indicated that such use may have occurred without his consent or knowledge.

Apparently, Appellant's only vehicular access to the base of the cliff is an old dirt logging road, about 10 to 15 feet wide, that follows a circuitous route through a wooded area. The steepest grade on this road, about 18% to 20%, makes it of doubtful use for trucks. Farm tractors and construction equipment can travel over it, however.

Responding to a citizen's complaint, a DER inspector visited the site of the dump on March 17, 1989. On March 20, 1989, DER issued a Notice of Violation, directing Appellant to remove the solid waste within 30 days. Appellant retained legal counsel who informed DER on April 14, 1989, that Appellant desired to cooperate with DER in closing the dump site and proposed a plan whereby combustible material would be burned and the remaining solid waste would be buried on site. When DER indicated that this proposal was unacceptable, Appellant agreed to seek proposals for hauling the solid waste away.

A proposal of George E. Logue, Inc., obtained by Appellant on April 19, 1989, stated that, because of the inaccessibility of the solid waste, it was not feasible to haul it away. Appellant was advised to seek DER's

permission to relocate the intermittent tributary at the base of the cliff and to cover the solid waste with clay and dirt which then would be seeded and mulched. The cost of performing this work would be $5,500. The proposal of George E. Logue, Inc. was unsatisfactory both to DER and to Appellant, and another proposal was sought from Woodhead, Inc. This proposal, dated July 11, 1989, recommended pushing up the outlying debris at the base of the cliff and then covering the entire pile with dirt dumped from the top of the cliff, for a total cost of $6,800.

When DER also rejected this proposal, Appellant obtained information on the cost of loading the solid waste and hauling it to an approved disposal site. Hauling costs would be about $10 per ton and dumping costs at a landfill would be $30 per ton. At a gross estimated weight of 300 to 450 tons, these costs would total $12,000 to $18,000. These figures do not include the cost of building a road with grades moderate enough for loaded trucks to use. Appellant has a debt burden of $94,000 on his farm and realized a net income of $12,000 from last year's farming operations. In order to raise the money to clean up the dump in a manner satisfactory to DER, he would have to sell off some of his farmland.

From 1978 to 1981, Lycoming County was engaged in a program to close old dump sites with the use of funds received from DER and from the Appalachian Regional Commission. DER gave the county the option of removing the solid waste to a disposal facility or of covering and seeding it. The latter option was used with respect to about 85% of the sites. However, it was not used if the site was in a floodplain. On some occasions, roads were constructed to enable the solid waste to be hauled away. Appellant's dump, although identified and placed on the county's list, was not closed because neither Appellant nor Loyalsock Township requested it.

DER became dissatisfied with Appellant's failure to close the dump and, on August 23, 1989, issued the Order forming the basis of the appeal. DER has neither alleged nor determined that any contaminants from Appellant's dump have entered the waters of the Commonwealth.

In order to qualify for a supersedeas, Appellant must show (1) irreparable harm, (2) his likelihood of prevailing on the merits, and (3) the unlikelihood of injury to the public: 25 Pa. Code §21.78(a). If pollution or injury to the public health, safety or welfare exists or is threatened, no supersedeas can be issued: 25 Pa. Code §21.78(b). Appellant has failed to satisfy items (2) and (3), rendering a consideration of item (1) unnecessary.

Appellant can prevail on the merits only by showing that DER's August 23, 1989 Order was beyond the limits authorized by law or was an abuse of discretion. The Order directed Appellant to cease dumping and, within 30 days, to remove all of the solid waste to an approved facility. Appellant challenges only the requirement to haul the waste away, arguing that this is an abuse of discretion under the circumstances existing at the site. The evidence reveals that, while terrain conditions make it difficult, removal of the waste is not impossible. A certain amount of road building would have to be done to enable trucks to navigate the steep slopes, but that does not pose an insurmountable problem in this age of heavy equipment.

Appellant claims, however, that demanding a costly removal of the solid waste is an abuse of discretion when it would be cheaper and simpler to burn the waste where it is and then cover the residue with soil. Appellant has not backed up this claim with any evidence to show that burning and burying the waste would be appropriate for this site. DER, on the other hand, has shown that burning is not an expedient method of disposal because terrain factors inhibit control measures, and that burial also is not an appropriate

measure because the land is in the floodplain: 25 Pa. Code §273.202(a)(1). Appellant made no effort to counter this evidence or to show that some other method of disposal is feasible. As a result, Appellant has been unsuccessful in his efforts to show a likelihood of prevailing on the merits.

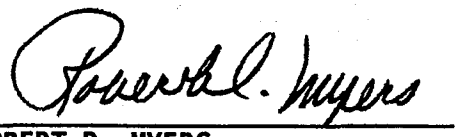
Disposal of solid waste in a location where surface waters can flow through it poses a threat of contamination. This is the situation that currently exists at the dump site where the intermittent tributary to Loyalsock Creek winds its way through the debris at the base of the cliff. If the Loyalsock overflows its banks, a greater volume of water could flow past the waste, dislodging some of it and carrying debris and contaminants downstream. There is some evidence that this may have happened in the recent past.

This situation poses a continuing threat of pollution and of injury to the public health, safety and welfare; it should be corrected as soon as possible. Even though the dump may have existed for many decades and even though no actual finding of contamination has been made, the threat nonetheless is real. We are not unmindful of the economic plight of many farmers, but all segments of society are required to comply with environmental laws - a requirement that frequently is costly.

ORDER

AND NOW, this 31st day of October, 1989, it is ordered that the Petition for Supersedeas, filed by John Bower on September 25, 1989, is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: October 31, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Martin Sokolow, Esq.
Central Region
For Appellant:
Allan R. Crider, Esq.
State College, PA
sb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

FRANCES SKOLNICK, et al.	:	
	:	
V.	:	**EHB Docket No. 89-290-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 7, 1989
and GPU NUCLEAR CORPORATION, Intervenor	:	

OPINION SUR MOTIONS TO DISMISS PETITION FOR SUPERSEDEAS

Synopsis

The Appellants have filed a petition for supersedeas, requesting that the Board halt GPU Nuclear Corporation's (GPUN) plan to operate an evaporation system to clean and dispose of water which was contaminated as a result of the accident at Three Mile Island. Both GPUN and the Department of Environmental Resources (DER) have filed motions to dismiss the petition for supersedeas, claiming that supersedeas is not available because GPUN was exempt from DER's plan approval requirements for air contamination sources even before DER issued the letter which has been appealed here. The motions to dismiss are denied because it is not clear that GPUN had legal authority to go forward with the evaporation plan without DER's specific approval in the letter.

OPINION

This proceeding involves an appeal by Frances Skolnick, Susquehanna Valley Alliance, Three Mile Island Alert, Concerned Mothers and Women, and People Against Nuclear Energy (collectively, the Appellants) from a letter of

the Department of Environmental Resources dated August 3, 1989. In this letter, DER stated that no plan approval for an air-contamination source was required for GPU Nuclear Corporation (GPUN) to install an evaporation system to clean and dispose of "accident-generated water." In their Notice of Appeal, the Appellants argue, among other things, that DER erred in determining that the evaporation system would constitute an air-contamination source of "minor significance" under 25 Pa. Code §127.14(8).

The Appellants filed a petition for supersedeas on October 3, 1989. In this petition, Appellants ask the Board to prevent GPUN from operating the evaporation system pending a decision on the merits of the appeal.[1] Both GPUN and DER responded to this petition by filing motions to dismiss the petition. On November 2, 1989, we entered an order denying these motions to dismiss. This opinion explains the basis for our order.

The motions filed by GPUN and DER raise similar arguments. They both contend that DER's letter is not the type of decision which the Board has the authority to supersede. GPUN explains that under 25 Pa. Code §127.14(8), no plan approval is required for "sources determined to be of minor significance by the Department." DER published a "Notice of Sources Determined to be of Minor Significance" in 18 Pennsylvania Bulletin, pp. 1856-1857, April 16, 1988. Listed among these sources of minor significance were:

> (31) Sources emitting radionuclides with a calculated whole body dose equivalent less than one millirem per year aggregated over all exposure pathways when calculated using the maximum potential (before control) emissions and point of maximum concentration occurring beyond the property line, for each pathway of exposure.

18 Pa. Bulletin p. 1857. GPUN argues, in a nutshell, that this Notice, not

---

[1] GPUN has indicated to the Board that the evaporation system will begin operating sometime after December 1, 1989.

DER's letter, exempted the evaporation system from the plan approval requirements; therefore, the Board lacks authority to halt operation of the system by superseding DER's letter. GPUN contends that granting a supersedeas would violate the principle that supersedeas is only available to preserve, not to alter, the lawful status quo which existed prior to the decision which has been appealed. See e.g. Parker Sand and Gravel v. DER, 1983 EHB 557, NSM Coals, Inc. v. DER, 1986 EHB 285.

The Appellants filed a response to the motions to dismiss the petition for supersedeas. The Appellants argue that GPUN could not go forward with the evaporation plan without the approval which DER granted in its August 3, 1989 letter; therefore, the Board may supersede DER's letter and halt the operation of the evaporation system. The Appellants explain that exemption (31) listed in the Notice in the Pa Bulletin does not apply to GPUN's evaporation system; therefore, the source of GPUN's authority to install and operate the evaporation system was DER's letter, not the Notice in the Pa Bulletin.

In reviewing a motion to dismiss, any ambiguities in the record must be resolved in favor of the non-moving party. Herskovitz v. Vespicco, 238 Pa. Super. 529, 362 A.2d 394 (1976), DEL-AWARE Unlimited, Inc. v. DER, 1988 EHB 158, 160. In this case, the motions to dismiss must be denied because it is not clear that GPUN had legal authority to go forward with the evaporation plan without DER's specific approval in the August 3, 1989 letter.

GPUN has not convinced us that exemption no. 31 in the Pa Bulletin Notice was the basis for the exemption of the evaporation system. While GPUN cites an internal DER memorandum to support its position, DER's August 3, 1989 letter does not mention exemption no. 31. It appears more likely to us that DER's letter was based upon other language in the Pa Bulletin Notice:

> Exemptions may be granted for sources not listed above. Such exemptions should be obtained by the submission of a completed Request for Determination of Requirement for Plan Approval/Operating Permit Application form, available from any Bureau of Air Quality office.

18 Pa Bulletin p. 1857 (emphasis supplied). We note that DER's letter described GPUN's submission by using the exact language underscored above. In addition, the entire tone of DER's letter gives the impression that DER is granting an exemption, not that it is merely confirming that the evaporation system was already exempted. These factors indicate that the specific basis of the exemption for the evaporation system was DER's August 3, 1989 letter, not exemption no. 31 listed in the Notice in the Pa Bulletin.[2] Therefore, the lawful status quo prior to DER's letter was that GPUN could not proceed with the evaporation process, and a supersedeas of DER's letter which granted the exemption would be an appropriate exercise of the Board's powers because a supersedeas would preserve, not alter, the lawful status quo which existed prior to DER's letter. See e.g., Parker Sand and Gravel v. DER, 1983 EHB 557.

---

[2] Even if we thought that exemption no. 31 did apply here, we would question whether the Pa Bulletin Notice could serve, on its own, to exempt the evaporation system. We are unsure of the legal status of this "Notice." If DER intended the Notice as a statement of policy, then the Notice would only indicate what DER tentatively planned to do when exemptions were sought in the future. If DER intended the Notice to operate on its own to exempt facilities, by spelling out what DER has determined are sources of "minor significance" under 25 Pa Code §127.14(8), then we question whether the provisions of the Notice are valid in that they were not promulgated as regulations. See e.g., Newport Homes, Inc. v. Kassab, 17 Pa. Commw. 317, 332 A.2d 568 (1975), Hardiman v. Commonwealth, DPW, ___ Pa. Commw. ___, 550 A.2d 590 (1988).

It follows from what we have stated above that DER's letter is amenable to a supersedeas, and that we must hold a hearing and consider the petition for supersedeas on its merits. Thus, the motions to dismiss the petition for supersedeas were properly denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: November 7, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Central Region
For Appellant:
Frances Skolnick
Lancaster, PA
For Intervenor:
John Proctor, Esq.
Washington, D.C.

nb

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

M. DIANE SMIT
SECRETARY TO THE B

NEWLIN CORPORATION, SOMERSET OF VIRGINIA INCORPORATED, DAVID EHRLICH and RICHARD WINN	:	**EHB Docket No. 83-237-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 16, 1989

OPINION AND ORDER SUR
PETITION FOR PARTIAL RECONSIDERATION

Synopsis

A petition for reconsideration filed pursuant to 25 Pa.Code §21.122(a)(1) is denied where the petitioners had ample opportunity to brief the issue upon which the Board's determination rested.

OPINION

On October 18, 1989, the Board issued an adjudication sustaining in part and dismissing in part the appeals of Newlin Corporation (Newlin) and Somerset of Virginia, Incorporated (Somerset) and sustaining the appeals of David Ehrlich and Richard Winn. The Board held that the Department of Environmental Resources' (Department) October 21, 1983, issuance of an order to Newlin and Somerset to undertake remedial activities at the Strasburg Landfill in Newlin Township, Chester County was not an abuse of discretion because §316 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.316 (Clean Streams Law), empowered the Department to direct landowners and occupiers to correct pollutional conditions on their land. The Board determined that Strasburg Landfill Associates, a joint venture of Newlin, Somerset, and Eco-Waste, Inc., was the owner of the

property on which the Strasburg Landfill is situate and that Newlin and Somerset, as joint venturers, were liable as landowners under §316 of the Clean Streams Law.

Newlin and Somerset filed a timely petition for reconsideration *en banc* of this portion of the opinion on November 6, 1989. As grounds for the petition, Newlin and Somerset contend that the Board's conclusions regarding their liability under §316 of the Clean Streams Law rested "on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question." 25 Pa.Code §21.122(a)(1). The Department opposed the petition in a response filed November 16, 1989.

We find the petitioners' claims that the adjudication rested upon a ground not considered by either party to be lacking in merit and disingenuous.

A great deal of evidence regarding the formation and purpose of Strasburg Landfill Associates was adduced at the hearing on the merits in this matter. The Joint Venture Agreement itself was admitted into evidence. Documents dealing with financing the sale of the landfill property to the joint venture and the joint venture's leasing the landfill to Strasburg Associates were also admitted into evidence. The order at issue in the appeal specifically cites §316 of the Clean Streams Law as authority for issuance of the order, and the Department did not indicate at the hearing that it was abandoning this particular issue.

As for the parties' briefs, the Department filed the initial post-hearing brief. Pages 10 through 13 of the Department's brief are devoted to argument why Newlin and Somerset, the joint venturers, are liable for the conditions at the Strasburg Landfill under §316 of the Clean Streams Law. Section IV of the post-hearing brief filed by Newlin and Somerset is entitled "Neither Newlin nor Somerset can be held liable under the Clean Streams Law

(35 P.S. 691-316 [sic]) through their participation in the SLA Joint Venture because SLA was neither a landowner nor occupier of the landfill portion of the property in question." Newlin and Somerset had ample opportunity to address the issue of joint venturer liability for the acts of the joint venture in the context of this argument.

Finally, Newlin and Somerset place great store in footnote eight of the Board's adjudication as grounds for reconsideration under 25 Pa.Code §21.122(a)(1). That footnote, which states "Neither party has directed us to any law on the subject, and the Department has merely broadly asserted that the joint venturers are liable," cannot be construed as indicating that the Board fabricated an entirely new basis for its holding that Newlin and Somerset were liable under §316 of the Clean Streams Law, as it is merely a comment on the parties' briefs. Otherwise, carrying the petitioners' argument to its logical conclusion, the Board's decisions would have to exactly follow the structure of the legal arguments in the litigants' post-hearing briefs. If that were the case, it would be unnecessary for the Board to exercise any judgment in reaching its decision; a mere indication that it adopted one party or the other's argument would be sufficient.

O R D E R

AND NOW, this 16th day of November, 1989, it is ordered that the petition for partial reconsideration *en banc* of Newlin and Somerset is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

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

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 16, 1989

cc: See following page.

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kenneth A. Gelburd, Esq.
Eastern Region
For Appellants:
Hershel J. Richman, Esq.
COHEN, SHAPIRO, POLISHER,
SHIEKMAN & COHEN
Philadelphia, PA
and
John A. Yacovelle, Esq.
Somerdale, NJ
and
Bruce L. Thall, Esq.
ABRAMSON, COGAN, KOGAN,
FREEDMAN & THALL
Philadelphia, PA
bl

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

M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA **DEPARTMENT OF ENVIRONMENTAL RESOURCES**	:	
v.	:	**EHB Docket No. 89-158-W**
WAWA, INC.	:	**Issued:** November 16, 1989

OPINION AND ORDER SUR
MOTION FOR PARTIAL DEFAULT ADJUDICATION

Synopsis

A motion for partial default adjudication will be denied where an error in failing to file an answer before the filing of preliminary objections resulted from confusion over the Board's Rules and the Pennsylvania Rules of Civil Procedure and the error was quickly corrected and caused no harm or prejudice to the opposing party. Preliminary objections in the form of a motion to strike and a motion for more definitive pleading are denied where the matter contained in the complaint is not scandalous or impertinent and provides a clear enough basis upon which to prepare an answer.

OPINION

This matter was initiated by the Department of Environmental Resources' (Department) June 9, 1989, filing of a complaint for civil penalties pursuant to Section 605 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605 ("The Clean Streams Law"). The complaint alleged that Wawa, Inc. ("Wawa") had discharged industrial waste from the wastewater treatment plant at its dairy and fruit juice processing

facility in Middletown Township, Delaware County, into Rocky Run Creek and into the sanitary sewers of Middletown Township in violation of its NPDES permit and various provisions of the Clean Streams Law. A standard Notice to Defend, as required by 25 Pa. Code §§21.32(b), 21.56(b), 21.64(b), and 21.65(a) and Pa. R.C.P. No. 1018.1(b), was attached to the complaint.

On June 29, 1989, Wawa filed, in the form of preliminary objections, a motion to strike and a motion for a more definite statement.

On July 19, 1989, the Department filed its memorandum in opposition to Wawa's preliminary objections, as well as a motion for a partial default adjudication prompted by Wawa's failure to file an answer within the 20-day period following service of the complaint in accordance with the Board's rules.

On July 21, 1989, Wawa filed its answer and new matter. On August 8, 1989, Wawa filed a memorandum in opposition to the default motion, explaining that the failure to answer the complaint in a timely manner was due to a mistake and was not intended to delay proceedings. Wawa argues the imposition of a default judgment would be inappropriately drastic in this case, and we agree.

The Board's rules of practice and procedure provide at 25 Pa. Code §21.64(a) that:

> Except as provided otherwise in these rules of procedure, the various pleadings described in the Pennsylvania Rules of Civil Procedure shall be the pleadings permitted before this Board and such pleadings shall have the functions defined in the Pennsylvania Rules of Civil Procedure.

However, the rule applicable to complaints for civil penalties at 25 Pa. Code §21.66 provides in pertinent part that:

> (a) Answers to complaints for civil penalties shall be filed with the Board within 20 days after the date

> of service of the complaint, unless for cause the Board, with or without motion, shall prescribe a different time, but in no case shall an answer be required in less than ten days after date of service.
>
> (b) Answers to complaints for civil penalties shall set forth any legal objections as well as any denial of facts, in a single pleading, regardless of whether they would ordinarily be raised as preliminary objections or other preliminary pleading.

Thus, unlike practice under the Pennsylvania Rules of Civil Procedure, 25 Pa. Code §21.66(b) requires that answers to civil penalty complaints also set forth legal objections and a denial of facts in a single pleading. While the Board's rules relating to sanctions empower it to enter a default adjudication, the Board's grant of such relief is discretionary and is reserved for the most unusual and extreme circumstances.

The caselaw relating to opening of default judgments provides guidance in disposing of the Department's motion. A trial court may open a default judgment and reinstate an action if there is a showing of good cause. Good cause is established where 1) the petition is promptly filed; 2) a meritorious defense can be shown; and 3) the failure to appear can be excused. Alston v. Philadelphia Elec. Co., 337 Pa Super. 46, 486 A.2d 473 (1984). In interpreting this principle, the courts have upheld reopening judgments where attorney oversight resulted in error. In Acherman v. Port Authority of Allegheny County, 323 Pa Super. 375, 470 A.2d 640 (1984), the defendant's attorney's mistake in listing the expiration date of an extension to file an answer to a complaint was found to be a basis for opening a default judgment where the delay was brief and was not an attempt to deliberately stall the proceedings. See also Johnson v. Yellow Cab Co., 226 Pa Super. 270, 272, 307 A.2d 423, 424 (1973) (new counsel incorrectly assumed that responsive pleading had been filed); and Dupree v. Lee, M. D. 241 Pa Super. 259, 361 A.2d 331 (1976) (reasonable explanation for counsel's mistake, oversight, or neglect

justified vacating a non pros).

Cases which have rejected the excuse of attorney mistake generally involve situations where counsel continued to delay filing an answer despite extensions and requests by opposing counsel. For example, in DER v. Marileno Corp., EHB Docket No. 87-458-W (Adjudication issued February 9, 1989), the Board entered a partial default adjudication where the defendant failed to file any response to a complaint for civil penalties and indicated its intention not to defend against the complaint. Similarly, in DER v. Canada-Pa Ltd., 1987 EHB 177, the Board referred to default adjudication as a drastic remedy, but granted it in light of the defendant's flagrant disregard for the administrative process, as evidenced by its repeated failure to file an answer to a civil penalties complaint.

We can easily distinguish the latter group of cases from this matter. Here, counsel, confused by the disparity in filing sequences required by the Board's rules and the Pennsylvania Rules of Civil Procedure, erroneously filed preliminary objections prior to filing an answer and new matter. Upon learning of this mistake, counsel immediately filed the answer and new matter and soon thereafter, filed a memorandum opposing the grant of a partial default adjudication, explaining that the error was a mistake and was not meant to delay or hinder the proceedings. The error resulted in a 20-day delay in the Department's receipt of Wawa's answer. The Department has not alleged harm or prejudice due to the delay, and counsel for Wawa diligently tried to rectify the error. In light of this, it would be unduly harsh to enter a partial default adjudication.

Next, we will address Wawa's preliminary objections. First, Wawa has filed a motion to strike Paragraphs 19, 20 and 21 of the Department's complaint. The paragraphs in controversy state as follows:

19. From October, 1982 to October, 1987 there has been a total of 50 months of statutory noncompliance out of 60 months, a 83% rate of noncompliance.

20. The violations of Wawa's permit revealed in the DMRs are not only numerous, they are also serious. The DMRs filed by Wawa show that many of the violations reported involve discharges of pollutants that are more than twice the allowable discharge limits. In some cases, the discharge of pollutants was more than twenty times the permit limit.

21. Each of these 4,116 exceedances constitutes a separate violation of the Clean Streams Law.

Wawa alleges Paragraph 20 is in the nature of a conclusion of law, includes inflammatory and slanderous statements and should be stricken pursuant to Pa. R.C.P. 1017(b)(2). Wawa further states that Paragraphs 19 and 21 are repetitive and serve no purpose. The Department responds that 25 Pa. Code §21.57 requires it to set forth the specific facts and circumstances upon which its complaint is based and that Paragraphs 19, 20 and 21 contain information relating to the wilfulness and severity of the alleged violations, factors which are to be considered under the Clean Streams Law in determining the amount of a civil penalty. Finally, the Department asserts that Paragraph 20 is a pleading of ultimate facts in compliance with 25 Pa. Code §21.56(b), which requires the Department to set forth the Board's authority to assess penalties.

Pursuant to Pa. R.C.P. No. 1017(b)(2), a preliminary objection in the form of a motion to strike is permitted when the pleading does not conform to a rule of court or contains scandalous or impertinent matter. Paragraph 16 incorporates Attachment A, a statistical enumeration of Wawa's alleged violations. Paragraphs 19 and 21 then go on to summarize those violations in a more straightforward narrative form; the paragraphs contain no scandalous or impertinent matter and describe Wawa's alleged violations in summary form. As

for Paragraph 20, since we must take severity into account in assessing civil penalties under the Clean Streams Law, the Department must allege some basis for our finding the violations to be serious. Thus, we will deny Wawa's motion to strike Paragraphs 19, 20 and 21.

Wawa also requested a more specific pleading or a more definite statement of the violations alleged in Paragraph 18, contending that the paragraph is inconsistent with the violations listed in Attachment A and is confusing to answer. The Department counters that the allegations are based on Wawa's own discharge monitoring reports (DMRs) and explains that under the Clean Streams Law each day a violation exists constitutes a separate violation.

Paragraph 18 states:

> 18. The discharge monitoring reports ("DMRs") submitted by Wawa from October, 1982 to October, 1987 show that defendant has violated the effluent limitations required by the NPDES permit on over 4,000 occasions:

Parameter	Number of Violations
TSS	2,313
BOD5	691
NH3	722
Fecals	300
Flow	90
Total	4,116

Attachment A sets forth the violations on an average monthly basis, and, on the basis of that attachment, it is unclear just how many days of the month Wawa actually was in violation of the Clean Streams Law; Paragraph 18, on the other hand, does refer specifically to the DMRs filed by Wawa. We find this a definitive enough basis upon which to respond and will deny Wawa's motion as it relates to this paragraph.

ORDER

AND NOW, this 16th day of November, 1989, it is ordered that:

1) The Department's motion for partial default adjudication is denied;

2) Wawa's preliminary objections in the nature of a motion to strike Paragraphs 19, 20, and 21 of the Department's complaint and a motion for a more definitive pleading regarding Paragraph 18 of the Department's complaint are dismissed;

3) The Department shall respond to Wawa's new matter on or before December 8, 1989; and

4) The parties shall submit a proposed schedule for completing discovery on or before December 22, 1989. In the event the parties fail to agree, the Board will impose a schedule on them.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 16, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Mary Young, Esq.
Eastern Region
For Appellant:
Mary Anne Taufen, Esq.
West Chester, PA
nb

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

M. DIANE SM
SECRETARY TO THE

FELTON ENTERPRISES, INC.	:	
	:	
v.	:	**EHB Docket No. 87-104-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 17, 1989**

OPINION AND ORDER

Synopsis

The Commonwealth of Pennsylvania, Department of Environmental Resources' (DER) motion for summary judgment in this proceeding arising from forfeiture of a surface mining bond, is denied. Where DER's motion and supporting affidavits fail to show that the mine site conditions at the time of the forfeiture justified such action and Appellant's response challenges the contentions as to site conditions at the time of the forfeiture, summary judgment will not lie. Appellant's subsequent cross motion for partial summary judgment and release of a portion of its collateral bond also will not lie, because DER's motion states that it is no longer seeking forfeiture of the bond on which Appellant seeks summary judgment.

OPINION

This is an appeal by Felton Enterprises, Inc. (Felton) from the February 9, 1987 letter to it from DER forfeiting a total of two collateral and three surety bonds posted by Felton with DER in connection with Felton's

surface mining operations in Derry Township, Westmoreland County, Pennsylvania.[1] Said surface mining operations were to be conducted pursuant to a series of permits designated as Mine Drainage Permit 34A76SM9 and Mining Permits Nos. 1665-1, 1665-2, 1665-34A76SM9-01-0, 1665-34A76SM9-01-1, and 1665-34A76SM9-02-1 in the DER notice of forfeiture. On June 23, 1989 DER filed a Motion for Summary Judgment seeking forfeiture of the collateral bond posted with regard to Mining Permit No. 1665-2. On July 17, 1989 Felton's counsel filed a Reply to DER's Motion and a Counter Motion. Felton's Counter Motion seeks a summary judgment directing DER to go to Felton's bank and cash in Felton's certificate of deposit posted as a collateral bond in connection with Mining Permit 1665-1. Thereafter Felton seeks an order from this Board directing payment of the releasable portion of this bond by DER to Felton. On August 3, 1989 DER filed a Reply to Felton's Countermotion and Reply to Felton's Reply to DER's Motion.[2]

This Board is empowered to grant motions for summary judgment, Summerhill Borough v. DER, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978). This power is to be favorably exercised only where the Motion itself meets the requirements therefore found in Pa.R.C.P. 1035. Pa.R.C.P. 1035(b) provides that such motions shall only be granted where the pleadings, depositions, answers to interrogatories and admissions together with the affidavits show that there is no genuine issue of material fact and that as a matter of law

---

[1]By Order dated June 22, 1989 this Board granted Felton's motion to consolidate the instant matter with that at Docket No. 88-535-R which challenges DER Compliance Order 88G297.

[2]DER has filed an Amended Moton for Partial Summary Judgment as to the collateral bond posted for Mining Permit 1665-2 and its compliance order. This Amended Motion will be addressed separately.

the moving party is entitled to a judgment. Neither DER's Motion nor that filed by Felton passes this test at this time.

DER supports its Motion[3] with the affidavit of Mining Inspector William Stroble as to conditions at the mine site on January 30, 1986, and March 31, 1986 and his issuance of Compliance Orders 86G070 and 86G194 respectively on those dates. DER reasons that since Compliance Order 86G070 was not appealed, it is final. DER also argues that since this Board dismissed Felton's appeal of Compliance Order 86G194, it is final. See Felton v. DER, 86-192-R. DER next argues this establishes the mine site conditions on the dates of these inspections and justifies the forfeiture. We concur that the lack of an appeal of a compliance order establishes site conditions as of the date of the inspection on which that order is based. The same is true on our dismissal of an appeal from a DER compliance order. If DER had forfeited the bond on Mining Permit 1665-2 on those dates we could have agreed that it had conclusively established site conditions as of that date and, if that were the only dispute between the parties, sustained DER's forfeiture.

Here DER's forfeiture did not occur at the time the Compliance Orders were issued and there is no indication the forfeiture was based upon site conditions at the time of those two inspections. DER's forfeiture notice is dated February 9, 1987. This is more than a year after issuance of Compliance Order 86G70 and approximately 11 months after issuance of

---

[3]Contrary to DER's Notice of Forfeiture which says the collateral bond for Mining Permit 1665-1 is forfeit, DER's Motion says it is not forfeiting this bond. Having taken the position that this bond is not forfeit, it is no longer the subject of this proceeding. If in the future DER seeks to forfeit all or a portion of this bond, it will have to begin a new forfeiture proceeding. An identical holding results from the statement in Paragraph 6 of DER's Motion for Summary Judgment that DER withdraws its forfeiture of the three surety bonds posted by American Druggist Insurance COmpany (GP465514, GP465554 and GP465312. These three bonds are no longer before this Board.

Compliance Order 86G194. Further in response to DER's Motion, Felton avers a change in site conditions after issuance of these two compliance orders as evidenced by subsequent DER inspection reports showed "satisfactory progress" on backfilling. When and if DER shows either this noncompliance with these two compliance orders on and after the date of the forfeiture or other violations of the Act for which forfeiture is appropriate, this factual dispute will be at an end. When it can do so, it should prevail in its forfeiture of this bond. At the point in this appeal at which we consider this Motion, however, there is a factual dispute between the parties on a material fact. Accordingly, the Motion must be denied.

As noted above, Paragraph 3 of DER's Motion for Summary Judgment says: "Certificate of Deposit No. 3437 has not been forfeited." This being the case, it reverses the position taken in DER's Notice of Forfeiture, and as of July 23, 1989 (when DER filed its Motion) it removed this particular bond from consideration in this proceeding. Since it is not before this Board, we cannot grant relief with regard to it. This means we can no longer declare it forfeit nor grant Felton's Motion for Summary Judgment in regard to it.

O R D E R

AND NOW, this 17th day of November, 1989, it is ordered as follows:

1) The Motion for Summary Judgment filed by DER on June 23, 1989 is denied.

2) The Motion for Summary Judgment filed by Felton on July 17, 1989 is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 17, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kirk Junker, Esq.
Katherine S. Dunlop, Esq.
Western Region
Virginia J. Davison, Esq.
Bureau of Hazardous Sites and
Superfund Enforcement
For Appellant:
Allan E. MacLeod, Esq.
Coraopolis, PA

pm

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

M. DIANE SMITH
SECRETARY TO THE BOARD

MIGNATTI CONSTRUCTION COMPANY, INC.	:	
	:	
V.	:	**EHB Docket No. 89-066-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 21, 1989
and WEST ROCKHILL TOWNSHIP, Intervenor	:	

OPINION AND ORDER SUR
APPEALABILITY OF THE DEPARTMENT
OF ENVIRONMENTAL RESOURCES' LETTER

Synopsis

An appeal of a letter advising a non-coal mining operator that its permits had expired because of its failure to initiate mining activity within two years of the date of the permits' issuance will not be dismissed for lack of jurisdiction where the operator is contesting the determination that mining activity had not been initiated on the site.

OPINION

This matter was initiated with Mignatti Construction Corporation's (Mignatti) March 14, 1989, filing of a notice of appeal challenging a February 14, 1989, letter from the Department of Environmental Resources

(Department) notifying it that the mining and mine drainage permits[1] (collectively, permits) authorizing the operation of its stone quarry and crushing plant in West Rockhill Township, Bucks County, had expired.

The Board granted West Rockhill Township's (Township) motion to intervene in this matter on May 2, 1989.

On September 1, 1989, following an August 31, 1989, telephone conference call with the parties, the Board ordered the parties to submit memoranda of law concerning whether the Department's letter of February 14, 1989, constituted an appealable action.

On September 19, 1989, Mignatti filed its memorandum in support of the proposition that the Department's letter was an appealable action. Mignatti argued that the two year expiration period in 25 Pa. Code §77.102(a)(6) was not applicable to its permits because the permits did not specifically contain an expiration period. Additionally, Mignatti contested the Department's determination that mining had not begun and enumerated various activities which had occurred on site which constituted initiation of mining activity. And, Mignatti asserted that the Department's determination that the permits had expired affected its property rights, since it no longer possessed the right to conduct its quarrying operations.

The Township's September 21, 1989, memorandum argued that the Department's letter was not appealable, citing Alternate Energy Store, Inc. v. DER, 1985 EHB 821, aff'd 107 Pa Cmwlth 66, 527 A.2d 1077 (1987). The Township

---

[1] Surface Mining Permit No. 300696-09850601-01-0 (the mining permit) was issued pursuant to the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 et seq. (Noncoal SMCRA); Mine Drainage Permit No. 09850601 was issued pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987 as amended, 35 P.S. §691.1 et seq. (The Clean Streams Law). The grant of these permits is at issue in Salford Township Board of Supervisors et al. v. DER and Mignatti Construction Company, EHB Docket No. 86-660-W.

also countered Mignatti's arguments by stressing that 25 Pa. Code §77.102(a)(6), which prescribed expiration dates for permits, was self-executing and was specifically incorporated in Standard Condition No. 1 of Mignatti's mining permit. The Township contested whether Mignatti's activities on site met the benchmark definition of surface mining activities in the pertinent statutes. Finally, the Township contended that the Department's letter was not a final adjudication.

On September 22, 1989, the Department filed its memorandum in support of dismissing the appeal for lack of jurisdiction, averring that the Board only has authority to hear cases stemming from actions or adjudications of the Department affecting Mignatti's rights and/or immunities. The Department cited both Alternate Energy Store, supra, and Gregory and Caroline Bentley v. DER and Donald and Joan Silknitter, EHB Docket No. 89-111-W (Opinion issued August 15, 1989). The Department alleged that when the Department issues a decision regarding Mignatti's application for repermitting of the site, the question regarding the existence of these permits will be moot and that Mignatti would have the opportunity to challenge the determination that the permits expired if and when it challenged the Department's forthcoming decision on Mignatti's repermitting application.

In order for the Board to have jurisdiction to review the Department's letter, that letter must constitute an adjudication within the meaning of the Administrative Agency Law, 2 Pa. C.S.A. §101. Chester County Solid Waste Authority v. DER, 1988 EHB 1173. Or, in other words, the Department's letter to Mignatti must somehow affect Mignatti's rights, privileges, immunities, duties, liabilities, or obligations. Under the circumstances presented herein, we believe that the Department's February 14, 1989, letter did in fact constitute an adjudication.

The first sentence of the Department's letter is a declaration that Mignatti's permits expired in accordance with 25 Pa. Code §77.102(a)(6). This necessitated a determination that no mining activity had been initiated on the site, a determination that is being contested by Mignatti. The Department's determination that no mining activity had been initiated prior to the expiration of the permits does alter Mignatti's rights and privileges, for it does affect Mignatti's ability to conduct its mining operations pursuant to the permits.

While it may appear that the precedents cited by the Department and the Township are directly on point, Mignatti's appeal is distinguishable from the cited cases. In Alternate Energy Store, the appellant contended that 25 Pa. Code §77.102(a)(6) did not operate to void its permit because protracted litigation in the county court of common pleas over the related zoning issues made it impossible to initiate mining. Unlike this matter, the applicant in Alternate Energy Store did not contest the fact that mining had not been initiated prior to the expiration of the permit. The Bentley decision is also distinguishable. The appellants in Bentley were contesting a letter from Department counsel advising them that the appeal period for contesting the issuance of a permit had expired. The Department's letter in that case did nothing to alter the legal status quo, as the Department's position regarding the Bentleys' appeal rights was immaterial to the exercise of those rights. Here, the Department's determination that mining had expired is very relevant to the issue of whether the permits had expired.

ORDER

AND NOW, this 21st day of November, 1989, it is ordered that this matter is placed on the hearing list.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 21, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kenneth A. Gelburd, Esq.
Western Region
For Appellant:
Paul W. Callahan, Esq.
Norristown, PA
For Intervenor:
John B. Rice, Esq.
Perkasie, PA

nb

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

M. DIANE SMIT
SECRETARY TO THE B

COUNTY OF SCHUYLKILL	:	
and	:	
F. A. POTTS & CO., INC. and GMP LAND CO.	:	
and SCHUYLDEL ASSOCIATES, Intervenors	:	
v.	:	**EHB Docket No. 89-082-W**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
CITY OF LEBANON AUTHORITY, Permittee	:	**Issued:** November 24, 1989

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

By Maxine Woelfling, Chairman

Synopsis:

An appeal of the issuance of a permit for the construction of a dam to replace an existing water supply dam is sustained in part and dismissed in part. The Board holds that the Department of Environmental Resources (Department) disregarded its own regulations in publishing notice of receipt of the permit application in the Pennsylvania Bulletin prior to having received a complete permit application. Noting that the purpose of publication in the Pennsylvania Bulletin is to afford the public an opportunity to effectively participate in the permitting process, the Board holds that the appellant was denied a meaningful opportunity to participate as a result of the Department's actions. The Board concludes that the Department must make an independent assessment of whether to hold a hearing based on the nature and impact of the

proposed activity and not merely the number of requests received and that where a public hearing may not be a judicious expenditure of Department resources, some other means of allowing effective participation in the permitting process must be accorded.

The Board holds that the Department did not abuse its discretion in relying on the comments of the Pennsylvania Historical and Museum Commission in assessing what historic resources would be impacted by the project and what measures were necessary to mitigate the effects.

Finally, the Board concludes that the Department committed an abuse of discretion in disregarding its regulations and not assessing the effect of the project on upstream property owners in the watershed, particularly the holders of mineral rights. The Department's assertion that the status quo *vis-a'-vis* mineral resource development in the watershed will not be changed by construction of the new dam was an after-the-fact justification reached without any consideration of the status quo. The permit is suspended and the matter is remanded to the Department for consideration of the effect of the project on the watershed and an overall assessment of the benefits and impacts of the project.

INTRODUCTION

This matter was initiated by the March 24, 1989, filing of a notice of appeal by the County of Schuylkill (County), seeking review of the Department's March 13, 1989, issuance of a permit to the City of Lebanon Authority (Lebanon) pursuant to the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.* (DSEA). The permit authorized the construction of a dam across Mill Creek in Pine Grove and Tremont Townships, Schuylkill County. Lebanon is the owner of an existing dam and reservoir, known as the High Bridge Dam, which will be replaced by the

dam authorized by this permit. The County claimed that the Department's issuance of the permit was an abuse of discretion because it failed to consider the impact of the project on riparian and property rights, particularly on the development of coal reserves, as required by 25 Pa.Code §105.14(b)(3), and because it failed to consider the effect of the construction of the dam on access to nearby State Game Lands, as required by 25 Pa.Code §105.14(b)(5). It also alleged that the Department, in violation of 25 Pa.Code §105.14(b)(8), failed to consider the reasonably foreseeable development of coal-bearing lands within the watershed, that the environmental evaluation required by 25 Pa.Code §105.15 was deficient in that it failed to address the historic significance of the High Bridge stone abutments, and that the Department violated its duties under Article I, §27 of the Pennsylvania Constitution by not conducting a thorough evaluation of the project under 25 Pa.Code §§105.14, 105.15, and 105.16. The County also questioned the necessity for construction of a new dam and alleged certain procedural defects in the permit application process.

On June 5, 1989, Lebanon filed a motion to dismiss, a motion for summary judgment, and a motion for expedited proceedings. The Board, by order dated June 27, 1989, granted the motion for expedited proceedings. In its motion to dismiss, Lebanon requested the Board to dismiss the County's appeal for lack of standing because the County failed to allege any direct, substantial, and immediate interest in the Department's action. Lebanon also contended that the County's argument regarding impact of the dam on coal reserves in the watershed constituted little more than an impermissible collateral attack on the Department's denial of surface mining permit applications in the watershed and that consideration of any impact of the dam on historic resources was outside the scope of the Department's authority under the DSEA

and, therefore, outside of the purview of the Board. The Board denied Lebanon's motion in an opinion and order dated July 28, 1989, holding that the County had standing to challenge the permit grant because it was the sequestrator of lands within the watershed and the Department was required by its regulations to consider the impact of the dam on development of lands within the watershed. The Board also held that the Department's regulations required consideration of the impacts of the dam on mineral resource development and historic resources within the watershed and denied the motion to dismiss with respect to those claims. The Board denied Lebanon's motion for summary judgment in a separate opinion of August 8, 1989, citing the existence of disputed material facts.

On July 28, 1989, F. A. Potts & Co., Inc. and GMP Land Co. (collectively, GMP) and Schuyldel Associates filed petitions to intervene; GMP, a bankrupt, owns surface and/or mineral rights in the watershed of the reservoir and Schuyldel Associates is to acquire GMP's assets pursuant to an agreement before the Bankruptcy Court. The Board granted the petitions to intervene in an August 1, 1989, order.

Hearings on the merits were conducted on July 31 and August 1-3, 1989. The County filed a motion for view of the premises on July 31, 1989, which was granted by the Board order dated August 3, 1989. A view of the premises was conducted on August 4, 1989.

The parties' post-hearing briefs were filed on September 8, 1989. The County addressed three issues in its post-hearing brief: whether the Department abused its discretion in advertising the receipt of the Lebanon permit application prior to having received a complete permit application; whether the Department abused its discretion by issuing the permit in the absence of information necessary to consider the impact of the dam on property

owners above it; and whether the Department abused its discretion by issuing the permit without consideration of the historical value of the old High Bridge abutments. GMP adopted the arguments advanced by the County in its post-hearing brief, with particular emphasis on whether the Department failed to consider GMP's property rights. Schuyldel Associates adopted GMP's post-hearing brief.

Lebanon argued in its post-hearing brief that the Department properly assessed any potential impacts of the project on property owners in the watershed and that the Department did not abuse its discretion in concluding that no historic sites would be harmed by the dam. Lebanon also contended that the Department's dam safety regulations were correctly applied in its review of the permit application. And, Lebanon advanced the rather novel argument that if the Board determines that the Department failed to apply its regulations to its review of Lebanon's application, then collateral estoppel would operate to prevent the revocation or remand of the permit.

The Department argued in its post-hearing brief that the County failed to substantiate its claim that the proposed dam was unnecessary because the existing dam was adequate to handle the applicable design flood. It also claimed that its publication of receipt of the permit application in the Pennsylvania Bulletin was not premature and that it was not required to hold a public hearing before reaching a decision on the permit application. The Department asserted that the County and the Intervenors failed to present any evidence of the dam's effects on the development of coal reserves in the watershed and that, even if they had, the Department properly evaluated the effects it was required to consider under 25 Pa.Code §§105.14(b)(3) and (8).

Any issues not raised in the parties' post-hearing briefs are deemed waived. Lucky Strike Coal Co. and Louis J. Beltrami v. Dep't of Environmental Resources, ___ Pa.Cmwlth ___, 546 A.2d 447 (1988).

The record in this matter consists of approximately 700 pages of testimony and 79 exhibits. After a full and complete review of it, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is the County, a county of the fourth class.

2. Appellee is the Department, the agency of the Commonwealth empowered to administer and enforce the DSEA and the rules and regulations adopted thereunder at 25 Pa.Code §105.1 *et seq.*

3. Permittee is Lebanon, a municipal authority created pursuant to the Municipality Authorities Act, the Act of May 2, 1945, P.L. 382, as amended, 53 P.S. §301 *et seq.* for the purpose of providing water supply and sewer services.

4. Intervor GMP is the owner of surface and mineral rights in the watershed of the proposed dam at issue in this appeal (N.T. 93-94, 116).

5. Intervenor Schuyldel Associates is a general partnership which was formed to acquire the assets of GMP, a bankrupt, for the sum of $7.5 million (N.T. 504-505; Ex. S-1).[1]

6. Lebanon owns and operates the High Bridge Dam, a water supply reservoir, which is located on Mill Creek in Pine Grove Township, Schuylkill County (Ex. P-21, ¶2, 3).

---

[1] The exhibits will be denoted "A" for the County, "GMP" for GMP, "S" for Schuyldel Associates, "P" for Lebanon, and "C" for the Department.

7. The construction of the High Bridge Dam was authorized by Permit No. D54-157A, which was issued by the Department of Forests and Waters on October 24, 1945 (Ex. P-21, ¶1).

8. The permit for the High Bridge Dam was issued pursuant to the Act of June 25, 1913, P.L. 555, as amended, 32 P.S. §681 *et seq.*, commonly known as the Water Obstructions Act; the Water Obstructions Act was repealed by the DSEA.

9. The High Bridge Dam is 66 feet in height (N.T. 301; Ex. P-1).

10. The High Bridge Dam impounds a maximum of 1,887 acre feet and has a drainage area of approximately 14.3 square miles, or 9,150 acres (Ex. P-1, P-21).

11. Based upon its size, the High Bridge Dam is a Class B dam under 25 Pa.Code §105.91(b) (N.T. 343).

12. Mill Creek crosses three township roads and State Route 443 before it flows into Swatara Creek approximately two miles downstream of the High Bridge Dam (Ex. P-18).

13. Thirty to forty people live in the area between the High Bridge Dam and Swatara Creek (Ex. P-18).

14. If the High Bridge Dam were to be overtopped, there would be a potential for a catastrophe downstream (N.T. 318-319).

15. The High Bridge Dam has a hazard potential classification of 1 under 25 Pa.Code §105.91(b) as a result of a potential for extensive loss of life and excessive economic loss in the event of dam failure (N.T. 343; Ex. P-18).

16. As a result of its size/hazard potential classification, the spillway of the High Bridge Dam is required by 25 Pa.Code §105.98(a) to be

able to pass one hundred per cent of the Probable Maximum Flood (PMF) without overtopping (N.T. 316).

17. The U.S. Army Corps of Engineers inspected the High Bridge Dam as part of the national dam inspection program and, in its September 22, 1978, Phase I Inspection Report determined that the spillway of the High Bridge Dam could only pass 45% of the PMF and was, therefore, "seriously inadequate" (Ex. P-1).

18. Lebanon undertook hydraulic and hydrologic studies to determine the actions necessary to meet dam safety standards (Ex. P-14).

19. A November 15, 1979, report prepared by Lebanon's consulting engineers found that the spillway capacity of the High Bridge Dam was 12,300 cubic feet per second (cfs) and would have to be enlarged to 27,500 cfs to accommodate the PMF (Ex. P-2).

20. A four feet gabion parapet was added to the dam in 1984-1985; the High Bridge Dam may now pass 18,500 cfs without overtopping (Ex. P-18).

21. Lebanon evaluated various alternatives for both increasing the spillway capacity to handle the PMF and meeting its future water supply demands and determined in 1987 that the construction of a new dam, to be known as the Christian E. Siegrist Dam, immediately downstream of the High Bridge Dam was the preferred alternative (Ex. P-20, P-21).

22. The Christian E. Siegrist Dam is a roller compacted concrete (RCC) dam 110 feet in height and 600 feet in length; it will have a drainage area of 14.9 square miles (Ex. P-20, P-21).

23. The Christian E. Siegrist Dam will impound a maximum surface area of 135 acres and have a maximum storage capacity of 5,800 acre-feet, or

1,910 million gallons; under normal operations the surface area of the reservoir will be 106 acres and the reservoir will have a storage capacity of 3,650 acre-feet, or 1,180 million gallons (Ex. P-21, ¶45, 47).

24. In a letter dated August 19, 1987, William B. Bingham of Gannett Fleming Water Resources Engineers, Inc. (Gannett Fleming), senior Project Manager, advised the County Commissioners of Lebanon's intentions to submit an application to the Department in fall, 1988 for the construction of a new dam downstream of the High Bridge Dam (N.T. 54; Ex. A-12).

25. In a September 22, 1987, letter, Arthur Thompson (Tom) Rhoads, P.E., the County's Real Estate Department Director, requested Mr. Bingham to provide the County with complete information on the proposed dam and reservoir (N.T. 55-56; Ex. A-13).

26. In an October 1, 1987, letter to Joseph J. Ellam, Chief of the Department's Division of Dam Safety, the County notified the Department of its interest in Lebanon's proposed dam and requested the opportunity to comment on the permit application (N.T. 56-57; Ex. A-14).

27. Mr. Ellam advised Mr. Rhoads in an October 7, 1987, letter that the project was in the preliminary stages and that the Department did not anticipate receiving Lebanon's permit application before spring, 1988, and he assured Mr. Rhoads that he was certain that Gannett Fleming would provide him the information that he had requested (N.T. 57-58; Ex. A-15).

28. Tom Rhoads advised Mr. Bingham in a June 28, 1988, letter that the County wished to comment on Lebanon's Joint Permit Application to the Department and the U.S. Army Corps of Engineers for the High Bridge Dam Access Road Bridge and noted that the County still had not received the data it requested in its October 1, 1987, letter (N.T. 58-59; Ex. A-16).

29. Lebanon transmitted copies of the Preliminary Contract Drawings for the Christian E. Siegrist Dam to the Department on October 21, 1988; the Department received the drawings on November 1, 1988 (Ex. P-4, P-20).

30. On November 1, 1988, Lebanon filed an application with the Department to construct and operate the Christian E. Siegrist Dam; the application was submitted on the Department's two page application form (N.T. 287; Ex. P-4).

31. The Department had extensive verbal and written communication with Lebanon for several years prior to the filing of the permit application and had discussions with Lebanon concerning the determination of the applicable spillway design flood (N.T. 319-320).

32. On November 2, 1988, the Department determined that Lebanon's application was complete for purposes of publication of notice of receipt of the application in the Pennsylvania Bulletin (N.T. 616-617).

33. By letter dated November 4, 1988, the Department acknowledged its receipt of Lebanon's permit application and requested Lebanon to submit proof of its notification of affected local governments, as required by §1905-A(b) of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-5(b), commonly referred to as Act 14 (Ex. P-5).

34. Roger Adams, a project review engineer in the Department's Division of Dam Safety, reviewed Lebanon's permit application and determined that the application was not sufficient to determine conformance with the DSEA and 25 Pa.Code §105.1 *et seq.* (N.T. 390).

35. The permit application did not contain data from the on-going testing of the RCC, or foundation, stability, thermal, or materials testing analyses (N.T. 391-392).

36. By letter dated November 16, 1988, Lebanon notified Pine Grove Township, Tremont Township, and the County that it had applied to the Department for a permit to construct and operate the Christian E. Siegrist Dam (N.T. 322; Ex. P-22).

37. Notice that the Department had received a permit application from Lebanon to construct and operate the dam was published at 18 Pennsylvania Bulletin 5280, 5282 (November 26, 1988).

38. The County advised Mr. Ellam in a November 16, 1988, letter that it had objections to the Christian E. Siegrist Dam project (N.T. 59-60; Ex. A-17).

39. Mr. Ellam responded to the County's November 16, 1988, letter in a November 30, 1988, letter stating that "much of the detailed design for the dam is in the preliminary stage," indicating that he had requested Lebanon to provide the County with the application and supporting documentation, and inviting the County to arrange a discussion of the permit application with him (N.T. 61; Ex. A-18).

40. The County submitted its objections to the proposed dam to Mr. Ellam in a December 12, 1988, letter and requested the opportunity to again comment when the complete permit application was received by the Department (N.T. 61; Ex. A-19).

41. Mr. Ellam acknowledged the County's comments in a December 19, 1988, letter which stated:

> We have noted and reviewed the several comments you have submitted. Several of the items will be addressed in the environmental evaluation that will be made by the Department. The issues noted in Items 6, 11, and 12 are self-explanatory; i.e., the plans submitted are preliminary and you may be assured that all sections of Chapter 105 will be addressed during the review process.
>
> (N.T. 63; Ex. A-20)

42. Lebanon submitted an environmental evaluation of the proposed dam project to the Department on January 10, 1989 (N.T. 288, 619; Ex. A-25, P-6).

43. Mr. Bingham responded to the County's objections in a letter to the Department dated January 16, 1989 (N.T. 64; Ex. A-21).

44. Lebanon submitted the foundation exploration and RCC analyses to the Department on January 19, 1989 (N.T. 393).

45. Lebanon submitted stability and thermal analyses and structural design to the Department on February 14, 1989 (N.T. 393).

46. The County has not challenged the thermal, foundation, stability, or RCC analyses (N.T. 425).

47. In a letter dated February 22, 1989, Mr. Ellam notified Tom Rhoads that the Department now had "a complete package of design information on the proposed dam" and was preparing its "final review of this data as the last stage in the application review" (N.T. 65; Ex. A-22).

48. The County met with representatives of Lebanon in late February, 1989 to express its concerns with the impact of the proposed dam on land development and historical resources in the watershed (N.T. 68-69).

49. In a response to a request from Mr. Rhoads, the Department met informally with him on March 3, 1989, to discuss the proposed dam project; Mr. Ellam advised Mr. Rhoads that a permit would be issued to Lebanon by March 10, 1989 (N.T. 345-346).

50. Mr. Rhoads did not request a public hearing during his March 3, 1989, meeting with Mr. Ellam (N.T. 345-346).

51. The County's principal concerns with the proposed dam project were expressed in a March 6, 1989, letter to Mr. Ellam which also requested

the Department to hold a public hearing on the permit application (N.T. 66, 76; Ex. A-23).

52. Lebanon submitted final plans and specifications for the Christian E. Siegrist Dam to the Department on March 8, 1989 (N.T. 288).

53. The County's March 6, 1989, letter was not received by the Department until March 13, 1989, the day the permit was issued to Lebanon (N.T. 306; Ex. A-23).

54. Tremont Township requested the Department not to issue the permit to Lebanon in a letter received by the Department on March 13, 1989 (N.T. 304-305; Ex. A-51).

55. The Pine Grove Area School District expressed its concerns that the proposed dam would adversely affect historical resources and tax revenues in a letter which was received by the Department on March 13, 1989. (N.T. 305).

56. The Department notified the County, Tremont Township, and the Pine Grove Area School District of the permit's issuance in letters to each dated March 15, 1989 (N.T. 306-307; Exa. A-7, A-53, A-54).

57. The PennVest Board met on March 15, 1989, to consider funding for the Christian E. Siegrist Dam (N.T. 308).

58. Notice of the permit's issuance was published at 19 Pennsylvania Bulletin 1437 (April 1, 1989).

59. The High Bridge was constructed circa 1820-1850 as a railroad bridge (N.T. 293).

60. Two massive stone abutments are all that remain of the High Bridge (view of premises).

61. The High Bridge was last used as a railroad bridge in 1951; its superstructure was demolished at that time (N.T. 108).

62. The construction of the proposed Christian E. Siegrist Dam will destroy one abutment and submerge the other (N.T. 119).

63. Mr. Ellam first visited the High Bridge Reservoir site in 1959 and last in the 1970's, and he observed the High Bridge abutments during his visit (N.T. 291, 292).

64. Neither Mr. Ellam nor Mr. Adams knew who built the High Bridge or how long it was in use (N.T. 295, 413).

65. The Swatara Furnace, an iron smelting furnace, is 500 yards downstream of the proposed dam (N.T. 421; Ex. A-26).

66. Construction equipment will pass within 100 yards of the Swatara Furnace (N.T. 97-98).

67. The Department relies on the Pennsylvania Historic and Museum Commission (Commission) to advise it on the historic value of a structure or a site (N.T. 329).

68. The Christian E. Siegrist Dam project required permits from the U.S. Army Corps of Engineers (Army Corps) pursuant to §404 of the Federal Clean Water Act, 33 U.S.C. §1344 (Ex. P-21).

69. As part of the §404 permit process and based on its evaluation of information submitted on February 10, 1988, the Commission directed Lebanon to prepare a Phase I Archaelogical Survey (N.T. 495-497).

70. In a May 13, 1988, letter from Mr. Rhoads to Donna Williams, the Director of the Commission's Bureau of Historic Preservation, the County expressed its concerns that the proposed dam project would destroy a historic site (N.T. 75; Ex. A-28).

71. The field work for the Phase I Archaeological Survey was performed by Cultural Heritage Research Services, Inc. during August and September, 1988 (Ex. A-26).

72. The Phase I Archaeological Survey was conducted north of the existing reservoir in 41 acres which will be inundated by the new reservoir (N.T. 500; Ex. A-26).

73. The Phase I Archaeological Survey did not address the old High Bridge (N.T. 73; Ex. A-26).

74. In a September 22, 1988, letter from Mr. Rhoads to Brenda Barrett of the Commission, the County again expressed its opinion that the proposed dam project would destroy historic resources (N.T. 76; Ex. A-29).

75. On October 18, 1988, the Phase I Archaeological Survey was sent to the Commission (N.T. 495-498; Ex. P-13, P-21).

76. On November 17, 1988, the Commission sent a letter to the Department informing it that the proposed dam "will not effect any historic resources providing that temporary and permanent construction is confined to those areas described in their [the Authority's] February 10, 1988 letter" (Ex. P-21, ¶71).

77. The Commission provided the Department with comments on the Phase I Archaeological Survey on January 13, 1989 (Ex. P-21, ¶74).

78. The Phase I Archaeological Survey was revised in response to the Commission's comments and transmitted to the Commission on January 24, 1989 (Ex. A-26).

79. Although the Commission advised the Department in a February 8, 1989, letter that the proposed dam project would have no impact on cultural resources "within the zone of new inundation," which included the High Bridge abutments, it was apparently unaware of the location of the High Bridge abutments (N.T. 501; Ex. P-14, P-15).

80. The Commission's February 8, 1989, letter expressed concern about the impact of the dam's construction on the Swatara Furnace and offered

its assistance to Lebanon and the Pennsylvania Game Commission, on whose property the Swatara Furnace is situated, to develop a plan to stabilize the furnace (Ex. P-14).

81. The Commission, the Army Corps, and the Game Commission visited the site of the project on February 27, 1989 (Ex. P-15).

82. The Commission communicated the results of its site visit to the Department in a March 3, 1989, letter which contained various suggestions for stabilizing the Swatara Furnace (Ex. P-15).

83. The Commission also indicated that it first became aware of "the extent of the surviving structures related to the High Bridge" during the site visit and noted that the Phase I Archaeological Survey did not include any reference to the High Bridge (Ex. P-15).

84. The Commission noted that the bridge was a "significant feature of this property and should have been described in this survey." It also indicated that the High Bridge had been determined to be ineligible for inclusion on the National Register of Historic Places (Ex. P-15).

85. The Commission requested copies of photographs of the High Bridge from Lebanon so that the photographs could be placed in the project file (Ex. P-15).

86. Lebanon revised its bracing plan for the Swatara Furnace to incorporate the Commission's suggestions (Ex. P-16).

87. The Commission notified the Department of its approval of Lebanon's revised stabilization plan and again requested photographs of the High Bridge abutments in a May 31, 1989, letter (Ex. A-19).

88. Lebanon's March, 1988 environmental assessment of the project did not address the historic value of the High Bridge abutments (N.T. 72-73; Ex. A-25).

89. Any effects of the proposed dam project on the Swatara Furnace will be minimized by the bracing plan and other measures, such as fencing, which Lebanon will implement during construction.

90. The Department properly relied upon the Commission's evaluation of the project's effect on historic resources, since the Commission evaluated both the High Bridge abutments and the Swatara Furnace.

91. A watershed is comprised of all that surface area above a particular stream which contributes runoff to the stream during a precipitation event (N.T. 623).

92. By virtue of orders of the Court of Common Pleas of Schuylkill County dated November 14, 1984, and January 15, 1985, the County holds under sequestration, through the County Tax Claim Bureau, the following lands in the watershed of the proposed Christian E. Siegrist Dam:

Lesher and Miller Tract	234.4 acres, coal and surface
Jacob Miller Tract	207.97 acres, coal reserve
Philip Himmelberger Tract	570.38 acres, coal reserve
Philip Weber Tract	23.47 acres, coal reserve
Philip Himmelberger Tract	78.36 acres
John Philip DeHaas Tract	.66 acre, coal reserve
Bickle Tract	45 acres, coal reserve
Bickle Tract	222 acres, coal and surface
Scharff Tract	162 acres, coal and surface
Catherine Knoll Tract	319 acres, coal and surface
DeHaas Tract	110 acres, coal and surface
John Knoll Tract	150 acres, coal and surface

(N.T. 33-35; Ex. A-4, A-5, A-9)

93. These parcels were sequestrated when the properties were exposed to upset sale for delinquent taxes and no bids equal to the upset price were made at the upset sales (Ex. A-4, A-2, A-3).

94. Within the watershed of the proposed dam, GMP owns approximately 1,500 acres of mineable coal reserves, as well as surface rights on several tracts (N.T. 93-94, 116).

95. The Pennsylvania Game Commission owns surface rights on lands within the watershed of the proposed dam (N.T. 93-94).

96. John W. Gunnett conducted a coal reserve assessment for land located within the watershed of the High Bridge Reservoir in Tremont Township for Pennsylvania Power & Light Company in 1976 (N.T. 210-211).

97. Mr. Gunnett, who received a B.S. degree in geology from the Pennsylvania State University in 1971 and an M.S. degree in mining engineering from that same institution in 1974, is a partner of Skelly and Loy, Engineers/ Consultants (N.T. 191-192).

98. Mr. Gunnett has authored various articles relating to innovative mining technologies, fuel supply, risk assessment issues, reserve studies, and reserve assessments (N.T. 195-196).

99. Mr. Gunnett has performed in excess of 100 coal reserve assessments (N.T. 195-196).

100. A coal reserve assessment consists of examining a prospective property which is suspected or known to have coal and assessing the quantity, quality, and the general mineability of that coal (N.T. 197).

101. A coal reserve valuation establishes the present value of a property's coal reserves and involves evaluations of the property and comparable sales (N.T. 202).

102. In performing the coal reserve assessment of the High Bridge watershed for PP&L, Mr. Gunnett first reviewed public records, including reports and maps of the U. S. Geological Survey (N.T. 212; Ex. A-11(a) and A-11(b)).

103. Mr. Gunnett then supervised core borings drilled at an angle to intersect steeply pitching, close to perpendicular, coal seams believed to be in the area; the holes were drilled to an 800 to 900 feet depth, drill logs

were kept of each drill hole and coal samples were collected to be analyzed for quality (N.T. 212-215; Ex. A-49).

104. There are 250 million tons of anthracite coal reserves to a depth of 800 feet in the High Bridge Reservoir watershed (N.T. 219).

105. These reserves are low-sulfur and, with cleaning, would be a desirable power plant fuel (N.T. 220).

106. In 1984-1985, Mr. Gunnett performed a coal reserve valuation for coal located on the land held by the County within the High Bridge Reservoir watershed for the purpose of testifying in litigation for Tremont Township against the County (N.T. 220-222).

107. There are 120 million tons of in-place potentially mineable coal reserves on the land of the County within the watershed of the High Bridge Reservoir, 85 million tons of which could be recovered by current surface mining technologies (N.T. 221).

108. In preparing the coal reserve valuation for the land held by the County, Mr. Gunnett identified the area controlled by the County within the watershed of the High Bridge Reservoir; did a market study to establish potential future market; identified the timing of the market and potential quantities of coal that could be sold; designed a surface mining operation to extract the coal reserves at the rate of 1.6 million tons a year; capitalized approximately $90 million as start-up costs for the operation; estimated mining and reclamation costs; defined the sales price; and established profits and revenues for a 39-year period and discounted those on a 15% return on investment (N.T. 222-223).

109. The present value of the coal reserves located on land held by the County within the watershed of the High Bridge Reservoir is $1.8 million in 1984 dollars (N.T. 224-225).

110. The tax delinquency on land within the watershed of the High Bridge Reservoir presently held by the County is $3.6 million through 1988 (N.T. 139).

111. The County attempts to recoup the tax delinquency on property held by it in sequestration by leasing the property to mine operators (N.T. 140).

112. The County receives three dollars per acre per month and three dollars per gross ton royalty of coal mined for parcels of land leased for strip mining (N.T. 141).

113. The County's lands within the High Bridge Reservoir were under lease in 1984 (N.T. 157).

114. The lessees declined the opportunity to renew the leases because of the cost of holding the lease and the questionable ability to gain mining permits in the area of the watershed of the High Bridge Reservoir (N.T. 158).

115. Other mine operators have expressed an interest in leasing the County's lands in the watershed (N.T. 158).

116. The Department denied the surface mining permit application of the Gary Scheib Coal Company, which leases portions of the Catherine Knoll, John Knoll and John DeHaas Tracts from the County (N.T. 144-145, 255).

117. The Rothermel Mine, an operating deep mine, is located on GMP land within the High Bridge Reservoir watershed (N.T. 116).

118. The March, 1988 environmental assessment did not identify GMP as an upstream owner of land within the watershed of the proposed dam (N.T. 116; Ex. A-25).

119. Lebanon did not provide the Department with any information concerning the existence of coal reserves within the watershed of the proposed dam (N.T. 299, 406).

120. At the time that it reviewed Lebanon's permit application, the Department believed that the only adjacent property owner was the Game Commission (N.T. 311).

121. At the time that the Department reviewed Lebanon's application, the Department did not have any knowledge of whether the Game Commission owned any coal reserves within the watershed of the project or adjacent to the project area (N.T. 311).

122. During the time that the Department was reviewing Lebanon's permit application, the Department had no knowledge regarding the quality of coal reserves situated within the High Bridge Reservoir watershed (N.T. 299).

123. The Department did not become aware of the coal reserve issue until March 3, 1989, ten days before the permit was issued, when Mr. Rhoads provided it with information (N.T. 297, 403).

124. Lebanon's consultant, Gannett Fleming, did not submit to the Department any information regarding coal mining within the watershed (N.T. 483).

125. In considering the impacts that the proposed dam would have on property or riparian rights, the Department reviewed the proposed project to assure that there would be no encroachment upon property rights or riparian rights of any immediately adjacent landowners above the project (N.T. 296, 311).

126. The Department concluded that the only property that would be inundated by the proposed dam would be property owned by Lebanon and the Game Commission (N.T. 311-312).

127. The Department concluded that the construction of the proposed dam would have no effect on surface and coal lands within the watershed because the status quo would not be altered (N.T. 346-348, 622-623; Ex. P-20).

128. The Department also concluded that public health and safety concerns outweighed any possible effects of future restrictions on land use in the watershed (Ex. P-20).

129. There is no evidence that the Department considered existing land uses, including coal mining, in the watershed in reaching its conclusions regarding the project's effect on future development in the watershed.

130. There is no evidence that the Department investigated or evaluated the status quo *vis-a'-vis* mining in the watershed of the proposed dam.

131. Because the High Bridge Reservoir is a gravity source, it is cheaper for the Authority to take water out of it than the Swatara Creek Intake, which is 12 miles downstream (N.T. 444-447).

132. The High Bridge Reservoir source is more reliable than Swatara Creek because the Swatara does not have adequate capacity in drought conditions and is subject to pollution incidents (N.T. 444-448, 469).

133. Lebanon takes a large proportion of its water from the Swatara Creek during July and August (N.T. 453).

134. Lebanon's existing sources of water supply will be inadequate in 10 years (N.T. 475).

135. If the proposed dam is built, Lebanon will rely on it for 100% of its supply (N.T. 101).

136. Lebanon has a policy of objecting to surface mining permit applications which could detrimentally affect the High Bridge Reservoir watershed (N.T. 463).

137. When Lebanon's permit application was submitted to the Department, it was not accompanied by an environmental assessment (N.T. 394).

138. At the time that Mr. Adams was reviewing Lebanon's permit application, he believed that the permit applicant was required to submit an environmental assessment as required by 25 Pa.Code §105.15(a) (N.T. 395-396).

139. The Department often requires a permit applicant to furnish environmental information (N.T. 397).

140. It was the Division of Dam Safety's understanding that the Secretary of the Department had directed that the Department, and not a permit applicant, was to prepare environmental assessments (N.T. 373).

141. The Department conducted an environmental assessment of the proposed dam project; the assessment consisted of a two page checklist, with appended commentary and recommendations concerning preservation of fisheries habitat (Ex. C-1).

142. The March, 1988, environmental assessment prepared for Lebanon concluded that any future development of the watershed was unlikely because it was owned by the Game Commission and that the project would have minimal secondary impacts because of Commonwealth ownership of the lands (Ex. P-6).

143. Lebanon's environmental assessment primarily analyzed the proposed dam's effects on the inundated area and immediate vicinity (Ex. P-6).

DISCUSSION

Under 25 Pa. Code §21.101(c)(3), a third party appealing the Department's issuance of a permit has the burden of proof. Dwight L. Moyer, Jr., et al. v. DER and Horsham Township, EHB Docket No. 86-641-W (Adjudication issued August 10, 1989). The scope of the Board's review is to determine whether the Department's action was an abuse of discretion or an arbitrary exercise of its duties. Warren Sand and Gravel v. DER, 20 Pa.Cmwlth 186, 341 A.2d 556 (1975).

Our review is *de novo*, and where the Department has taken discretionary action, such as the issuance of permits under the DSEA, we may substitute our discretion for the Department's if we determine that the Department has committed an abuse of discretion. Rochez Bros., Inv. v. Commonwealth of Pennsylvania, Department of Environmental Resources, 18 Pa.Cmwlth 137, 334 A.2d 790 (1975). Accordingly, the County has the burden of establishing that the Department's issuance of the permit for construction of the Christian E. Siegrist Dam to Lebanon constituted an abuse of discretion or an arbitrary exercise of the Department's authority. For the reasons which follow, we hold that the County has satisfied that burden in part.

Public Notice and Public Hearing

The County asserts that the Department's issuance of the permit to Lebanon should be remanded because of irregularities in the Department's processing of the permit application, namely, its publication of notice of receipt of the application in the Pennsylvania Bulletin when the permit application was incomplete and its failure to conduct a hearing on the permit application. The Department, arguing that its interpretation of its regulations should be accorded great deference, contends that the permit application was complete for purposes of publication and that its failure to conduct a public hearing was not an abuse of discretion, especially in light of the fact that no request to do so was received prior to the permit's issuance and no objections were received from any other parties. Lebanon joins in the Department's arguments.

The regulation relevant to public notice, 25 Pa.Code §105.19, states:

> (a) The Department will publish a notice in the Pennsylvania Bulletin upon receipt of a complete application for a permit and again upon the issuance of a permit by the Department.
>
> (b) No application for a permit is complete

> until all necessary information and requirements under the act and this chapter, including proof of financial responsibility, have been satisfied by the applicant.
>
> * * * * *
>
> (emphasis added)

This regulation must be read in concert with 25 Pa.Code §105.13(d), which generally applies to all permits under the DSEA and provides that

> Each application for a permit shall be accompanied by such information, maps, plans, specifications, design analyses, test reports, and other data as may be specifically required by the provisions of this chapter and such additional information as may be required by the Department to determine compliance with the provisions of this chapter.

and 25 Pa.Code §105.81, which is applicable to permits for the construction of dams.[2] In particular, the latter regulation states:

> (a) In addition to the information required by §105.13 of this title (relating to permit applications - information and fees), all permit applications pursuant to this subchapter for the construction or modification of dams and reservoirs shall give the following information:
>
> (1) The name and address of the applicant.
>
> (2) The location, type, size, height, and purpose of the proposed dam and reservoir and appurtenant works.
>
> (3) For projects involving storage of fluids or semifluids other than water, information concerning the chemical content, viscosity, and other pertinent physical characteristics of the fluid or semifluid impounded.
>
> (4) The storage capacity and reservoir surface areas for normal pool and maximum high water.

---

[2] The issue of the environmental assessment required by 25 Pa.Code §105.15 will be addressed separately, *infra*.

(5) Plans for proposed permanent monitoring of performance by instrument installations in the dam, including the purposes of the instrumentation. If no instrumentation is considered necessary, reasons for this judgment shall be stated.

(6) As accurately as may be readily obtained, the area of the drainage basin, pertinent rainfall and streamflow records, and flood flow records and estimates.

(7) The proposed time for commencement and anticipated completion of construction.

(8) The method and schedule of operation of the dam including an emergency warning system and operation plan if required pursuant to §105.134 of this title (relating to emergency warning system and operation plan).

(9) Plans for control of erosion and water pollution during the anticipated construction operations including plans for adequate measures to limit the erosion of the soil from exposed slopes after completion of construction. Such plans shall indicate that adequate control measures will be taken during construction to protect the quality of stream flow below the project site. The application shall include a copy of a letter from the conservation district in the county where the project is located indicating that the district reviewed the applicant's erosion and sediment control plan and considers it to be satisfactory.

(10) Proof of title or adequate flowage easements for all land area below the top of the dam elevation that is subject to inundation.

(11) Such other information as the Department may require.

(b) The application shall be accompanied by a design report, construction plans, and specifications, all in sufficient detail to evaluate the safety, adequacy, and suitability of the proposed work.

The language of these regulations is quite plain - a permit applicant must submit the information required by 25 Pa.Code §§105.13(d) and 105.81(a) and

(b) before the Department may initiate its formal review of the permit application and so indicate to the public by notifying it through publication of a notice in the Pennsylvania Bulletin.

The Department urges us to accord great deference to its interpretation of its regulations and hold that the material submitted by Lebanon as a permit application on November 1, 1988, was sufficient to trigger publication of receipt of the application in the Pennsylvania Bulletin. While ordinarily an agency's interpretation of its regulations is to be accorded deference, that it not the case when the agency's interpretation is contrary to the plain meaning of the regulations or nonsensical, Leader Nursing Centers, Inc. v. Dept. of Pub. Welfare, 82 Pa.Cmwlth 53, 475 A.2d 859 (1984), or where the agency interprets a single section of a regulation without reference or regard to the entire regulation, Westmoreland Manor v. Dept. of Pub. Welfare, 91 Pa.Cmwlth 155, 496 A.2d 1282 (1985). Furthermore, 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. Delaney v. State Horse Racing Com'n., 112 Pa.Cmwlth 407, 535 A.2d 719 (1988). Applying those principles, we cannot accord the Department's interpretation of 25 Pa.Code §105.19 deference, for it ignores the requirements of 25 Pa.Code §§105.13(d) and 105.81(a) and (b).

We recognize that it is a rare case when a permit applicant submits every piece of information that the Department may require to evaluate its permit application at the time of the application's submittal. We also are aware that the Department and permit applicants are engaged in a continual dialogue over the course of the Department's evaluation of a permit application. But, the permit application process is not a two-way interchange between the Department and the permit applicant. The right of the public to

participate in the permit application process pervades the various environmental regulatory statutes and the rules and regulations adopted thereunder[3] and that right is of little consequence where the opportunity to participate is not a meaningful one. The public cannot engage in such participation if it does not receive sufficient information regarding the permit application at the initial stage of the process. Or, in other words, when notice of receipt of an application is published in the Pennsylvania Bulletin, the minimum permit application information prescribed by the Department's regulations must have been submitted.

The process which was followed in this case bears no resemblance to the process described in the Department's rules and regulations and, as a consequence, provided little meaningful opportunity for the County to participate. The Department began evaluating the proposed Christian E. Siegrist Dam long before a permit application was ever submitted by Lebanon. The Department worked with Lebanon to develop the spillway design for the dam long before the permit application was ever submitted (Finding of Fact 31). The permit application which was submitted in November, 1988, consisted of the Department's two page application form[4] and the preliminary contract drawings (Findings of Fact 29, 30) and was, by the admission of the Department's project review engineer, Roger Adams, not sufficient to determine conformance with the requirements of the DSEA and the rules and regulations promulgated

---

[3] See, e.g., the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* and 25 Pa.Code §86.1 *et seq.*; and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* and 25 Pa.Code §92.1 *et seq.*

[4] This is perhaps the smallest permit application form in a major regulatory program. Our experience with reviewing permitting decisions in other programs has brought before us for review voluminous and complex permit application forms.

thereunder (Finding of Fact 34). That the permit application was not in conformance with the requirements of 25 Pa.Code §§105.13(d) and 105.81(a) and (b) was even more evident in the correspondence of Joseph Ellam, the Chief of the Division of Dam Safety, with the County. Mr. Ellam responded to a November 16, 1988, letter from the County by stating that "much of the detailed design for the dam is in the preliminary stage" (Finding of Fact 39). He again indicated to the County in a December 19, 1988, letter that the plans for the dam were preliminary (Finding of Fact 42). And although he observed in a February 22, 1989, letter to the County that the Department had a complete package of design information and would begin its final review of the permit application (Finding of Fact 47), Lebanon was still submitting materials up until right before the permit was issued (Findings of Fact 44, 47).[5] This final review of the permit application took 19 days and the entire review process was completed four months after the permit application was submitted.[6]

Not only was the permitting process rather unorthodox here, the opportunity afforded the County to participate in the process was less than meaningful. The County was constantly put off by the Department and Lebanon. The Department's representations concerning the status of the review of the permit application would not have led a reasonable person to expect that the

---

[5] We recognize that the County was not concerned with the technical information submitted at this time, but that does not allow us to cast aside the County's objections to the permitting process which address the entire process.

[6] While we have respect for the talents of the Department's technical staff and are aware of the burdens under which they perform their duties, we find it rather strange that a permit for a dam which has both the highest size and hazard potentials was issued in a little over four months, while permits for solid waste disposal facilities, air pollution sources, and industrial wastewater discharges may take several years to review.

issuance of a permit was imminent. The Department seemed to be put off by the County's requests for information, directing the County to seek it from Lebanon, which, in turn, was somewhat less than expeditious in responding to the County's requests. And, the Department's attitude in responding to the County's concerns seemed to be that the County should direct them to the applicant, rather than to exercise its authority under the DSEA to evaluate the application and reach a decision.

As for the issue of the public hearing, the Department argues that the decision to hold a public hearing is a discretionary one and that it did not abuse its discretion in this case because no one other than the County objected to the permit application and the County did not request a hearing until after the permit had been issued. We find this argument very simplistic. The decision to conduct a public hearing on a permit application is not one to be based solely upon the number of requests or comments received. The Department must exercise some independent judgment and assess whether a hearing should be conducted by virtue of the nature, location, and impact of a project. However, we do recognize that a public hearing is not necessarily a judicious use of resources when interested parties are few in number. There are other means of affording interested parties a meaningful opportunity to participate in the permit application review process. Given the circumstances presented here, it was an abuse of discretion not to afford greater public participation in the process. The application was for a major water supply dam located outside the municipality it was to serve, indeed located outside the county in which the municipality was located. A major landholder in the watershed - the County - had expressed objections and

concerns over the project. Given this, it was an abuse of discretion by the Department not to implement measures, such as conferences with the protestants, to assure meaningful participation in the process.

As for the relief we may fashion for the County, it is arguable that if this were the only issue on which the County prevailed, remanding the matter to the Department to afford greater public participation would be, in a sense, useless, as the County had had an opportunity to air its concerns before the Board. Since the County's argument regarding this issue must be viewed with a mind to its major substantive issues - failure to protect historic resources and failure to evaluate development of coal-bearing lands in the watershed of the proposed dam, the relief we afford on those issues, if any, will serve as the relief to be afforded on this issue.

Evaluation of Impact on Historic Resources

The County contends that the Department abused its discretion by not requiring Lebanon to address the historical significance of the High Bridge abutments. More specifically, the County contends that it was an error for the Department not to seek the opinion of the Commission regarding the historical value of the abutments in light of the concerns raised by the County. On the other hand, Lebanon argues that the Department properly relied on the Commission's determination that the abutments were not eligible for inclusion on the National Register of Historic Places, since that determination was indicative that the abutments did not have historic value.

The rules and regulations promulgated pursuant to the DSEA at 25 Pa.Code §105.15(b) empower the Department to require an applicant to submit information regarding, *inter alia*,

> The potential impacts to the extent applicable of the proposed activity on water quality, stream flow, fish and wildlife, aquatic habitat, federal and state forests, parks, recreation, instream and

> downstream water uses, prime farmlands, areas or structures of historic significance, streams which are identified candidates for or included within the federal or state wild and scenic river systems and other relevant significant environmental factors.
>
> (emphasis added)

Similarly, 25 Pa.Code §105.16(a) states that:

> The determination of whether the potential for significant environmental harm exists will be made by the Department after consultation with the applicant and other concerned governmental agencies. If the Department determines that there may be a significant impact on natural, scenic, historic, or aesthetic values of the environment, the Department will consult with the applicant to examine ways to reduce the environmental harm to a minimum. If, after consideration of mitigation measures, the Department finds that significant environmental harm will occur, the Department will evaluate the public social and economic benefits of the project to determine whether the harm outweighs the benefits.
>
> (emphasis added)

This regulation authorizes the Department to consult with the Commission regarding the impact of a project on the historic values of the environment and, assuming that a significant impact may occur, to examine mitigation measures.

A threshold determination must be made of whether historic resources will be impacted. Based on the record before us, we cannot conclude that the High Bridge abutments have historic value for purposes of the application of these regulations. Nor can we conclude that neither the Commission nor the Department was aware of the High Bridge abutments.

It is apparent from Mr. Ellam's testimony that he was familiar with the High Bridge abutments, although he was not aware of details regarding the purpose of the High Bridge and the dates of construction and demolition (Findings of Fact 63, 64). And, while the High Bridge abutments were not addressed in the Phase I Archaeological Survey (Finding of Fact 73), the Commission certainly became aware of the precise location of the bridge abutments in the

project area during its site visit with the Army Corps of Engineers and the Game Commission in February, 1989 (Findings of Fact 81, 83). The Commission's awareness of the High Bridge abutments was evident in its March 3, 1989, letter to the Department (Finding of Fact 82). However, such awareness was not translated into a determination that the High Bridge abutments had any particular historic value. The Commission noted that the abutments were not eligible for inclusion on the National Register of Historic Places and simply requested photographs and any available information for inclusion in the project file (Findings of Fact 84, 85). Presumably, had the Commission been concerned with the potential destruction of the High Bridge abutments by the proposed dam, it would have raised that concern in its March 3, 1989, letter to the Department.

Lebanon raises the very apt point that age does not equate with historic value. If such were the case, it is arguable that anything old should be preserved because of its cultural value. Judgments must be made by professionals with expertise in historic preservation and resources must be allocated, since the reality is that not everything can or should be preserved. The History Code, 37 Pa.C.S.A. §101 *et seq.* We cannot hold, given the evidence before us, that the Department abused its discretion on this issue.

The County also questions Lebanon's plans for mitigating the effects of the dam's construction on the Swatara Furnace, but its arguments are not related to the efficacy of the proposed bracing plans and the other measures to minimize the impact of vehicular traffic on the structure. Rather, the County seems to be concerned with development of the Swatara Furnace site as a tourist attraction. Such issues are independent of the issues before us in this matter, as we are primarily concerned with the impact of the proposed dam

on the structure. Since the Commission has found Lebanon's proposed bracing plan to be satisfactory and the Department has relied upon the Commission's assessment, we cannot find any abuse of discretion because there were no plans for future development of the Swatara Furnace site.

Evaluation of the Project's Impact on Land Uses in the Watershed

The final issue before us is the extent to which the Department must review the effects of a project on property or riparian rights of upstream owners and on foreseeable development within the watershed. The County contends that the Department committed an abuse of discretion in that it failed to ascertain the identity of upstream property owners and consider the effects of the project upon them. The Department essentially argues that 25 Pa.Code §105.14(b)(3) requires it to assess the direct physical impacts of the project, while 25 Pa.Code §105.14(b)(8) directs it to consider the effects of development on the project, not the effects of the project on development. Particularly with respect to the effect of the dam on development of coal reserves in the watershed, the Department asserts that because the status quo will be maintained, there will be no effect on development of coal reserves in the watershed. Lebanon, rather than joining the Department's contentions, addresses whether it was proper for the Department, rather than the applicant, to prepare the environmental assessment and asserts that the purpose of the project - to eradicate an unsafe dam and provide water supply - more than justified the impacts, if any, on future development in the watershed.

The purposes of the DSEA are set forth in §2 as

> (1) Provide for the regulation of dams and reservoirs, water obstructions and encroachments in the Commonwealth, in order to protect the health, safety and welfare of the people and property.
>
> (2) Assure proper planning, design, construction, maintenance, monitoring and super-

vision of dams and reservoirs, including such preventive measures as are necessary to provide an adequate margin of safety.

(3) Protect the natural resources, environmental rights and values secured by the Pennsylvania Constitution and conserve the water quality, natural regime and carrying capacity of watercourses.

(4) Assure proper planning, design, construction, maintenance and monitoring of water obstructions and encroachments, in order to prevent unreasonable interference with waterflow and to protect navigation.

(emphasis added)

See also, 25 Pa.Code §105.2. The regulations promulgated pursuant to the DSEA at 25 Pa.Code §§105.14-105.16 implement the purpose articulated in §2(3) of the DSEA. Section 105.14(b) requires the Department to consider these factors, *inter alia*, in reviewing a permit application:

(1) Potential threats to life or property by the project.

(2) Potential threats to safe navigation created by the project.

(3) The effect of the proposed project on the property or riparian rights of owners above, below, or adjacent to the project.

(4) The effect of the proposed project on regimen and ecology of the watercourse or other body of water, water quality, stream flow, fish and wildlife, aquatic habitat, instream and downstream uses, and other significant environmental factors.

(5) The impacts of the proposed project on any nearby national wildlife refuge, national natural landmark, National or State park or recreation area, or National or State historical site.

(6) Compliance by the proposed project with all applicable laws administered by the Department, the Fish Commission, and any river basin commission created by interstate compact.

(7) The need for the proposed project to be located in or in close proximity to the water and alternatives in location, design, and construction which are available to minimize the adverse impact of the project upon the environment and to protect the public natural resources of the Commonwealth.

(8) Present conditions and the effects of reasonably foreseeable future development within the affected watershed above and below the project:

(i) Any dam, water obstruction, or encroachment shall be designed, constructed, and operated so as to assure adequacy and compliance with the provisions of this chapter, taking into account reasonably foreseeable development within the affected watershed.

(ii) In assessing the impact of future development upon a dam, water obstruction, or encroachment, the Department may require the applicant to submit data regarding estimated development potentials and municipal, county, and regional planning related to the affected watershed.

(9) Consistency with State and local floodplain and storm water management programs, the State Water Plan, and the Coastal Zone Management Plan.

(10) Consistency with the designations of wild, scenic, and recreational streams under the National Wild and Scenic Rivers Act of 1968 or the Pennsylvania Scenic Rivers Act.

(emphasis added)

Section 105.15(a) requires each application for a Class A or B or hazard classification 1 dam to contain an environmental assessment. After reviewing the environmental assessment required by 25 Pa.Code §105.15(a), the Department is authorized by §105.15(b) to require the submission of additional information regarding:

(1) The potential impacts to the extent applicable of the proposed activity on water quality, stream flow, fish and wildlife, aquatic habitat, Federal and State forests, parks,

> recreation, instream and downstream water uses, prime farmlands, areas or structures of historic significance, streams which are identified candidates for or included within the Federal or State wild and scenic river systems and other relevant significant environmental factors.
>
> (2) Alternatives to the proposed action including alternative locations, routings or designs to avoid or reduce significant adverse environmental impacts.
>
> (3) Actions to be taken through design, location, or operation of the proposed structure or other activities to mitigate any unavoidable significant environmental impacts created by the proposed project.

And, in reaching its final decision regarding the environmental effects of a project, the Department is to apply 25 Pa.Code §105.16(a):

> The determination of whether the potential for significant environmental harm exists will be made by the Department after consultation with the applicant and other concerned governmental agencies. If the Department determines that there may be a significant impact on natural, scenic, historic, or aesthetic values of the environment, the Department will consult with the applicant to examine ways to reduce the environmental harm to a minimum. If, after consideration of mitigation measures, the Department finds that significant environmental harm will occur, the Department will evaluate the public social and economic benefits of the project to determine whether the harm outweighs the benefits.

We find that the Department's actions in reviewing Lebanon's permit application were not in accordance with these requirements.

We will first address the issue of who is required to prepare the environmental assessment. The Department witnesses gave conflicting testimony regarding this obligation: Mr. Adams believed that the applicant, as required by 25 Pa.Code §105.15(a), was to submit the assessment, while Mr. Ellam testified that the Secretary of the Department directed that the Department,

and not the permit applicant, prepare the assessment. The language of the regulation is quite clear - the permit applicant is to prepare the assessment. Until the language of this regulation is amended by the Environmental Quality Board, the Department is bound by it and must implement it regardless of the Secretary's directives. While we agree with the County that the Department acted contrary to its regulations, any harm was subsequently cured by Lebanon's submission of an environmental assessment to the Department on January 10, 1989.

The more important issues to be addressed involve the substantive aspects of the assessment, and it is here that we find deficiencies in the Department's actions. We cannot agree with the Department and Lebanon that the Department was not required to evaluate potential resource development in the watershed or the effect of the proposed dam on upstream property owners in the watershed. Nor can we accept the premise that because the existing dam has been in place since 1948, the construction of the proposed dam will not impact mineral resources in the watershed.

The regulations do not confine the Department's analysis of the effects of a project to the zone of inundation and the immediately adjacent upstream and downstream areas. On the contrary, §105.14(b)(3) refers to effects on property or riparian rights "above, below, or adjacent to the project," while §105.14(b)(8) refers to "present conditions and the effect of reasonably foreseeable development within the affected watershed above and below the project..."

As for the argument that the Department was not required to examine the effects of the dam on development in the watershed, the interpretation suggested by the Department - that it must only evaluate the effects of reasonably foreseeable future development on the dam and not the effects of

the dam on future development in the watershed - is consistent with the language of subsection (ii) of §105.14(b)(8). But, it matters little which interpretation, the Department's or the County's, we accord deference, for an examination of potential mineral resource development is required to ascertain both the effect of development on the dam and the effect of the dam on development.

The Department and Lebanon also contend that the Department was not required to assess the impact of the project on development of coal reserves in the watershed. The Department's obligation to assess the project's impact on land uses in the affected watershed is recognized in 25 Pa.Code §§105.14(b)(3), and (4), 105.15(b)(1), and 105.16(a). In examining what land uses must be considered in assessing the impact of a proposed activity, the Commonwealth Court has held in Pennsylvania Environmental Management Services, Inc. v. Dept. of Env. Resources, 94 Pa.Cmwlth 182, 503 A.2d 477, n.3 (1986), that the agricultural value of land adjacent to a landfill must be evaluated by the Department in reaching a determination on a permit application. Similarly, the mineral resource use of land is a recognized value in the Commonwealth and must be evaluated by the Department. That mining may be perceived as environmentally degrading is of no consequence, for any land use may be environmentally degrading if not conducted properly.

Turning now to what the Department did assess, it is undisputed that the Department's assessment was not consistent with our analysis of the requirements of the regulations. The Department's internal environmental assessment was nothing but a simplistic checklist which did little more than assess the direct water quality impacts of the dam (Ex. C-1). The Department erroneously believed that all property in the watershed was held by either Lebanon or the Game Commission and this assumption was buttressed by Lebanon's

environmental assessment (N.T. 311-112; Ex. P-6). The municipal, county or regional planning applicable to the watershed is obviously relevant to development potential in the watershed, but the Department merely accepted Lebanon's characterization of land ownership and development potential, rather than requiring information on the planning for the watershed, as it was authorized to do by 25 Pa.Code §105.8(b)(8)(ii). And, no evaluation of mineral reserves or the potential for development of mineral resources in the watershed, from both an economic and a regulatory perspective, was performed by either the Department or Lebanon.

The Department and Lebanon suggest that the status quo relating to mineral resource development in the watershed will remain unchanged, since a dam has been in the watershed since 1948. While this argument has some superficial appeal, it is fallacious for several reasons, the most important being that the Department made little or no attempt to ascertain the status quo. In fact, the Department's conclusion regarding this issue appeared to be nothing more than an afterthought generated by its March 3, 1989, meeting with the County. The Department's argument is also flawed from the standpoint that the entire regulatory climate has changed since 1948, with the enactment of new laws and regulations governing both dams and mineral resource development.

Both the Department and Lebanon argue that the County's arguments are little more than a collateral attack on the Department's denial of surface mining permits sought by the County's lessees. We have not considered the particularities of the Department's denial of surface mining applications by the Gary Schieb Coal Company or any other prospective surface mining operator in reaching our conclusions. But, there must be some general assessment of the propensity of the coal in the watershed to generate acid mine drainage and other broad factors relating to the likelihood of obtaining regulatory

approval to surface mine (e.g. pre-existing discharges in the area and an operator's liability for treatment of them). That was not done in this case.

Finally, both the Department and Lebanon argue that the benefits of the project in eradicating an unsafe dam and serving future water supply needs for Lebanon's service area more than offset any detriment to the ability to develop mineral resources in the watershed. The parties have disputed whether the High Bridge Dam is presently unsafe. Although temporary repairs have somewhat increased its safety, its spillway still falls far short of meeting the applicable design requirements and the Department's conclusion in this regard is certainly supportable. Of concern, however, is the Department's evaluation of the public economic and social benefits of the project under 25 Pa.Code §105.16(a) in light of the significant impact[7] of the project on natural resources in the watershed. The Department's conclusion was deficient because it was reached without a full awareness of the other landowners in the watershed and the impact on land uses.

Relief

The Board has the authority, when it finds that the Department has abused its discretion, to substitute its discretion for the Department's and make a determination on the basis of the record before it. However, we will not step into the Department's shoes when we have insufficient evidence to make such a determination, as we believe the case to be here.[8] We will

---

[7] We are not suggesting that the Department must evaluate the effect of a project permitted under the DSEA on every conceivable land use and landowner in the watershed. What we hold is that there is a significant impact on mineral resources in light of the fact that the County and GMP own surface and/or coal rights to nearly 40% of the land in the watershed.

[8] Nor will we assume that role when external forces, such as obtaining

footnote continued

remand this matter to the Department to make an assessment of the Christian E. Siegrist Dam's effect on future development in the watershed, including mineral resource development, and reach a conclusion pursuant to 25 Pa.Code §105.16. In doing so, the Department is to allow meaningful participation by the County and other interested parties.

Finally, we will address Lebanon's argument that collateral estoppel applies to prevent the remand of this matter to the Department because the Department misrepresented its application requirements and consequently led the Authority to act against its own interest in submitting an incomplete or deficient application. The doctrine of estoppel may operate against the Commonwealth in certain circumstances; however, the Courts have been reluctant to apply the doctrine when the Commonwealth is acting in a governmental capacity, as is the case here. Farmers Bank and Trust Co. of Hummelstown v. Com., Dept. of Banking, 43 Pa.Cmwlth 325, 402 A.2d 323 (1979). We must also be aware that Lebanon's consulting engineers are hardly unsophisticated and must be charged with some knowledge of the regulatory framework within which they operated. Divine Providence Hosp. v. Dept. of Public Welfare, 76 Pa.Cmwlth 188, 463 A.2d 118 (1983). And, if we were to adopt Lebanon's argument, any holding by the Board that the Department had not properly applied its regulations would only operate prospectively and would render no relief to affected third parties which successfully challenge the Department's actions.

CONCLUSIONS OF LAW

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

---

continued footnote
public funding (i.e., PennVest funding) are present, for a project's eligibility for such funding is not, *per se*, relevant to our consideration of whether it satisfied the relevant regulatory requirements.

2. The County and the Intervenors have the burden of proving by a preponderance of the evidence that the Department abused its discretion in issuing a permit to Lebanon.

3. Before the Department may publish notice of receipt of an application for a dam permit in the Pennsylvania Bulletin, it must have received the information required by 25 Pa.Code §§105.13(d) and 105.81(a) and (b).

4. The Board will not accord deference to the Department's interpretation of its regulations where such interpretation disregards the plain language of the regulation or results in an interpretation contrary to broad statutory purpose.

5. The Department's review of Lebanon's permit application constituted an abuse of discretion in that it resulted in the denial of a meaningful opportunity for the public to participate in the process.

6. A decision whether or not to hold a public hearing on a permit application must be reached on the basis of the nature and location of a project and the parties with a potential interest in the permit decision.

7. The Department's decision not to conduct a public hearing on Lebanon's permit application or afford some other means of effective participation in the permit review process was an abuse of discretion, given the location of Lebanon's proposed dam and the interest and objections of a major landholder in the watershed of the project.

8. The Department may properly rely on the expertise of the Commission in assessing a project's impact on the historic values of the environment. 25 Pa.Code §105.16(a).

9. The Department did not abuse its discretion in approving the destruction and inundation of the High Bridge abutments where the bridge abutments did not have any peculiar historic value.

10. The bracing plan and other measures for restricting the impact of vehicular traffic on the Swatara Furnace will mitigate any impacts resulting from the construction of the proposed Christian E. Siegrist Dam.

11. The Department did not abuse its discretion in relying upon the Commission's assessment of the bracing plan and other measures for mitigation of construction impacts on the Swatara Furnace.

12. The Department must evaluate a proposed dam's impact on the property or riparian rights of owners upstream of the dam.

13. Potential development of mineral resources upstream of a dam must be evaluated by the Department where mineral resources are a significant aspect of the watershed, as mineral resource development is a recognized land use.

14. The Department abused its discretion in failing to ascertain the identity of upstream property owners in the watershed and to evaluate mineral resource development in the watershed.

O R D E R

AND NOW, this 24th day of November, 1989, it is ordered that:

1) The appeal of the County and the claims of GMP and Schuydel Associates are sustained with regard to their arguments that the Department failed to follow the applicable public participation procedures and failed to assess upstream development impacts in the watershed;

2) The appeal of the County and the claims of GMP and Schuyldel Associates are dismissed with regard to the claim that the effects of the project on historic resources in the watershed were not properly evaluated; and

3) Permit No. D54-157-A is suspended and remanded to the Department for action consistent with this opinion. The Department shall complete its evaluation within 90 days of the date of this order.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Terrance J. Fitzpatrick did not participate in this decision.

DATED: November 24, 1989

cc: See following page.

cc: **DER Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Michael J. Bedrin, Esq.
Northeastern Region
John McKinstry, Esq.
Central Region
For Appellant:
Michael J. O'Rourke, Esq.
Pottsville, PA
For Permittee:
Robert P. Haynes III, Esq.
C. Peter Carlucci, Jr., Esq.
SHEARER, METTE, EVANS & WOODSIDE
Harrisburg, PA
For Schuylkill Associates:
Gerald J. McConomy, Esq.
WOLF, BLOCK, SCHORR & SOLIS-COHEN
Philadelphia, PA
For F. A. Potts and GMP Land Co.:
James P. Wallbillich, Esq.
Abraham H. Frumkin, Esq.
FRUMKIN, SCHRALOW & CERULLO
Pottsville, PA
bl

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

M. DIANE SMIT
SECRETARY TO THE B

KEYSTONE SANITATION COMPANY, INC.

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

: **EHB Docket No. 89-198-W**

: **Issued:** November 29, 1989

OPINION AND ORDER SUR
PETITIONS TO INTERVENE

Synopsis

Interests of a municipality and a citizens group are sufficient to warrant their intervention in an appeal of the denial of a solid waste disposal permit. The extent of their participation is limited to evidence related to the technical grounds for permit denial and adverse impacts on the local environment in order to assure that issues in the appeal would not be needlessly broadened and in order to avoid cumulative evidence.

OPINION

This matter was initiated with the July 14, 1989, filing of a notice of appeal by Keystone Sanitation Company, Inc. (Keystone) challenging a June 16, 1989, letter from the Department of Environmental Resources (Department) denying Keystone's application for a proposed municipal waste landfill in Union Township, Adams County, pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (Solid Waste Management Act). The proposed landfill is adjacent to an existing landfill operated by Keystone. In general, the Department denied the application

because Keystone failed to demonstrate that its proposed operation conformed with the Solid Waste Management Act and would not cause surface or groundwater pollution. Regarding the permit application deficiencies, the Department cited 22 specific deficiencies which fell into the broad categories of siting deficiencies, technical deficiencies, and compliance status problems.

On August 9, 1989, Union Township filed a petition to intervene. In support of its petition to intervene, Union Township argued that the proposed landfill will be located within its borders and that activities at the existing landfill adversely affect the health, safety, welfare, and property of its citizens. Union Township stated it will produce evidence on local concerns and considerations, adverse effects of current landfill operations, the legal and technical insufficiency of the permit application, and past violations at the existing landfill facility. Finally, Union Township alleged that its interests will not be adequately represented by the parties of record, since it has more detailed and specific knowledge of adverse effects due to current operations and that the interests of justice and judicial economy would be best served if Union Township could present its arguments in this forum.

A second petition to intervene was filed on August 17, 1989, by Citizens Urging Rescue of the Environment (CURE). CURE supported its petition for intervention by asserting that it has actively participated throughout the permit proceedings before the Department and that it represents interests that will be directly affected by the outcome of this appeal, including the health, water supplies, and property of local residents. CURE stated that it will present evidence on the unsuitability of the site, the extent of groundwater contamination, the inadequacy of proposed monitoring and remediation systems and geophysical studies, air pollution concerns, and apparent violations of the Solid Waste Management Act and alleged its environmental consultant's expert testimony will materially assist the Board in its review of this

matter. CURE argued that its interests will not be adequately represented by the current parties of record because it has retained a highly qualified environmental consultant and attorneys to assist in its case. It also asserted that the testimony it will present will not be cumulative and will independently relate to and supplement the Department's grounds for denial.

While the Department contended that it would adequately represent the interests of the petitioners, it did not directly oppose the petitions. Instead, it urged that if the petitioners are permitted to intervene, the scope of their intervention should be limited to presenting evidence and arguments that were not cited in the Department's June 16, 1989, denial letter.

Keystone opposed both petitions to intervene. With respect to Union Township, it argued that the municipality's interests are adequately represented by the Department and that the evidence Union Township proposes to present is irrelevant or repetitive and would improperly expand the scope of the appeal. Regarding CURE, Keystone alleged that its interests would be adequately represented by either Union Township or the Department and contended that the fact CURE has retained environmental consultants and attorneys is not material to the question of whether intervention should be granted by the Board. Finally, Keystone proposed that if intervention is granted to either petitioner, it should be limited to presenting direct testimony of non-cumulative witnesses and other evidence supporting the reasons given by the Department in its denial letter.

Intervention before the Board is governed by 25 Pa.Code §21.62. The Board has consistently held that intervention is discretionary and that petitioners must show a direct, immediate, and substantial interest in the outcome of the litigation. Franklin Township Board of Supervisors et al. v. DER, 1985 EHB 853. The factors considered by the Board in ruling on a petition to intervene include 1) the prospective intervenor's relevant interest; 2)

the adequacy of representation provided by the existing parties; and 3) the ability of the prospective intervenor to present relevant evidence. BethEnergy Mines, Inc. v. DER, 1987 EHB 873. Intervention will not be granted, however, if it is not in the public interest. Franklin Township., *supra*.

We believe that both Union Township and CURE have an interest in this matter which is sufficient to warrant intervention. Union Township, as the host municipality of both Keystone's existing landfill and its proposed landfill which is the subject of the permit denial, has a direct interest in this appeal. CURE, a non-profit corporation, the purpose of which is to protect the natural environment for the benefit of the citizens of York and Adams County, also has a sufficient interest in that its members live, work, own property, or use groundwater supplies in close proximity to the proposed landfill and, thus, may be adversely affected by the proposed landfill.[1] Its interests do not necessarily coincide with those of Union Township, as its membership is broader than Union Township. Both petitioners have an interest separate and distinct from that of the Department and each has a peculiar knowledge of local conditions relating to the existing and proposed Keystone Landfill.

The real issue in deciding these petitions, as CURE pointed out, is the scope of intervention. While we have held that an intervenor may broaden the scope of an appeal by raising any issue which could have been raised by an appellant, Sunny Farms, Ltd., et al. v. DER and OUCH, Inc., 1982 EHB 445, we also have held that we would not grant intervention where it would overly

---

[1] CURE's status in this appeal is distinguishable from its status in an earlier appeal, Keystone Sanitation Co., Inc. v. DER, 1987 EHB 22, since it is now incorporated and thus has an interest as a legal entity distinct from the interests of Union Township.

broaden the scope of the original appeal and impede the Board's deliberations through a proliferation of issues, Franklin Township, *supra*, 1985 EHB 853, 857, or where the evidence sought to be introduced by the intervenor was not relevant to the issues before the Board, City of Harrisburg v. DER, 1988 EHB 946.

The Department has cited 22 reasons for its denial of Keystone's permit application, and Keystone has challenged each of these reasons in its notice of appeal, thus bringing before the Board numerous issues which are legally and technically complicated. Significantly broadening the scope of this appeal would unduly delay the disposition of this appeal; consequently, we will limit the scope of each intervenor's evidence.

Union Township has stated in its petition to intervene that it will present evidence of this nature:

> A. Evidence of relevant local concerns and considerations, and evidence that establishment of an expanded landfill at this location is inconsistent with those concerns and with Article 1, Section 27 of the Pennsylvania Constitution.
>
> B. Evidence, including specific testimony, concerning activities at the Keystone Sanitation Landfill and resulting adverse affects on the local environment and living conditions caused by the current operations and any expanded waste operations.
>
> C. Evidence as to the technical and legal insufficiency of the permit application at issue.
>
> D. Evidence of past violations of law in connection with operation of the existing landfill facility.

Such evidence is very general in nature and, as such, may not be very helpful to the Board, particularly since the issues involved in the appeal are highly technical. Given this description of Union Township's evidence, we cannot ascertain how Union Township would illuminate the issues in this matter. It

is Union Township's burden to "fully and completely...advise the parties and the agency as to the specific issues of fact or law to be raised or controverted...." 1 Pa.Code §35.29. The only prospective evidence which satisfies this standard is evidence of adverse effects on the local environment. We believe that such evidence, particularly as it relates to surface and groundwater pollution, would be useful to the Board, and we will limit Union Township's participation to this issue.

On the other hand, the evidence which CURE proposes to introduce is generally quite specific. As articulated in Paragraph 4 of its petition to intervene, CURE proposes to introduce:

> (a) Expert testimony regarding the climate, topography, soils, geology, and hydrogeology of the Keystone site, showing that the proposed landfill expansion site is unsuitable for use as a municipal waste landfill;
>
> (b) Expert testimony regarding: (1) the nature and extent of groundwater and surface water contamination at the proposed landfill expansion site, (2) the probable persistence of contaminants in the highly fractured bedrock aquifer underlying the proposed expansion site, and (3) the inadequacy of the proposed monitoring and remediation systems at the proposed site;
>
> (c) With respect to the foregoing, Citizens will present expert testimony regarding defects in the design of the proposed facility, including:
>
> > (i) The inadequacy of present geophysical studies provided by Keystone and the need for additional siting data which can be provided by seismic refraction, electromagnetic conductivity surveys, very low frequency surveys, or audio magneto-telluric surveys to locate fractures in the bedrock beneath the landfill for groundwater monitoring and landfill construction purposes;
> >
> > (ii) The need for installation of additional groundwater monitoring wells and/or borings on the proposed landfill expansion site through and open to fractures and fracture zones identified in (i) above, for monitoring purposes;

(iii) Installation of additional monitoring wells both on-site and off-site to determine the properties of the regional aquifer and the nature, extent, and migration of existing groundwater contamination;

(iv) A stability analysis of the proposed facility in view of the location of said facility in a seismic impact area;

(v) Analysis of possible air pollution concerns arising from the applicant's "air stripping" of contaminated groundwater and the proposed venting of methane produced at the proposed facility;

(d) Testimony regarding apparent violations of 35 P.S. §§6018.503(c) and (d) by the owners and operators of Keystone. In addition, Citizens' expert will testify regarding the lack of public liability insurance and inadequte bonding for the proposed facility;

(e) Such other evidence as may be appropriate in view of the issues involved and the evidence presented by Keystone in support of its appeal.

The broad evidence of site suitability in Paragraph 4(a), while of general interest, would do little to illuminate the highly specific, technical issues in this appeal. The evidence proposed in Paragraph 4(d) would best be presented by the Department, as it is the entity with the authority and responsibility to implement §503 of the Solid Waste Management Act. The evidence proposed in Paragraph 4(e) is too non-specific and will not be permitted. But, we believe that presentation of the specific evidence set forth in Paragraphs (4)(b) and 4(c) is relevant to the issues forming the basis for the permit denial, does not necessarily overlap with evidence which would be presented by the Department, and would be useful to the Board.

O R D E R

AND NOW, this 29th day of November, 1989, it is ordered that:

1) The petitions to intervene filed by Union Township and CURE are granted subject to the limitations in the foregoing opinion; and

2) On or before December 29, 1989, the parties shall submit a proposed schedule for the completion of discovery and filing of pre-hearing memoranda, stipulations, and exhibits. In the event that the parties are unable to agree on such a schedule, the Board will establish it.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 29, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kurt J. Weist, Esq.
Central Region
For Appellant:
Robert B. Hoffman, Esq.
REED SMITH SHAW & McCLAY
Harrisburg, PA
For Union Township:
Eugene E. Dice, Esq.
Harrisburg, PA
For CURE:
John R. Alison, Esq.
HOWREY & SIMON
Washington, DC

bl

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

M. DIANE SMIT
SECRETARY TO THE E

UNION TOWNSHIP

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

: **EHB Docket No. 89-202-W**

: **Issued:** November 29, 1989

OPINION AND ORDER SUR
MOTION TO DISMISS

Synopsis

An appeal of the denial of a permit for a proposed municipal waste facility is dismissed because the Board can grant no relief where the appeal does not challenge the permit denial, but asserts that additional reasons should have been cited as grounds for the denial.

OPINION

This matter was initiated with the July 17, 1989, filing of a notice of appeal by Union Township (Township), seeking review of a June 16, 1989, letter from the Department of Environmental Resources (Department) denying the application of Keystone Sanitation Company for a proposed municipal waste landfill in Union Township, Adams County. The Department's action, which was pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (Solid Waste Management Act), was for the stated reasons that Keystone failed to demonstrate that its application was complete and accurate and satisfied the requirements of the Solid Waste Management Act and failed to show that operations at the landfill

would comply with the Solid Waste Management Act and would not cause surface water pollution or groundwater pollution. As grounds for its appeal, the Township stated that although it supported the denial of Keystone's permit application, it believed the Department failed to list several other bases for the denial.

On August 21, 1989, the Department filed a motion to dismiss the Township's appeal claiming that because the Township agreed with the result achieved by the denial letter, it was not adversely affected by the action. Further, the Department argued that because the Department had already denied Keystone's landfill permit, there was no relief that the Board could grant to the Township, thus rendering the appeal moot. Finally, the Department contended that the Township had no standing to bring the appeal, since the kinds of harm the Township wished to address could result only if a permit were issued to Keystone.

On September 11, 1989, the Township filed its response to the motion to dismiss alleging that it continues to be aggrieved due to the possibility of Keystone successfully challenging the permit. The Township asserts that this appeal is not moot because of the pendency of its petition to intervene at Docket No. 89-198-W, Keystone's appeal of the permit denial. In support of this argument the Township cites the possibility that Keystone could prevail in its appeal or that the Township's arguments may never be heard if, assuming it is granted intervention, the issues it may raise at Docket No. 89-198-W are limited.

We fail to see how the Township's appeal at this docket is affected by Keystone's appeal at Docket No. 89-198-W, since each must stand on its own merits. More importantly, we are at a loss to ascertain what relief we can grant to the Township in this matter because the Department has already

afforded that relief to the Township with the permit denial. Willard M. Cline v. DER, EHB Docket No. 88-471-R (Opinion issued October 16, 1989). We can hardly remand the permit denial to the Department to find other grounds to deny it.

O R D E R

AND NOW, this 29th day of November , 1989, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of Union Township is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

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

Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 29, 1989

cc: See next page

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kurt J. Weist, Esq.
Central Region
For Appellant:
Eugene E. Dice, Esq.
Harrisburg, PA

bl

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

M. DIANE SM
SECRETARY TO TH

MID-CONTINENT INSURANCE COMPANY	:	
	:	
v.	:	**EHB Docket No. 88-390-E**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 30, 1989**

OPINION AND ORDER

Synopsis

DER's Motion to Strike Appellant's Pre-Hearing Memorandum for noncompliance with Pre-Hearing Order No. 1 is well taken, where the document submitted by Appellant fails to meet virtually all of the requirements of the Board's Order and does not inform either this Board or DER of the Appellant's position.

OPINION

On September 28, 1988, Mid-Continent Insurance Company ("Mid-Continent") filed an appeal with this Board from DER's forfeiture of surety bonds it posted in connection with Mining Permit 1841-3 issued to Wills Construction Company by DER for a mine in Upper Turkeyfoot Township, Somerset County. In response to this appeal we issued a Pre-Hearing Order No. 1, dated October 4, 1988.

Pre-Hearing Order No. 1 required that Mid-Continent as appellant file a Pre-Hearing Memorandum with this Board by December 19, 1988 which contained:

A. Statement of the facts Mid-Continent intends to prove.

B. The contentions of law with detailed citations to authorities (cases, etc.) which support these contentions.

C. A description of any scientific tests relied upon and summary of all expert testimony to be offered.

D. Order of Appellant's witnesses, and

E. A list of documents which Mid-Continent may seek to introduce (copies of which were to be attached).

On December 19, 1988 the Board received a one and one-half page document without attachments, which purportedly complied with our Order. In response thereto on February 21, 1989, DER's counsel filed a Motion to Strike Mid-Continent's filing for failing to comply with our Pre-Hearing Order No. 1. The Board wrote to Mid-Continent's counsel, notifying him that he had until March 13, 1989 to respond to this DER motion. Mid-Continent's counsel has not seen fit to reply to DER's motion, which we now grant.

As to a statement of facts, Mid-Continent says it will prove that either the site has been reclaimed or can be reclaimed. This is all that is offered as to facts by the appellant. The statement is not only inconsistent since it says: "the site reclaimed but if it isn't, it can be reclaimed," but it is entirely too brief and unspecific.

As to contentions of law with citations to authority, Mid-Continent says DER abused its discretion, was arbitrary and capricious. This is the extent of its contentions. No citations to authority are provided, which is not surprising since the contentions should support the facts, and facts are

not set forth in the Statement of Facts. Though a passing reference to "regulations promulgated by the Department of Environmental Resources" is made, this is totally inadequate, and, of course, which regulations is not stated. A reference without citation is also made to the Surface Mining Conservation and Reclamation Act (Act No. 418), but to what purpose?

As to experts and a summary of their testimony, one person is identified who holds some unspecified position with an entity identified as "Commonwealth Stone." What this entity is, and how this person has expert evidence to offer, is not spelled out. That he will testify as to site conditions is stated, but nothing more specific is included. Such a summary is much too brief.

Mid-Continent identifies one other witness, so we will assume these are its only two witnesses.

Mid-Continent's Pre-Hearing Memorandum indicates Appellant intends to introduce some unidentified DER documents relating to this mine site. It does not identify same specifically and does not attach them as we ordered.

If the purpose of a pre-hearing memorandum is to flesh out the bones of an appeal, this document filed by Mid-Continent still leaves us with the appeal's skeleton. Mid-Continent's Pre-Hearing Memorandum does not tell the Board what Mid-Continent's evidence will be and it makes it impossible (as DER's motion points out) for DER to file a response. Faced with DER's motion, the wise approach for Mid-Continent would have been to amend its filing or to have opposed DER's motion (assuming there was any basis for doing so). The lack of a Mid-Continent response to DER's motion, speaks volumes.

All that remains for this Board is to decide whether to dismiss this appeal or not. Though DER seeks dismissal, we will not dismiss it. As we have stated in the past on bond forfeitures we are reluctant to dismiss where

DER has the burden of proof. Howard D. Will v. DER, 1987 EHB 27. A sanction pursuant to 25 Pa.Code §21.124 is appropriate, however, for noncompliance with Pre-Hearing Order No. 1 and for failure to respond to DER's motion. Kenneth D. Rothermal Coal Company v. DER, 1988 EHB 39; Swistock Associates Coal Corporation v. DER, 1988 EHB 42; M. F. Fetterolf Coal Company, Inc. v. DER, 1987 EHB 85. Should Mid-Continent fail to comply with the Order set forth below, dismissal of its appeal could be ordered by this Board.

O R D E R

AND NOW, this 30th day of November, 1989, DER's Motion to Strike Appellant's Pre-Hearing Memorandum is granted. The document purporting to be Appellant's Pre-Hearing Memorandum is struck. Appellant shall file a new Pre-Hearing Memorandum with this Board by not later than December 12, 1989. Said Pre-Hearing Memorandum shall comply in full with all portions of our Pre-Hearing Order No. 1 as explained above, and Appellant shall be barred from offering any physical evidence or testimony not spelled out in its Pre-Hearing Memorandum. Appellant will also be barred in its case-in-chief from offering documents not attached thereto or from advancing any legal arguments not specifically set forth therein (and accompanied by citations to legal authorities supporting same). Appellant is also barred from offering any testimony in its case-in-chief except from Louis Mellinger and Martin J. Kammerer, though its counsel may cross-examine any witness offered by DER as part of DER's case-in-chief.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 30, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Steven Lachman, Esq.
Western Region
For Appellant:
David Flower, Esq.
YELOVICH & FLOWER
Somerset, PA

rm

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

M. DIANE SMITH
SECRETARY TO THE BOARD

FRANCES SKOLNICK, et al.	:	
	:	
V.	:	**EHB Docket No. 89-290-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 30, 1989**
and GPU NUCLEAR CORPORATION, Intervenor	:	

OPINION AND ORDER SUR PETITION FOR SUPERSEDEAS

Synopsis

A petition for supersedeas filed by the Appellants is denied in an appeal involving DER's exemption of an air contamination source from the requirements for plan approval and an operating permit. The Appellants have not shown that they will be irreparably injured in the absence of a supersedeas, nor have they demonstrated that DER erred in granting the exemption.

OPINION

This proceeding involves an appeal filed on August 31, 1989 by Frances Skolnick, Susquehanna Valley Alliance, Three Mile Island Alert, Concerned Mothers and Women, and People Against Nuclear Energy (collectively, the Appellants) from a letter of the Department of Environmental Resources (DER) dated August 3, 1989. In this letter, DER stated that no plan approval or operating permit was required for GPU Nuclear Corporation (GPUN) to install and operate an evaporation system to clean and dispose of water which had been contaminated as a result of the accident at Unit 2 of the Three Mile Island

Nuclear Generating Station. In their Notice of Appeal, the Appellants allege, among other things, that DER erred in determining that the evaporation system would constitute an air contamination source of "minor significance"--and, thus, that it would be exempt from DER's permitting requirements--under DER's regulations at 25 Pa. Code §127.14(8).

The Appellants filed a petition for supersedeas on October 3, 1989. In this petition, Appellants request the Board to bar GPUN from operating the evaporation system until the Board can hold full hearings and render a final decision on the appeal.[1] GPUN and DER filed motions to dismiss the petition for supersedeas; these motions were denied by the Board on November 2, 1989. Hearings on the petition for supersedeas were held on November 15 and 16, 1989. This Opinion and Order addresses the petition on its merits.

GPUN's proposed evaporation system is designed to dispose of roughly 2.3 million gallons of water which were contaminated with radioactive materials as a result of the accident and subsequent clean-up at Unit 2 of TMI.[2] The contaminated water, referred to in the record as "accident generated water," will first be run through demineralizer systems to reduce the contaminant levels (GPUN Exh. G, p. 3). The water is then fed into a storage tank, and from there it is routed to the evaporator, which boils the

---

[1] GPUN has indicated to the Board that the evaporation system will begin operating sometime after December 1, 1989.

[2] The radioactive materials in the water are "radionuclides." The chief radionuclides present are tritium, strontium-90, and cesium-137. The tritium cannot be separated from the water and appears to be responsible for the level of radioactivity in the vapor which will be discharged from the evaporation system. (Transcript 330, GPUN Exh. G, p. 2)

water and collects the solid particulate matter as sediment.[3] The steam from the evaporator is then routed to a distillate tank, where it condenses back to water (GPUN Exh. G, Attachment B). The water in this tank is sampled and then either sent forward to the vaporizer (where it is boiled for discharge to the atmosphere) or, if necessary, sent back to the evaporator for further processing.

In its letter granting the exemption, DER stated that the determination was conditioned upon the evaporation system maintaining a decontamination factor (DF) of 1000 (DER letter of August 3, 1989, condition 2). DER also required adherence to certain sampling and monitoring requirements as a condition of its exemption of the system. GPUN was required to conduct sampling and analysis at set intervals of both the water fed into the evaporation system (the "influent") and the water which had gone through the evaporator and was in the distillate tank (the "effluent") (conditions 2(b)(c)). In addition, GPUN was required to install a continuous radiation monitor to monitor water going into the vaporizer, and a stack effluent sampler to determine environmental releases. (condition 3)

The Appellants have raised a host of factual and legal arguments in support of their petition for supersedeas. Their chief argument, however, appears to be that DER abused its discretion by determining that the evaporation system would constitute an air contamination source of "minor significance", and, thus, that the evaporation system would be exempt from DER's operating permit and plan approval requirements. See 25 Pa. Code §127.14(8). More specifically, Appellants argue that GPUN's evaporation

---

[3] This sediment, which contains radioactive materials, will be packaged and shipped to a federally licensed facility for low-level radioactive waste. (GPUN Exh. G, p. 2)

system does not fit within the criteria set out by DER in a "Notice" published in 18 Pennsylvania Bulletin, pp. 1856-1857, April 16, 1988. This Notice sets out criteria for exemption of certain air contamination sources; listed among these was an exemption for sources emitting radionuclides (number 31). The Petitioners argue that DER erred by exempting the evaporation system when the system did not satisfy the criteria for sources emitting radionuclides published in the Notice. Thus, the Appellants contend that they are likely to succeed on the merits of their appeal, and that they have suffered irreparable harm per se due to DER's violation of the law. See Pennsylvania Public Utility Commission v. Israel, 356 Pa 400, 52 A.2d 317 (1947).

GPUN contends that the Appellants have not satisfied the standards for granting a supersedeas. GPUN argues that DER did not abuse its discretion by granting an exemption. In particular, GPUN contends that the evaporation system fits within the criteria in the Notice for sources emitting radionuclides. GPUN also argues, however, that DER acted properly in determining that this was a source of minor significance even if the system did not meet the numerical criteria in no. 31 in the Notice. Finally, GPUN contends that the Appellants have not presented any evidence to support their claim that they will be irreparably injured if a supersedeas is not granted.

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

1) irreparable harm to the petitioner

2) the likelihood that the petitioner will prevail on the merits of the appeal, and

3) the likelihood of injury to the public.

25 Pa. Code §21.78(a). The petitioner bears the burden of demonstrating that these factors warrant granting a supersedeas. Lower Providence Township v.

DER, 1986 EHB 395.

Applying these factors to this case, it is clear that the petition for supersedeas must be denied. The Appellants have not demonstrated that a supersedeas is warranted - in particular, they have not shown that they will suffer irreparable harm if a supersedeas is not granted.

The evidence submitted at the hearing does not support the Appellants' claim of irreparable harm. Margaret Reilly, Chief of the Division of Environmental Radiation in the Bureau of Radiation Protection within DER, testified regarding DER's calculation of the radiation doses resulting from the evaporation system.[4] These doses were estimated using a computer program named "COMPLY" (GPUN Exh. H, p. 1). COMPLY was developed by the United States Environmental Protection Agency to calculate radiological doses to offsite individuals in the vicinity of a source of airborne emissions. (Id. at p. 2) The program consists of four levels of increasing complexity. The higher the level, the greater the number of source-specific factors which are used in estimating the dose (Id.). As a result, the higher levels yield a more accurate dose estimate (Id. at p. 3). DER ran COMPLY at all four levels to estimate the dose resulting from the evaporation system (Id. at p. 4). Level 2 yielded a dose estimate to the maximally exposed individual[5] of 3.2 millirems per year, while Level 4 resulted in a dose estimate of 0.8 millirems per year (Id.). Ms. Reilly concluded that the best estimate of the expected

---

[4] In order to conserve hearing time, the parties agreed to submission of affidavits as the direct testimony of several witnesses. These affidavits are Appellants' Exhibit A and GPU Nuclear Exhibits G, H, I, and J. Ms. Reilly's affidavit is GPU Nuclear Exh. H.

[5] The "maximally exposed individual" is a hypothetical person who is assumed to be subject to the highest possible amount of radiation from each of the pathways (inhalation, consuming vegetables and meat affected by the radiation, etc.) by which the radiation could affect a person. (T. 324, GPUN Exh. J, p. 6)

dose would be equal to or less than 0.8 millirems per year (Id. at pp. 4-5). She stated that this level of dosage was "truly insignificant" when compared with other possible sources of involuntary exposure (T. 207). She also stated that doses in the range of one, two, or three millirems per year were insignificant (Id.).

GPUN witness William J. Cooper testified regarding the health effects of doses of radiation. Doses of 200 rems or more delivered over a short period of time induce radiation sickness and can be fatal (GPUN Exh. J, p. 10). Doses from 10 rems to 100 rems can increase the risk of cancer and genetic abnormalities (Id.). At low levels of exposure, in the area of 5-10 rems, health effects have not been observed or detected statistically (Id.). Nonetheless, for the purpose of establishing health standards, a conservative approach is taken and a linear relationship between dose and effects, with no threshold, is assumed (Id.). Mr. Cooper also compared the projected doses from evaporation to the doses from other natural and man-made sources (Id. at p. 9). To cite just one example from his testimony, a person living in a brick house (as opposed to a wooden one) would receive an additional whole body dose of 20 millirems per year (Id.). Mr. Cooper concluded that the projected doses from evaporation were insignificant (Id. at p. 8).

The Appellants did not introduce any evidence to refute the testimony of Ms. Reilly and Mr. Cooper, both of whom are certified by the American Board of Health Physics (T. 197, 320), regarding the insignificance of the projected doses from evaporation. The Appellants did, however, construct another argument to establish that they have met the irreparable injury requirement. They argued that DER violated the law by exempting the evaporation process from plan approval and operating permit requirements, and that this violation of the law constitutes irreparable injury per se to the public. See

Pennsylvania Public Utility Commission v. Israel, 356 Pa. 400, 52 A.2d 317 (1947). In order to succeed in this argument, the Appellants must demonstrate clearly that DER's action was illegal. See Citizens for Upper Dauphin v. DER, EHB Docket No. 89-034-M (Opinion and Order issued June 16, 1989). The Appellants have failed to carry this burden.

To evaluate the Appellant's legal argument, it is necessary to review the basis for DER's authority to regulate air pollution. The statutory source of DER's authority is the Air Pollution Control Act, Act of January 8, 1960, P.L. 219, as amended, 35 P.S. §4001 et seq. Section 6.1(a) of the Act, 35 P.S.§4006.1(a), provides:

> [n]o person shall construct, assemble, install or modify any stationary air contamination source . . . . unless such person has applied to and received from the department written approval so to do: Provided, however, That no such approval shall be necessary . . . with respect to any . . . . class of units as the [Environmental Quality Board], by rule or regulation, may exempt from the requirements of this section.

Section 6.1(b) of the Act, 35 P.S. §4006.1(b), provides:

> No person shall operate any stationary air contamination source which is subject to the provisions of subsection (a) of this section unless the department shall have issued to such person a permit to operate such source . . . .

Finally, the Department's regulations, at 25 Pa. Code §127.14, provide:

> Approval is not required for the construction, modification, reactivation, or installation of the following:
>
> * * * *
>
> (8) Other sources and classes of sources determined to be of minor significance by the Department.

Applying the above provisions to this case, there is no dispute that the evaporation system constitutes a "stationary air contamination source"

under 35 P.S. §4006.1(a) and (b). In addition, 35 P.S. §4006.1(a) specifically authorizes the exemption of certain sources from the requirement for plan approval and an operating permit. The question in this case is whether DER properly concluded that the evaporation system was a source of "minor significance" under 25 Pa. Code §127.14(8).

The Appellants base their argument that DER erred upon a "Notice" (18 Pennsylvania Bulletin 1856, April 16, 1988) in which DER listed sources which it determined met the minor significance standard in the regulations. Listed among these sources of minor significance were:

> (31) Sources emitting radionuclides with a whole body dose equivalent less than one millirem per year aggregated over all exposure pathways when calculated using the maximum potential (before control) emissions and point of maximum concentration occurring beyond the property line, for each pathway of exposure.

18 Pennsylvania Bulletin 1857. The Notice also provided that:

> Exemptions may be provided for sources not listed above. Such exemptions should be obtained by the submission of a completed Request for Determination of Requirement for Plan Approval/Operating Permit Application form, available from any Bureau of Air Quality Control office.

The Appellants contend that DER acted illegally in exempting the evaporation system because the system does not satisfy the criteria listed in number 31 in the Notice for sources emitting radionuclides. They argue that the annual dose could possibly exceed one millirem per year, because the calculated dose of 0.8 millirems per year using level four of COMPLY was based on an assumption that the accident generated water would be evaporated over a twenty-four month period, whereas the evaporation of the water could be completed in as little as fifteen months (T. 15, 31).

The Appellants appear to be correct that the dosage to the maximally exposed individual could exceed one millirem per year. Dr. Piccioni testified

that the dosage would be 1.3 millirems per year if the evaporation period were shortened to 15 months (T. 31). However, we do not agree with the Appellants' assumption that the one millirem per year standard is a binding norm and that DER may not exempt sources which may release more than one millirem per year. There are two reasons for this conclusion. First, the Notice itself states that "exemptions may be provided for sources not listed above" 18 Pennsylvania Bulletin 1857. Second, the Notice does not establish a binding rule because the Notice was not adopted in accordance with the procedures for promulgating regulations. See e.g., Newport Homes, Inc. v. Kassab, 17 Pa. Commw. 317, 332 A.2d 568 (1975), Hardiman v. Commonwealth, DPW, ___ Pa. Commw. ___, 550 A.2d 590 (1988). The purpose of the Notice was described very well in the testimony of DER's Hartwin Weiss. He stated that the specific sources listed in numbers 1-31 of the Notice constitute "a number of sources which generally should be exempted that we really didn't want to hear about" (T. 136, 137). But DER retains discretion to grant exemptions in other situations on a case-by-case basis where DER determines that the "minor significance" standard in 25 Pa. Code §127.14(8) has been met (T. 125-127). Therefore, the critical issue here is not whether the evaporation system meets the "one millirem per year standard", it is whether the system meets the more general standard of "minor significance."

The evidence supports DER's finding that the evaporation system was an air contamination source of minor significance. Specifically, the testimony of Margaret Reilly and William Cooper regarding the insignificance of the projected doses supports this finding. (See GPUN Exhibits H, J.) Although, as stated above, it appears that the dose to the maximally exposed individual could be higher than 0.8 millirem per year, because the release could occur over 15 rather than 24 months, the difference is not so material

as to alter our conclusion. Ms. Reilly testified that doses in the range of one, two, or three millirems are insignificant[6] (T. 207). Mr. Cooper also testified that an annual dose of 3.2 millirems is insignificant (T. 326). Furthermore, we must consider the conservative assumptions which DER used in running COMPLY. In Ms. Reilly's words, "it's probably overkill . . . . we really maxed it out" (T. 205-206).

Finally, in reviewing whether DER erred in granting an exemption, we must consider the conditions which DER imposed on GPUN. These conditions required GPUN to conduct sampling and monitoring of both the water going into the system and the vapor discharged by the system. GPUN was also required to maintain a decontamination factor of at least 1000 or it must halt operation of the system. These conditions were based upon the plans which GPUN submitted in its request for determination. DER's insertion of these conditions in the exemption letter provides assurance that the projected dose levels will be achieved during the operation of the system.[7]

In summary, the Appellants have not carried their burden of proving that they will be irreparably injured in the absence of a supersedeas. Therefore, the petition for supersedeas must be denied.

---

[6] The Appellants took the position at the hearing that the one millirem per year guideline was sacrosanct. They based this argument upon number 31 in the Notice, and also upon DER's alleged adoption of a one millirem per year standard in a previous application by a company referred to as "B & W." We excluded evidence regarding this other application because DER's actions with regard to another application were not controlling here, and because admitting the evidence would require the Board to re-litigate the circumstances surrounding the other application (T. 314-318). In addition, we note that Mr. Weiss testified that this other application was withdrawn before DER ruled upon it (T. 120, 122-123). The Appellants did not refute this testimony.

[7] Although we tend to agree with Appellants' witness Kosarek that the evaporation system does not operate so automatically that it should be considered a "control device" (See Appellants' Exhibit A), the conditions inserted by DER are, in our view, sufficient to assure proper functioning of the system.

ORDER

AND NOW, this 30th day of November, 1989, it is ordered that the Appellants' petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: November 30, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Central Region
For Appellant:
Frances Skolnick
Lancaster, PA
For Intervenor:
John Proctor, Esq.
Scott W. Clearwater, Esq.
BISHOP, COOK, PURCELL & REYNOLDS
Washington, D. C.
and
Thomas A. Baxter, Esq.
SHAW, PITTMAN, POTTS & TROWBRIDGE
Washington, D. C.
and
Robert Rogan, Director
Licensing & Nuclear Safety
Middletown, PA

nb

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

M. DIANE SMIT
SECRETARY TO THE B

BENJAMIN COAL COMPANY	:	**EHB Docket No. 87-084-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 5, 1989

OPINION AND ORDER SUR
PETITION TO INTERVENE

Synopsis

Petition to intervene by an individual who owns the site on which the mining company of which he is president has been denied a permit to conduct surface mining is denied as untimely pursuant to 25 Pa.Code §21.62(a). The petition was filed after the close of testimony and the filing of post-hearing briefs by the parties.

OPINION

This matter was initiated by Benjamin Coal Company (Benjamin) on March 10, 1987, with the filing of a notice of appeal seeking review of the Department of Environmental Resources' February 10, 1987, denial of Benjamin's application to conduct surface coal mining at a site in Brady Township, Clearfield County, commonly referred to as the Stahlman-Ochs site. On June 8, 1987, Benjamin, with the concurrence of the Department, filed a motion for an expedited hearing which was granted by Board order dated June 24, 1987.

A petition to intervene was filed by the Allegheny Mountain Chapter of Trout Unlimited on August 3, 1987. The Board denied the petition at 1987 EHB 762. Thereafter, hearings were conducted on August 3-7, September 28-29, and October 21-23 and 28, 1987. The filing of post-hearing briefs was completed with the submission of the Department's post-hearing brief on March 24, 1989, and the matter is now ripe for adjudication.[1]

On November 16, 1989, a petition to intervene in this matter was filed by David J. Benjamin; although Mr. Benjamin is President of Benjamin Coal Company, he filed his petition as an individual. As grounds for the petition to intervene, Mr. Benjamin alleged that he is the owner of the property on which the Stahlman-Ochs site is situate, that Benjamin is involved in a liquidation proceeding before the United States Bankruptcy Court, that the Trustee for Benjamin and the Department have negotiated an agreement which, if approved by the Bankruptcy Court, would result in the withdrawal of this appeal, and that he wished to intervene in this appeal to secure an adjudication by the Board which, assuming that the appeal of Benjamin is sustained, will enable the transfer of the mining permit for the Stahlman-Ochs site to another operator.

The Department objected to Mr. Benjamin's petition on November 28, 1989, contending, *inter alia*, that Mr. Benjamin's petition was untimely under 25 Pa.Code §21.62(a); that the Board could grant no relief to Mr. Benjamin, especially if the Trustee, as contemplated, withdraws this appeal; and that

---

[1] There were numerous delays by both parties in filing post-hearing briefs. Not all of these were sanctioned by Board orders authorizing extensions. Benjamin requested an extension to June 1, 1989, to file a reply to the Department's post hearing brief, and that request was granted by by the Board on May 3, 1989. As of the date of this opinion, Benjamin has not submitted its reply brief and if it does so, the Board will disregard it in adjudicating this matter.

allowing Mr. Benjamin's intervention would jeopardize the settlement before the Bankruptcy Court.

While Pa.R.C.P. No. 2327 and 1 Pa.Code §35.3 would allow the filing of a petition to intervene under the circumstances presented herein, the Board's own rules of practice and procedure at 25 Pa.Code §21.62(a) mandate the filing of petitions to intervene prior to the initial presentation of evidence in a proceeding. The strict application of this rule may seem unfair where Benjamin's status has so markedly changed during the pendency of this proceeding, but we are bound by our own rules and regulations, as is any administrative agency. Moreover, Mr. Benjamin's interest as an individual has not changed during the course of the appeal. Consequently, we must deny the petition as untimely.[2]

O R D E R

AND NOW, this 5th day of December, 1989, the Petition to Intervene filed by David J. Benjamin is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: December 5, 1989

---

[2] Because we have denied the petition on this grounds, it is unnecessary for us to address the other reasons cited by the Department as grounds for denial. We do note that the effect granting intervention would have on the proceedings before the Bankruptcy Court is not, in a of itself, grounds for denying Mr. Benjamin's petition. Furthermore, although we would agree with the Department that there would be no relief the Board could grant Mr. Benjamin if the Trustee, on behalf of Benjamin, withdraws this appeal, the Trustee has not yet received the approval of the Bankruptcy Court to do so.

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Martin H. Sokolow, Jr., Esq.
Central Region
For Appellant and Petitioner:
Carl A. Belin, Jr., Esq.
BELIN, BELIN & NADDEO
Clearfield, PA
bl

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

M. DIANE SMI
SECRETARY TO THE I

FRANK COLOMBO, d/b/a COLOMBO TRANSPORTATION SERVICES AND NORTHEAST TRUCK CENTER, INC., et al.	:	
V.	:	**EHB Docket No. 88-420-M (Consolidated)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 7, 1989**

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS
MOTION AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Synopsis

In disposing of a Petition for Supersedeas and a Motion and Cross-Motion for Partial Summary Judgment, the Board holds that a permit is not required under the Solid Waste Management Act for the storage and transportation of municipal waste. While DER's Order and Amended Order are declared unlawful with respect to the permitting issue, the Board holds that the Appellant has not shown a likelihood of prevailing on the merits on the other outstanding issue - whether or not DER's mandate to cease operations was an abuse of discretion. Consequently the supersedeas was not issued.

OPINION

On October 17, 1988, Frank Colombo, d/b/a Colombo Transportation Services and Northeast Truck Center, Inc. (collectively referred to as "Colombo") filed a Notice of Appeal from an October 5, 1988 Order of the Department of Environmental Resources (DER), directing Colombo to apply for a

permit for a municipal waste transfer facility and assessing a civil penalty of $1,500 for the operation of such a facility without a permit, in violation of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. The Order related to a business conducted by Colombo at 1125 North Keyser Avenue in the City of Scranton, Lackawanna County.

This appeal was proceeding toward hearing when, on August 18, 1989, DER issued an Amended Order which, inter alia, (1) added Walter Makowka and Fred Dirisi, d/b/a Makowka Transportation, Inc. (collectively referred to as "Makowka") to the caption; (2) directed Colombo and Makowka to cease operations; (3) directed Colombo and Makowka to file and implement a nuisance abatement plan; (4) directed Makowka to apply for a permit for a municipal waste transfer facility; and (5) assessed civil penalties in the amount of $15,000 each against Colombo and Makowka.

Colombo filed a Notice of Appeal from the Amended Order on August 24, 1989 (docket number 89-282-M), accompanied by a Petition for Supersedeas. Makowka filed a Notice of Appeal on September 15, 1989 (docket number 89-424-M). On August 23, 1989, DER issued a Compliance Order to Pen Pac, Inc. and Raymond Barbiere, its president, (collectively referred to as "Pen Pac"), directing them to cease transporting solid waste to Colombo's facility. Pen Pac filed a Notice of Appeal from the Compliance Order on September 15, 1989 (docket number 89-417-M).

While these procedural steps were being taken before the Board, DER was seeking an injunction against Colombo and Makowka in the Court of Common Pleas of Lackawanna County (89 Equity #90). On August 25, 1989, the Court entered a preliminary injunction directing Colombo and Makowka to (1) cease acceptance of equipment used to transport municipal waste, (2) comply with

DER's Amended Order, and (3) abate public nuisance conditions on Colombo's property. The injunction was made permanent on August 30, 1989, pursuant to a stipulation of the parties providing, inter alia, that Colombo and Makowka would cease operations until they had complied with DER's Order and Amended Order. The Board's jurisdiction was specifically preserved.

The Court proceedings apparently convinced the parties of the possibility of resolving some of the issues without litigation. At their request, the Board cancelled the supersedeas hearing scheduled for September 7, 1989. While the parties were trying to work out an abatement plan, Colombo filed on October 3, 1989, a Motion for Partial Summary Judgment on the issue of whether a permit is required for his operations. When it became apparent that no agreement could be reached on the abatement plan, a hearing on Colombo's supersedeas request was scheduled and held on November 2, 1989, in Harrisburg, before Administrative Law Judge Robert D. Myers, a Member of the Board.

Prior to the hearing, an Order had been entered consolidating all of the appeals at docket number 88-420-M and granting intervention to the City of Scranton, Affiliated Food Distributions, Inc., Salvatore Falzone, t/a Best Beverage, Cronin's Irish Cottage, John J. Cronin's Auto Sales, Ralph Noto and Charles T. Evers, t/a Keyser Office Complex Park, Keyser Valley Citizens Association and William Rothstein and Sons Company. These Intervenors, along with DER, filed responses to Colombo's Motion for Partial Summary Judgment alleging the existence of disputes as to material facts. DER, in addition, filed its own Motion for Partial Summary Judgment on the permitting issue.

The record consists of the pleadings, a hearing transcript of 312 pages and 13 exhibits.

On January 1, 1988, Colombo originated activities that made him a link in the transportation chain of municipal solid waste. On that date, he opened his property on Keyser Avenue for use as a drop-off point for long haul waste transporters. Tractor-trailer combinations loaded with 95 to 110 cubic yards of municipal solid waste from New Jersey would pull onto Colombo's property where the loaded trailers would be detached and the truck tractors would be connected to empty trailers for the return trip to New Jersey. Using his own 14 power units, Colombo would tow the loaded trailers to the Empire Landfill, about 4 miles away, where they would be unloaded and swept clean before being returned to the Colombo property. Colombo's operations enabled the long haul waste transporters to make two round trips per day by avoiding the delays associated with the landfill.

Colombo's business hours ran from 7:00 a.m. to 5:00 p.m. on weekdays and from 6:30 a.m. to noon on Saturday. Loaded trailers that arrived on weekdays too late to be taken to the landfill were parked on the property overnight. Trailers arriving after noon on Saturday were parked on the property until they could be taken to the landfill on Monday. Between 70 and 90 loaded trailers were handled daily, on the average, and anywhere from 20 to 35 would be parked overnight. Eventually, the operation covered 4 acres of the property, 2-1/2 of which were paved.

The loaded trailers were covered only with a mesh tarp that allowed rain to enter and odors to escape. These odors prompted complaints from neighboring businesses and residences (many of the Intervenors) beginning in the Spring of 1988 and continuing to August 1989 when the operations were halted. The complaints were more numerous during the warm months and on Sunday nights. In response to these complaints, the City of Scranton took steps to have the operations declared a public nuisance, and adopted an

ordinance declaring the storage of garbage on a truck for more than one hour to be a nuisance. Colombo challenged both actions in the Court of Common Pleas of Lackawanna County. DER also received complaints and, after sending inspectors to the Colombo property, issued the Order of October 5, 1988.

The operations continued, however, and grew in size, creating problems for neighboring businesses. A beverage distributor across Keyser Avenue received complaints from customers and employees, one of whom got sick from the smell. A fresh produce distributor worried about the odor permeating his fruits and vegetables. In an effort to end the complaints, Colombo (1) stopped accepting loaded trailers from noon on Saturday until 1:00 p.m. on Sunday, (2) created two different levels on which to park the trailers, and (3) employed odor-masking devices. These efforts had no noticeable effect on the number of complaints. In fact, the earth-moving activities involved in creating the two parking levels produced increased runoff of silt-laden stormwater which tended to clog downstream drainage facilities.

On Sunday, August 13, 1989, James P. Connors (Director of Community Development for the City of Scranton) visited the Colombo property. Later that same day, William F. McDonnell (Acting Regional Solid Waste Manager for DER's Wilkes-Barre Regional Office) and Edward Shoener (Regional Director for DER's Wilkes-Barre Regional Office) also visited the property. They found 66 trailers loaded with municipal solid waste and disagreeable garbage odors detectable beyond the property boundaries even though an odor-masking agent was being used. Odors emanating from trailers parked on the unpaved upper level were especially offensive, perhaps because about 12 of them were leaking liquids, some of which was the product of decomposing waste. During another inspection conducted on August 22, 1989, Mr. Connors observed 45 loaded trailers, many of which were leaking, and found thousands of maggots on the

lower level. Again, the stench was sickening, despite the employment of an odor-masking agent.

DER's Amended Order was the result of the August 13, 1989, inspection. In an effort to satisfy certain provisions of the Amended Order and of the injunction made permanent on August 30, 1989, Colombo retained RemTech Environmental Services, Inc. to prepare an abatement plan. Such a plan was prepared and submitted to DER, the City of Scranton and the Intervenors on September 1, 1989. After receiving comments from these parties, the plan was revised and resubmitted on September 26, 1989. Further refinements were made on October 13, 1989.

In its latest version, Colombo's Abatement plan proposes to solve the environmental problems by, inter alia, (1) requiring the use of solid tarps; (2) diverting incoming vehicles into an enclosed bay where they would be inspected for exterior cleanliness, odors, dripping, spillage and tarp integrity and where corrective action would be taken before vehicles would be allowed to proceed to the parking area; (3) conducting additional spot inspections while vehicles are in the parking area; (4) paving the upper level and installing storm drains serving both levels; (5) directing water and leakage into storm drains connected to the sanitary sewer system, (a Wastewater Contribution Permit Application was filed with the City of Scranton on or about October 16, 1989); (6) cleaning of parking areas twice daily with a pressure washdown and vacuum vehicle; (7) installing erosion and sedimentation controls (an updated plan had not yet been filed with the Lackawanna County Conservation District); (8) installing vector and odor controls; and (9) inaugurating a record-keeping system.

In addition, whenever the average daily temperature is predicted to exceed 80o F, the abatement plan proposed that no more than 50 loaded trailers

would be parked on the site and that the parking time for loaded trailers would not exceed 5 hours. At other times, the number of loaded trailers could not exceed 100 and could not be parked for more than 24 hours. The average daily throughput of loaded trailers would not exceed 150 and the maximum would not exceed 250.

As of the date of the hearing, DER had not approved Colombo's abatement plan. DER's McDonnell and the Intervenors' expert witness, Joseph Guzek, both expressed the opinion that, given the proximity of the Colombo property to other businesses and residences, the only way to control the odors is by placing the entire operation within a building. Colombo's expert, Gary Brown, is of the opinion that the abatement plan adequately addresses all of the environmental concerns and that complete enclosure is not necessary.

To be entitled to a supersedeas, Colombo must show (1) irreparable harm, (2) the likelihood of prevailing on the merits, and (3) the unlikelihood of injury to the public or other parties. If injury to the public health, safety or welfare exists or is threatened during the supersedeas period, the supersedeas cannot be granted: section 4(d) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d); 25 Pa. Code §21.78. The immediate cessation of business operations, as mandated by DER's Amended Order, will cause irreparable harm to Colombo: Elmer R. Baumgardner et al. v. DER, 1988 EHB 786.

Colombo claims that he also has suffered irreparable harm because DER's Order and Amended Order target the wrong entities. They are directed against Frank Colombo, d/b/a Colombo Transportation Services and Northeast Truck Center, Inc. when, in reality, the activities are carried on by a separate corporation, Northeast Rental Corp., owned by Frank Colombo's wife and two sons and managed by one of the sons. Frank Colombo claims that

the adverse publicity received by Northeast Truck Center, Inc. as a result of the Order and Amended Order have forced it out of business. DER's alleged error in identifying the responsible party, in Colombo's opinion, establish irreparable harm and the likelihood that Colombo will prevail on the merits.

The argument strikes us as disingenuous. If Frank Colombo, Colombo Transportation Services and Northeast Truck Center, Inc. are not involved in the activities addressed in DER's Order and Amended Order, why do they seek a supersedeas? A DER mandate to cease certain activities has no impact on a person or entity not engaged in those activities. Furthermore, the argument is raised at a very late date. The Notice of Appeal filed from DER's Order is silent on the subject; it is mentioned for the first time in the Notice of Appeal filed from the Amended Order 10 months later. During that period, Frank Colombo had given a deposition in which he stated that the business involved in the appeal was Northeast Truck Center, Inc., doing business as Colombo Transportation Services, that Northeast Truck Center, Inc. sells and services trucks and that Colombo Transportation Services "is the one that is doing the hauling of the garbage." When asked who is the owner of Colombo Transportation Services, he answered, "I am." In addition, Frank Colombo, Susan Colombo, C. & J. Transportation, Inc. t/a Northeast Truck Center, had filed a civil action in the Court of Common Pleas of Lackawanna County seeking a declaratory judgment that the City of Scranton's "one-hour garbage storage ordinance" (referred to above) was invalid. Northeast Rental Corp. was not a party to these proceedings and was not mentioned by Frank Colombo in his testimony.

We note also that the abatement plan is for Colombo Transportation Services but the site sketch and soil/surface water analyses incorporated within it are for Northeast Truck Center, Inc. We are unable to find any

mention of Northeast Rental Corp. It is apparent that Frank Colombo blurred the distinctions between the various entities operating out of the premises on Keyser Avenue, led DER to conclude that they had named the proper parties and failed to mention Northeast Rental Corp. until August 24, 1989, after the Amended Order had been issued. If the responsible party has not been targeted accurately, it is Colombo's fault. Any harm that may have resulted to "innocent" businesses is not chargeable to DER, therefore, and does not afford a basis on which Colombo is likely to prevail on the merits.

Colombo does prevail on the merits of the permitting issue, however. The SWMA repeatedly refers to the "collection," "storage," "transportation," "processing" and "disposal" of solid waste. All but "collection" are defined in section 103, 35 P.S. §6018.103, as follows:

> "Disposal." The incineration, deposition, injection, dumping, spilling, leaking, or placing of solid waste into or on the land or water in a manner that the solid waste or a constituent of the solid waste enters the environment, is emitted into the air or is discharged to the waters of the Commonwealth.
>
> "Processing." Any technology used for the purpose of reducing the volume or bulk of municipal or residual waste or any technology used to convert part or all of such waste materials for offsite reuse. Processing facilities include but are not limited to transfer facilities, composting facilities, and resource recovery facilities.
>
> "Storage." The containment of any waste on a temporary basis in such a manner as not to constitute disposal of such waste. It shall be presumed that the containment of any waste in excess of one year constitutes disposal. This presumption can be overcome by clear and convincing evidence to the contrary.
>
> "Transportation." The off-site removal of any solid waste at any time after generation.

It is apparent that Colombo's operations cannot be considered "disposal"[1] or "processing" but can be considered "storage" and "transportation."

The Legislature has stated (section 102, 35 P.S. §6018.102) that the purpose of the SWMA is, inter alia, to "require permits for the operation of municipal and residual waste processing and disposal systems, licenses for the transportation of hazardous waste and permits for hazardous waste storage, treatment and disposal"; and to "protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage and disposal of all wastes." This legislative scheme is implemented by subsequent portions of the statute. Article II, dealing with municipal waste, and Article III, dealing with residual waste, are similar in that they regulate collection, storage, transportation, processing and disposal but require permits only for processing and disposal. Article IV, which deals with hazardous waste, however, not only regulates but requires permits (or licenses) for all of the described activities. Sections 501 and 610, 35 P.S. §6018.501 and §6018.610, which make it unlawful to operate or use land for solid waste "storage" without a permit "as required by this act" obviously apply only to hazardous waste and not to municipal or residual waste.

The municipal waste regulations adopted by the Environmental Quality Board on April 8, 1988, follow the legislative scheme. 25 Pa. Code Chapter 271 contains general provisions; Chapters 273, 275 and 277 deal with disposal facilities; Chapters 279, 281 and 283 deal with transfer, composting and resource recovery facilities, respectively - facilities mentioned in the statutory definition of processing; Chapter 285 deals with collection, storage

---

[1] While there was evidence of some "leakage" from the parked trailers, it is apparent that this resulted more from neglect than design.

and transportation. All of the chapters impose permit requirements except Chapter 285, which regulates collection, storage and transportation by certain design and operational measures not involving permits.

The regulatory definitions of "storage" and "transportation" are virtually identical to the statutory definitions in the SWMA. However, the regulations (25 Pa. Code §271.1) contain the following definition of "transfer facility":

> A facility which receives and temporarily stores solid waste at a location other than the generation site, and which facilitates the bulk transfer of accumulated solid waste to a facility for further processing or disposal. The term includes 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, closure and postclosure care and maintenance activities, and other activities in which the natural surface has been disturbed as a result of or incidental to operation of a transfer station. A facility is a transfer facility regardless of whether it reduces the bulk or volume of waste. The term does not include portable storage containers used for the collection of municipal waste other than special handling waste.

The term "transfer facility" is used in the SWMA definition of "processing" but is not defined itself in that Act. DER argues that Colombo's operations constitute a "transfer facility" within the scope of the regulatory definition. As such, they are subject to the provisions of Chapter 279, including the requirement for a permit.[2]

---

[2] Curiously, the Amended Order requires Colombo to submit a plan describing how his operations will comply with 25 Pa. Code §285.201 et seq., the portion of the regulations dealing with collection and transportation. No mention is made of a plan complying with Chapter 279 (transfer stations) or with Chapter 285, Subchapter A (storage).

We are satisfied that Colombo "receives and temporarily stores solid waste at a location other than the generation site" and "facilitates the bulk transfer of accumulated solid waste to a facility for further processing or disposal." In order to fall within the statutory and regulatory permit requirement for municipal waste, however, the activity at the transfer facility must amount to processing or disposal.

The regulatory definition of "transfer facility", which states that it is a "facility", adopts the definition of that term incorporated in the regulations at 25 Pa. Code §271.1. Accordingly, it must be a place where "municipal waste disposal or processing is permitted or takes place." The basic regulatory provision applicable to transfer facilities (25 Pa. Code §279.201), requiring the issuance of a "permit", adopts the definition of that term in 25 Pa. Code §271.1. Thus, the operator of a "transfer facility" must have DER authorization to operate a "municipal waste disposal or processing facility."

The fact that transfer facilities were mentioned in the statutory definition of "processing" suggests that the Legislature expected that such places would be involved in processing rather than disposal. The regulations, while acknowledging that the activity may be either processing or disposal, certainly contemplate the former. They require the submission of an operating plan detailing the "process" to be employed (25 Pa. Code §279.102), contemplate that the waste will be unloaded (25 Pa. Code §279.214) and that "processing" will take place (25 Pa. Code §279.262). Even though processing rather than disposal may have been the contemplated activity, the regulations are clear that one or the other must take place.

This conclusion is not affected by that portion of the regulatory definition of "transfer facility" stating that it is not necessary that a

reduction in bulk or volume take place at the site. This sentence apparently was inserted in response to the April 23, 1986 decision of the Court of Common Pleas of Montgomery County in Commonwealth, Dept. of Environmental Resources v. O'Hara Sanitation Company, affirmed by Commonwealth Court on August 4, 1989 (___ Pa. Cmwlth. ___, 562 A.2d 973). DER had contended in that case that O'Hara's garage was a transfer station and, therefore, a processing facility under the SWMA. The Court denied this contention, ruling that processing requires either the reduction in size or the conversion of municipal waste, neither of which took place at the O'Hara site. In the absence of these activities constituting "processing," the site could not be considered a transfer facility requiring a permit.

The O'Hara case involved an earlier definition of "transfer facility" than that currently set forth in 25 Pa. Code §271.1. The current definition does not change the core element of the O'Hara decision, however; it merely states that reduction in size does not have to take place on the site. Conversion alone would be sufficient, as well as any activity constituting disposal.

It is obvious that Colombo does no processing or disposal of municipal waste at the site on Keyser Avenue. This conclusion is not affected by the incidental handling of municipal waste by Colombo personnel as the result of actual or threatened spillage, as detailed in the abatement plan. It is just as obvious that Colombo stores municipal waste on the Keyser Avenue property and transports it to a disposal site. This conclusion is not affected by the amount of time the loaded trailers remain on the site - any temporary containment is enough to constitute storage. To comply with the SWMA, Colombo's storage of municipal waste on the Keyser Avenue site and the transportation of such waste from there to a landfill must be authorized by

DER regulations (35 P.S. §6018.201). Those regulations constitute Chapter 285 (25 Pa. Code §285.101 et seq.) which, as already noted, imposes no permit requirement.

DER argues, however, that its mandate to Colombo to obtain a permit is justified under section 402(a) of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.402(a), which reads as follows:

> Whenever the department finds that any activity, not otherwise requiring a permit under this act, including but not limited to the impounding, handling, storage, transportation, processing or disposing of materials or substances, creates a danger of pollution of the waters of the Commonwealth or that regulation of the activity is necessary to avoid such pollution, the department may, by rule or regulation, require that such activity be conducted only pursuant to a permit issued by the department or may otherwise establish the conditions under which such activity shall be conducted, or the department may issue an order to a person or municipality regulating a particular activity. Rules and regulations adopted by the department pursuant to this section shall give the persons or municipalities affected a reasonable period of time to apply for and obtain any permits required by such rules and regulations.

We have several difficulties with this argument. First of all, DER makes no allegations in the Order or the Amended Order that Colombo violated the CSL. The citations supporting the allegations are all derived from the SWMA and the regulations beginning at 25 Pa. Code Chapter 271. The CSL is not mentioned in the preamble to the ordering paragraphs or in the ordering paragraphs themselves. Colombo is ordered to take certain action pursuant to the SWMA and the regulations beginning at 25 Pa. Code Chapter 271.[3]

DER attempts to overcome this deficiency by pointing out that the regulations beginning at 25 Pa. Code Chapter 271 specifically refer to section

---

[3] Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, also is cited. However, this power of DER to abate nuisances is not relevant to our discussion here.

402(a) of the CSL as one of the statutory bases for the regulations. There is no dispute about this reference and we will concede, for purposes of argument, that the Environmental Quality Board, acting pursuant to section 402(a) of the CSL, could have imposed a permit requirement for an activity meeting the conditions of section 402(a) but which is specifically exempt from the permit requirements of the SWMA. Nonetheless, the Environmental Quality Board did not do so as far as Colombo's operations are concerned. By virtue of its own definitions of "facility" and "permit"in the regulations which it adopted pursuant both to the SWMA and the CSL, the Environmental Quality Board limited transfer facilities to those places where processing or disposal takes place, and excluded storage and transportation activities from any permit requirement.

DER's mandate to Colombo to file an "application for a permit for a municipal waste transfer facility" is unambiguous. It can only mean a transfer facility as defined in the regulations beginning at 25 Pa. Code Chapter 271. Since Colombo's operations do not fall within the scope of that definition, the mandate was beyond the scope of the SWMA and the regulations, even though they were based partly on section 402(a) of the CSL. There are no disputes as to any facts material to this issue and Colombo is entitled to partial summary judgment as a matter of law.

In order for Colombo to prevail on the merits completely, he must also convince the Board that DER's shutdown order was not authorized by law or was an abuse of discretion. Colombo has not shown the likelihood of prevailing on the merits on this issue. Section 601 of the SWMA, 35 P.S. §6018.601, declares any violation of a regulation to be a public nuisance; and

section 602(a), 35 P.S. §6018.602(a), empowers DER to issue cease and desist orders to such violators. Based on these statutory provisions, DER has the manifest authority to issue the Order and Amended Order involved here.

Whether or not the exercise of such authority with respect to Colombo's operations represents an abuse of discretion depends on the specific conditions present on the Keyser Avenue property. Based on the evidence before us at this stage of the proceedings, we cannot say that Colombo is likely to prevail on the merits on this point. The evidence, instead, suggests strongly that DER was amply justified in shutting down the Colombo operations for gross violations of Chapter 285. That being the case, the granting of a supersedeas would be inappropriate.

Colombo argues that, regardless of his past history, he should be allowed to reopen his operations on the basis of the proposed abatement plan which, in his opinion, will eliminate the past problems. The evidence on this point is conflicting, to say the least, and the details of the plan are still being worked out and modified.[4] Colombo himself, in his Answer to DER's Cross-Motion for Partial Summary Judgment, acknowledges on page 11 that this issue is not ripe for decision. If we were to permit the operations to resume without the assurance that the abatement plan is adequate in its present form, we would be threatening the health and welfare of the Intervenors and of the public generally. Such circumstances prohibit us from issuing a supersedeas.

---

[4] An updated Erosion and Sedimentation Control Plan had not yet been filed by Colombo as of the date of the supersedeas hearing.

ORDER

AND NOW, this 7th day of December, 1989, it is ordered as follows:

1. Colombo's Motion for Partial Summary Judgment is granted and DER's Cross-Motion for Partial Summary Judgment is denied. Colombo's appeal is sustained with respect to those portions of DER's Order and Amended Order directing him to apply for a permit for a transfer station.

2. Colombo's Petition for Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 7, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Anderson Lee Hartzell, Esq./Eastern Region
Michael Bedrin, Esq./Northeastern Region
For Appellants Colombo:
Stephen C. Braverman, Esq.
Philadelphia, PA
and
Philip T. Medico, Jr., Esq.
Forty Fort, PA
For Appellants Pen-Pac
and Makowka Transportation
James M. Pierce, Esq.
Wayne, PA
For Citizen Intervenors:
Thomas J. Ratchford, Jr.
Scranton, PA
For City of Scranton Intervenor:
A. Keith Redmon, Esq.
Scranton, PA
Courtesy Copy:
Gregory Pascale, Esq.
Scranton, PA
sb

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

M. DIANE SMITH
SECRETARY TO THE BO

KERRY COAL COMPANY	:	
	:	
v.	:	EHB Docket No. 89-231-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 7, 1989

OPINION AND ORDER
SUR APPELLANT'S MOTION FOR PROTECTIVE ORDER

Synopsis

The instant case is an appeal by the applicant from DER's denial of an application for a surface mine permit where the applicant proposes mining and a discharge to a High Quality Water. In turn this necessitates the applicant's demonstration, pursuant to 25 Pa.Code §95.1, that the operation is justified as a result of necessary social and economic development, which must be of significant public value. After commencement of this appeal, DER timely filed 48 interrogatories for which it seeks answers from Appellant. Some of these interrogatories relate to this demonstration. In response, Appellant has filed a Motion for Protective Order. In light of Big "B" Mining Company v. Commonwealth, DER, 1987 EHB 815, and the broad scope of discovery allowed under Pa.R.C.P. 4003.1, with minor exceptions Kerry Coal's motion cannot be granted.

OPINION

Kerry Coal Company ("Kerry") has appealed from DER's denial of application No. 04880104, in which Kerry proposes the Schaeffer-Nelson mine to be located in South Beaver Township, Beaver County. The mine is located in the Brush Run and Painter Run Watersheds. In its Notice of Appeal, Kerry states that DER abused its discretion in requiring Kerry to show a "...sound or economic justification for the proposed discharges; or in the alternative, determining that Appellant would be discharging to a stream that is classified as needing special protection." Thereafter during the period set for discovery, DER propounded 48 interrogatories to Kerry which include the six which are before me today. In response, Kerry's counsel has filed a Motion for Protective Order as to six of these interrogatories, and DER has filed its Opposition to Appellant's Motion for Protective Order.

Preliminarily it must be observed that Pa.R.C.P. 4003.1 sets forth a broad definition as to what is considered allowable discovery, allowing discovery of "any matter not privileged which is relevant to the subject matter involved in the pending action." Moreover, DER correctly observes that Pa.R.C.P.4012 limits issuance of protective orders to only those cases where the movant shows good cause for the protection sought. Sharon Steel Corporation v. Commonwealth, DER, 1978 EHB 321. Accordingly, Kerry must do more than say it is unfair for such an order to be issued.

The burden is on Kerry here because of the factual content of this appeal. From Kerry's appeal, it appears that in part DER denied Kerry's application because of the location of the proposed mine site and the point of the proposed discharge. Since Kerry is challenging DER's decision to apply 25 Pa.Code §95.1, one issue which will be adjudicated by the entire Board is whether Kerry has met its burden under 25 Pa.Code §95.1. Big B Mining Company

v. DER, 1987 EHB 815. In turn this exposes Kerry to discovery by DER on the aspects of Kerry's efforts to make this demonstration. With this said, we must now turn to the individual interrogatories.

Interrogatory 13

DER's Interrogatory 13 asks Kerry to identify each mine it operated from 1985 through 1989 and to provide certain data as to each identified mine. Kerry's objection is that it has furnished this information to DER previously in the application for permits or reports on its mining activities which DER's regulatory program requires it to submit. Kerry argues thus that the information is already available to DER in its own records and that therefore providing it a second time is burdensome. DER admits that at least some of this information is in fact in its possession, but says it is not available in a readily usable way.

A review of Kerry's Motion shows it does not say any of the information for 1989 is in DER's possession. Only the information for 1985 to 1988 was provided. Kerry must answer Interrogatory 13 in full as to all mines it operated in 1989.

As to the mines operated in 1985 through 1988, if indeed DER has this information because Kerry provided it previously, then Kerry should not have to provide it again even if DER does not have the information centrally located and accessible as DER says. This lack of centralization is based on internal DER organizational decisions which cannot be laid on Kerry's doorstep. Kerry may nevertheless be reasonably required to assist DER in two ways. Kerry must certify in writing that each piece of information for each mine site which is now sought by DER has been previously provided to DER, or provide same. As to all information provided previously, Kerry must, on a mine by mine basis for each mine it operated, identify the DER office by name

and address to which it provided this information and indicate the permit number or similar identifying number under which it was provided. To the extent DER does not possess this information as to any mine site after it searches its own files using the information Kerry provides, it may ask more specific questions of Kerry through a second set of interrogatories designed to produce same.[1]

Interrogatory 14

DER's Opposition to Appellant's Motion for Protective Order indicates in Paragraph 7 that DER withdraws Interrogatory 14. This being true, Kerry's Motion with regard to same is moot, as we can no longer grant or deny Kerry relief regarding same. Thus the motion will be denied.

Interrogatory 15

As to Interrogatory 15, Kerry says the information is irrelevant, is privileged and providing same would be time consuming. Stating such allegations of this type in conclusory fashion without offering any reasoning, factual support for each conclusion, or citations to legal authority does not meet the burden on Kerry under the rules of civil procedure (See Pa.R.C.P. 4011 and Pa.R.C.P. 4012) and our decisions on who bears the burden concerning such issues. Sharon Steel Corporation v. DER, supra. This is sufficient reason alone to deny Kerry's motion.

The fact that Kerry may spend substantial time gathering this information does not by itself make its provision burdensome, especially if the information sought is relevant. To hold otherwise would be to allow a

---

[1]This type of a resolution to this dispute is one which the parties are capable of arriving at by discussion between counsel for the parties. Such a resolution by the parties would free the Board for work on other matters before it. This Board member strongly urges that parties coming before him with discovery disputes meet and earnestly attempt to resolve these disputes between themselves before bringing them to the Board for resolution.

party to prevent its opponent from having access to relevant information solely because the information is not readily accessible. Such a holding would be contrary to the intent of these very rules. Accordingly, we will first look at its relevance. Kerry provides no reason why it is not relevant. DER argues the information is relevant because of the Big B Mining Company v. DER, supra, issues as to whether or not Kerry has to mine this site to obtain exactly this coal (because it is unique)--as opposed to mining similar coal on a watershed not requiring special protection. While we are not convinced this information sought by DER will be relevant (though it may be), Kerry's information on this point may lead to relevant information and we are not persuaded that Kerry should be able to keep this information from DER solely with such a conclusory allegation. Having found this information is not irrelevant, the question of Kerry expending time to provide it is easier to address. Kerry never says providing the information is burdensome and so we are left with the question of whether the fact that providing relevant information will take some time or effort is a sufficiently good reason to issue a protective order. Our research discloses no case holding that expenditure of some effort to produce information is sufficient grounds for issuance of such an Order denying access to same.

Finally, Kerry avers its coal leases are privileged but again fails to state in what way this is so, even though it bears the burden of proof of such a privilege. Privilege goes to the question of whether evidence is admissible before the Board. If it is not admissible before the Board, DER will be as barred from discovery of it just as it would be from introducing it at trial. Goodrich Amram 2d §4011(c). Neither DER nor this Board has found a case applying privilege to these leases. Accordingly, we will deny Kerry's motion on this interrogatory on this basis also.

Interrogatory 16

Kerry asks for a protective order as to Interrrogatory 16 because Kerry says it is currently unable to identify the persons it will employ at this mine. In response DER says Kerry's Permit Application represents that 80% of those to be employed at this mine, if the permit is granted, will live within 30 miles of this mine site, and thus Kerry must know who these prospective employees are. Kerry may not have these names yet, and if this is the case Kerry should so state in its answer to this interrogatory. Kerry offers no basis for our issuance of a protective order, however. If Kerry develops this information subsequently, then pursuant to the Section II Instructions, Paragraph 2 of DER's Interrogatories, Kerry will have to promptly provide same to DER. If Kerry developes this information and does not produce it, on motion we may bar its use at trial by Kerry.

We disagree with DER that Kerry has to have these names and addresses now. Kerry has made an allegation as to employment of "local" residents in its application for permit to justify a decision to authorize the proposed mine. Kerry also had the burden of proof on this issue before DER and continues to have it before this Board. Under Big B Mining Comany v. DER, supra, this is a proper consideration in review of the social and economic justification of this application, and after Kerry's representation to DER to this effect on this point in its application, it is one on which we will expect evidence to be offered by Kerry. Kerry must, however, provide DER all information in its possession or control which supports its contention on this point, and it must do so now or suffer the consequences. If DER believes Kerry's response, when made, is inadequate, DER is free to seek a sanction or to use that response's inadequacy against Kerry at trial.

Interrogatory 18

In Interrogatory 18, DER seeks both the names of the owners of the coal which Kerry proposes to mine and how much of the coal each owner possesses pursuant to his title. DER justifies this request citing Big B Mining Company v. DER, supra, because the impact of royalty payments on the local economy or the lack of same is a relevant part of the economic analysis of the application for this permit. We agree that under Big B Mining Company, supra, DER may seek this information from Kerry in discovery. Since Kerry's only objection to the interrogatory was that it provided something like this information to DER already but Kerry concedes it was not provided in a usable form, Kerry's motion will be denied as to Interrogatory 18.

Interrogatory 30A

Interrogatory 30A seeks to have Kerry specify the residence community of each proposed employee at Kerry's proposed mine. DER justifies this by again citing Big B Mining. In Interrogatory 16, DER seeks each such employee's name and address if the employee will reside within 30 miles of the mine site. A response by Kerry to Interrogatory 30A citing an answer by Kerry to Interrogatory 16 which provides information in response thereto and adds those employees not living within 30 miles is an adequate response to Interrogatory 30A also. For the reasons set forth above in discussing Kerry's objection to Interrogatory 16, we deem this a proper interrogatory. As stated as to Interrogatory 16, Kerry may, if it is willing to suffer the consequences of such an answer, also answer Interrogatory 30A by saying it does not have this information (contrary to the at least implicit assertion to the contrary in its application for permit). However, if Kerry does give this type of answer, it will again bear the consequences thereof.

Interrogatory 30D

DER seeks the identity of the resident communities of the purchasers of the coal to be mined at this site. Again DER defends this request citing Big B Mining. Kerry says this information is not relevant, won't lead to admissible evidence and is speculative, but again fails to make any effort to substantiate these conclusory assertions.

Here Kerry may have a point on which it can be sustained. If DER wants to know about the market for coal mined from this site, the residence community of a buyer won't produce this information. If I live in a township in Butler County, Philadelphia or Boca Raton, that does not establish whether or not the company I own in Pittsburgh will buy any of this coal. Moreover, there is a speculativeness in this interrogation's answer about who the specific purchaser will be when we do not even know when coal will be produced or if the coal could be purchased for resale. This is not to say that "market" is an improper area of inquiry for DER. This is an area in which DER can properly pursue further inquiry. The Board may well wish to see evidence offered to it on "the market" for this coal when we hear this matter, so we encourage Kerry to develop same and provide it to DER. In turn if DER has contrary information, it should be exchanged with Kerry and all should be offered at the hearing. This question on community of residence, however, does not appear to be one which is relevant or calculated to lead to admissible information in this case.

O R D E R

AND NOW, this 7th day of December, 1989, Kerry Coal Company's Motion for Protective Order is sustained as to Kerry's answering DER's Interrogatory 30D. The Motion is denied as it pertains to Interrogatories Nos. 13, 15, 16, 18 and 30A and Kerry is directed to answer same. As to Interrogatory 14, the motion is denied as moot because of DER's withdrawal of the Interrogatory.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 7, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
David Gallogly, Esq.
Western Region
For Appellant:
Bruno A. Muscatello, Esq.
STEPANIAN & MUSCATELLO
Butler, PA

rm

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

M. DIANE SMITH
SECRETARY TO THE BOARD

SWISTOCK ASSOCIATES	:	
	:	
v.	:	**EHB Docket No. 88-240-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 8, 1989**

OPINION AND ORDER
SUR
MOTION TO SUSTAIN APPEAL

Synopsis

A Motion to Sustain Appeal, in the nature of a motion for a nonsuit, made at the conclusion of DER's case in consolidated appeals in which DER has the burden of proof, will be granted when DER has not presented adequate scientific evidence and when the evidence presented rises no higher than mere conjecture.

OPINION

Swistock Associates Coal Corporation (Swistock) filed a Notice of Appeal (88-240-M) on June 16, 1988, in which it contested Compliance Order (C.O.) 88H046 issued by the Department of Environmental Resources (DER) on June 3, 1988. On July 11, 1988, Swistock filed another Notice of Appeal (88-273-M), challenging C.O. 88H046A issued by DER on June 30, 1988. C.O. 88H046A moved the compliance date from July 5, 1988 to July 19, 1988. In all other material aspects it was identical to C.O. 88H046. As a result, the two appeals were consolidated at docket number 88-240-M by a Board Order dated November 3, 1988.

A site view was held on April 17, 1989. A hearing was convened in Clearfield, Pennsylvania, on the following day and proceeded until April 20, 1989. At the outset of the hearing, the parties presented a Joint Stipulation of Facts. DER then called 10 witnesses - 4 residents of the area and 6 persons employed or retained by DER. Only two of DER's witnesses gave opinion testimony. One of these, John Ritter, testified concerning infiltration tests. The other, John Smith, testified concerning hydrology and the effect of mine reclamation on soils.

After Mr. Smith had been on the witness stand for a day, during which he gave his direct testimony and was subjected to extensive cross-examination, Swistock moved that Smith's entire testimony be stricken "as being based on speculation and not being supported by substantial evidence and not capable of being used by evidence as part of the record by this Board." DER did not oppose the Motion and, instead, asked for a continuance which was granted.

By letter of May 19, 1989, DER advised the Board that it did not intend to withdraw the C.O.'s forming the basis of the appeals but was resting its case without presenting any additional evidence. On June 15, 1989, Swistock filed a Motion to Sustain its Appeal on the ground that DER had failed to carry its burden of proof. DER filed its Response to the Motion on July 5, 1989,[1] and Swistock filed a Reply on July 17, 1989.

The stipulated facts and those developed at the hearing reveal the following:

---

[1] The transmittal letter with this Response stated that DER was withdrawing the C.O.'s as of July 5, 1989. The Board does not know whether this, in fact, was done. In any event, DER has not requested the Board to dismiss the appeals as moot and we will proceed to dispose of the Motion before us.

Swistock, a licensed surface coal mining operator, received a mining permit from DER authorizing it to conduct a surface coal mining operation on the Joseph Lytle property in Lawrence Township, Clearfield County. The Lytle Site was situated on a crescent-shaped, 146-acre tract of land that sloped toward the center into a draw running to the southwest for a distance of about 1800 feet. From the highest point on the Site to the lowest was a drop of about 150 feet, but the draw descended another 50 feet after leaving the Site. Most of the surface water on the Site flowed into the draw and emptied into an unnamed tributary of Little Clearfield Creek.

Near the mouth of the draw were two residences accessed by an unpaved private lane. The residence on the northwest side of the draw had been occupied since 1976 by the Sheldon Bloom family. The residence on the southeast side of the draw had been occupied by Ardell Jacobson since the 1920s. Where the private lane crossed the draw, a 20" metal pipe had been placed to carry the flow of water under the roadway.

Mining began in 1978, at which time erosion and sedimentation controls were put in place on the Lytle Site. Mining was completed early in 1984; regrading and replanting of the affected area was accomplished by September 1984. Most of the erosion and sedimentation controls were removed in June 1985 and the control sites were regraded and replanted. At about the same time, Swistock constructed (with DER approval) a livestock watering pond for Joseph Lytle at a point in the draw near the downstream property line of the Lytle farm. Joseph Lytle resumed farming part of the site during the 1985 growing season.

Reclamation of the Lytle Site also involved the restoration of a portion of an unpaved Township road (T-590) which crossed the Lytle Site in a general northeasterly direction until it neared the northeastern border of the

Site where it turned sharply to the northwest. Swistock and Lawrence Township had agreed in 1980 that Swistock could mine through the road if, at the conclusion of mining, it restored the road at its own expense. Restoration was to include the relocation toward the north of the northeastern leg of the road in order to eliminate the sharp curve near the northeastern border of the Site. The record is silent as to the date when this restoration was completed. However, there is evidence that, after the road had been restored, Lawrence Township personnel cut a drainage ditch along the eastern side of the road. The purpose of this ditch was to carry stormwater toward the south where it was directed into a culvert (also constructed by Lawrence Township personnel) which carried it under the road to a point where it was discharged onto the surface of land draining toward a dike-like structure near the head of the draw, maintained by Swistock for erosion control. This work was done at Swistock's expense and was completed sometime prior to mid-October 1985. On October 23, 1985, the Township formally released Swistock from any liability in connection with T-590.

Early in September 1985, a DER inspector noted some minor erosion on the Site and advised Swistock to monitor the situation and take corrective action as needed. No other problems were detected until late April 1986 when Swistock was advised by DER that a diversion ditch had breached and had caused erosion above the livestock watering pond. Swistock was ordered to take corrective action and this done by early May.

During 1985 and 1986, the Blooms and Ardell Jacobson were observing what appeared to them to be a heavier discharge of water through the draw. Often, this water would backup at the private lane and flow into Jacobson's basement. Apparently, Jacobson did not complain either to Swistock or to DER. He did seek help from the Township, however, and sometime in 1986 the Township

did two things. It placed a 15" plastic pipe under the private lane at a point designated by Jacobson, and it spread shale on the surface of the private lane. The effect of spreading the shale is uncertain. Mrs. Bloom testified that 6" to 8" of shale was put in place; but Township personnel stated that they only filled in the potholes, raising the level of the lane by no more than 1".

Jacobson first complained to DER and Swistock early in August 1986, citing two problems: (1) basement flooding, and (2) well water contamination. DER's Hawk Run office responded by sending Mining Specialist Gene Lynch to investigate the situation on August 13, 1986. Based on this investigation, DER concluded that there was no degradation of well water. But it was unable to determine whether Swistock's mining had increased runoff into the draw. In an effort to alleviate the flooding, DER directed Swistock to clean out the livestock watering pond (which had become silt-laden) and to further repair the breached dike further up the draw. The pond was cleaned out in August and the dike was completed by the middle of October.

Mr. Lynch made a follow-up inspection on October 1, 1986. About two weeks later, he and Edward Frank, a DER hydrogeologist, conducted a joint investigation. This was followed on October 23, 1986, by a field conference involving representatives of DER and Swistock. After considering the pre-mining and post-mining aspects of the watershed, land use and grades, DER concluded that Swistock's operation had not increased the surface runoff. Jacobson's flooding, it was decided, probably stemmed from the raising of the level of the private lane.

Jacobson's letter to the U.S. Office of Surface Mining (OSM) prompted the issuance of a 10-day letter on October 29, 1986. DER's response on November 5, 1986, enclosing the results of the investigation, apparently

satisfied OSM. In the meantime, the dike had breached again and had silted up the livestock watering pond. Corrective action was completed by Swistock by November 17, 1986, except for reseeding which had to be deferred until the spring of 1987. Jacobson was not satisfied in the least by DER's conclusions. He kept up a persistent letter-writing campaign to state and federal officials, demanding relief. One result of this effort was an investigation on May 27, 1987, by engineers of DER's Bureau of Abandoned Mine Reclamation. Their conclusions agreed with those reached by the Hawk Run Office.

Stage II bond releases (indicating successful revegetation and the absence of excessive runoff) were issued by DER to Swistock late in December 1986 and early in February 1987. DER inspections on May 14 and August 27, 1987, reported "no erosion." Flooding of Jacobson's basement ended in 1986 or 1987. Nonetheless, he continued his letter-writing campaign. One of these letters prompted officials in DER's Central office in Harrisburg to send an engineer, John Smith, to investigate. After visiting the Site in March 1988, Mr. Smith concluded (1) that there was no degradation of well water, but (2) Swistock's mining had produced additional runoff that flooded Jacobson's basement. Based on these conclusions, the Central office directed the Hawk Run office to issue C.O.'s requiring Swistock to take corrective action. These C.O.'s form the basis of the consolidated appeals.

DER has the burden of proof, 25 Pa. Code §21.101(b)(3), and must establish the legality and necessity for issuing the C.O.'s by a preponderance of the evidence, 25 Pa. Code §21.101(a). Swistock's Motion, in effect, is a motion for a nonsuit, amounting to a demurrer to DER's evidence. In disposing of the Motion, we must view the evidence in a light most favorable to DER, giving DER the benefit of every inference of which the evidence is susceptible: Idlette v. Tracey, 407 Pa. 278, 180 A.2d 37 (1962).

DER can survive Swistock's Motion only if it has made out a prima facie case that Swistock's mining activities have disturbed the prevailing hydrologic balance, increasing the amount of surface runoff and causing flooding on Jacobson's property. The occurrence of flooding was clearly established; indeed, it was not disputed. A prima facie case on the other elements has not been made out, however.

The evidence on surface runoff is far from conclusive. Mrs. Bloom testified that flooding occurred more frequently during the first two years after reclamation than either before or since. Having moved into her home only in 1976, a few years before mining began, her pre-mining experience was limited. During the years 1979 to 1985 erosion and sedimentation controls required to be maintained by Swistock on the Lytle Site undoubtedly would have reduced peak flows running down the draw. The removal of most of these controls in June 1985 would have allowed peak flows to increase. Mrs. Bloom's observations could be explained by these changes or by the natural variations in storm intensity and rainfall amounts - especially relevant since the increase in flooding frequency lasted only for a two-year period.

Joseph Lytle testified that there are more rocks in his soil, that his crop yields are down and that he experiences increased surface runoff and erosion on his farm. There is no evidence, however, to establish what connection, if any, these changes would have with downstream flooding. Even if we accepted Lytle's testimony, we are still faced with the necessity of considering the existence of the dike and livestock watering pond - structures that did not exist pre-mining and which would tend to reduce the rate of surface runoff leaving the Lytle farm.

John Ritter provided the only expert testimony bearing on this subject. He stated that, as a general rule, runoff increases during the first

few years after mining and then declines toward pre-mining conditions. He conducted infiltration tests on the Lytle Site on November 30, 1988 using 4 plots - 2 in areas disturbed by mining and 2 in areas undisturbed by mining. Runoff from the disturbed areas was greater than from the undisturbed areas. However, Mr. Ritter limited his testimony to the 4 specific plots - 1 meter by .4 meter in size - and acknowledged that the results could not be extrapolated to the watershed as a whole. In addition to the limited nature of this testimony, we also have questions about its probative value. The tests were done nearly two years after the flooding had stopped. If the flooding was the result of increased runoff from disturbed soils, why was the flooding not still occurring? And even if we accept the premise that there are areas of the Lytle Site where runoff is greater than it was pre-mining, what effect does this have downstream off the Site? Is this additional runoff caught behind the dike or in the livestock watering pond and released at a controlled rate, or does it increase the peak flows passing the Bloom and Jacobson residences? There is no evidence to answer these questions for us.

The law of this Commonwealth, since the beginning of serious enforcement of environmental statutes, has required the use of available scientific tests to prove violations: Bortz Coal Company v. Air Pollution Commission, 2 Pa. Cmwlth. 441, 279 A.2d 388 (1971). Given the circumstances of this case, we believe that it was incumbent upon DER to present scientific evidence to prove that there was an increase in runoff from the Lytle Site as a result of Swistock's operations. In the absence of such evidence, we are left to speculate on this critical element of the case. If this conclusion is pertinent to the runoff issue, it is doubly so to the alleged changes in hydrology. At the very least, there should have been evidence presented on the pre-mining and post-mining aspects of the soils, the slopes and the size

of the watershed - evidence based on technical analysis and not on visual observation alone. DER's failure to present adequate scientific evidence on this subject leaves a gaping hole in the fabric of proof.

There are other unanswered questions in our minds. What effect, if any, did the relocation of T-590 have on the hydrology of the Lytle Site? Or the culvert that the Township placed under the relocated road without the benefit of engineering advice? What effect, if any, did the elevation of the private lane have on the flooding of Jacobson's basement? DER's evidence has revealed that there are a number of factors that may have contributed to the flooding - some attributable to Swistock's actions and some not. This rises no higher than conjecture and does not make out a prima facie case: 9 Standard Pennsylvania Practice 2d §58.10. Accordingly, Swistock's motion will be granted.

ORDER

AND NOW, this 8th day of December, 1989, it is ordered as follows:

1. The Motion to Sustain Appeal, filed by Swistock Associates Coal Corporation on June 15, 1989, is granted.

2. The consolidated appeals of Swistock Associates Coal Corporation are sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 8, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
John McKinstry, Esq.
Central Region
For Appellant:
Stephen C. Braverman, Esq.
Patricia R. Kalla, Esq.
Philadelphia, PA
sb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

RALPH D. EDNEY	:	
	:	
V.	:	**EHB Docket No. 89-200-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 8, 1989**

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

An appeal is dismissed when it challenges DER's prosecutorial discretion.

OPINION

On July 14, 1989, Ralph D. Edney (Appellant) filed a Notice of Appeal from a June 14, 1989, letter of the Department of Environmental Resources (DER). DER's letter was a response to Appellant's letter of May 6, 1989 which complained about the actions of Sewage Enforcement Officer David Waltz (Waltz) and requested that he be suspended or terminated. In its response, DER acknowledged that Waltz had violated some important technical requirements of the Rules and Regulations but stated that no action would be taken to suspend or revoke his certification.

On August 18, 1989, DER filed a Motion to Dismiss the Appeal because, inter alia, DER's June 14, 1989 letter did not constitute an

appealable action. Appellant responded to the Motion on September 6, 1989; DER filed a reply on September 21, 1989; and Appellant filed a further response on September 27, 1989.

The essence of Appellant's appeal is his objections to DER's refusal to suspend or revoke Waltz's certification as a Sewage Enforcement Officer. DER's refusal to act in the manner requested by Appellant was an exercise of its prosecutorial discretion. As such, it was not an adjudicatory action subject to judicial or quasi-judicial review: Downing v. Commonwealth, Medical Education and Licensure Board, 26 Pa. Cmwlth. 517, 364 A.2d 748 (1976); Consolidation Coal Company v. DER, 1985 EHB 768.

ORDER

AND NOW, this 8th day of December, 1989, it is ordered as follows:

1. DER's Motion to Dismiss is granted.
2. Ralph D. Edney's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 8, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Gary A. Peters, Esq.
Western Region
For Appellant:
Ralph D. Edney
Transfer, PA
sb

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

M. DIANE SMITH
SECRETARY TO THE BO

SCURFIELD COAL, INC.	:	
	:	
V.	:	**EHB Docket No. 88-229-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 27, 1989

OPINION AND ORDER SUR
MOTION TO DISMISS

Synopsis

DER's Motion to Dismiss an appeal from the Order to Appellant to cease operation of a coal tipple because the appeal has become moot by Appellant's compliance with the Order is denied. Where Appellant asserts it complied only to facilitate negotiation of an amicable resolution of the dispute and without conceding arguments advanced in its appeal, Appellant's securing of plan approval from DER for restricted operation of its tipple, cannot be construed as a waiver of the issues in its appeal dealing with its right to operate the tipple at its prior pre-Order levels.

OPINION

On May 9, 1988, DER issued an Order to Scurfield Coal, Inc. pursuant to its authority under the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended ("Air Act"). This Order directed Scurfield to cease the operation of its "Heshbon" tipple. Scurfield appealed this Order to the Board.

DER has filed a motion to dismiss Scurfield's appeal alleging that it is now moot. In support, DER avers Scurfield complied with this Order while appealing. Specifically, DER's motion says that during the appeal's pendency. Scurfield sought a Plan Approval from DER to operate this tipple and DER gave approval as to "house coal but denied it as to Steam coal." DER also says its Plan approval decisions were not challenged by Scurfield in an appeal to this Board and are thus now final. DER says that in the period subsequent to its Plan Approval, Scurfield has operated the tipple in compliance with the Plan approval, and as a result, DER has advised Scurfield the Order was no longer in effect. Accordingly, DER concludes the appeal is now moot.

In response, Scurfield's Answer To Motion To Dismiss admits Scurfield has complied with DER's Order while stating its tipple operations never did violate the Air Act. Scurfield also asserts DER lacked authority to require a permit for the tipple's operation, and that Scurfield submitted an application for plan approval as an act of accommodation to facilitate settlement with DER. Scurfield's Answer also contends no appeal of the partial denial of the plan approval is required of it.[1]

As we have frequently indicated in the past, we are reluctant to dismiss appeals where the burden of proof is on DER. Howard D. Will v. DER, 1987 EHB 27. However, where we cannot grant meaningful or effective relief, we will dismiss moot appeals, Paradise Watch Dogs v. DER, 1988 EHB 1138. As we have also stated in the past, we will inquire when a motion such as this is

---

[1] Scurfield's Answer was not accompanied by a brief on the law on this point--necessitating our research into this area to determine whether or not DER's case law and legal theory has merit. Scurfield's counsel would be well advised to file a supporting brief the next time he is involved with a motion such as this so that he can be sure we address each argument he believes he has raised.

filed to determine whether or not an event has occurred during the appeal's pendency which deprives us of our ability to grant such relief. Swatara Township et al. v. DER, 1988 EHB 336. Whenever it is suggested that an appeal is moot, we will review the case in the light most favorable to the nonmoving party. Pengrove Coal Company v. DER, 1987 EHB 913.

Had DER merely moved to dismiss because of Scurfield's compliance with this Order, we would have denied DER's Motion. Compliance during an appeal's pendency does not render an appeal moot. Joseph Granteed v. DER, 1988 EHB 806, Kerry Coal Company v. DER, 1988 EHB 755, Scott Paper Company v. DER, 87 EHB 13. So to, had DER withdrawn its Order, we would have granted the motion. A. P. Weaver & Sons Inc. v. DER, 1988 EHB 1041. Here, however, DER's letter says Scurfield has complied with DER's Order, correcting the major violations so the Order is no longer in effect. This creates a beast which is neither fish nor fowl. This ill-defined beast is made the more indistinct by the fact that Scurfield's Notice of Appeal challenges DER's legal authority to issue this Order to Scurfield and Scurfield has reraised this issue in its Answer to DER's Motion. Clearly, if Scurfield is right and DER lacks legal authority to issue this Order, then Scurfield's interim compliance with the Order is irrelevant. Further, the Plan Approval issued to Scurfield by DER may also be irrelevant if Scurfield's allegations are shown to have merit.[2]

---

[2] Scurfield's contention that it did not need to appeal the partial denial of the Plan Approval is not correct if DER shows it had authority to issue its May 9, 1988 Order to Scurfield. Scurfield's allegations as to DER's lack of authority are to imprecisely defined to pass on at this time but if the Air Act is constitutional, was constitutionally applied to Scurfield and authorized issuance of DER's Order and its subsequent plan approval, Scurfield's failure to appeal the partial denial in the plan approval could limit the future operation of this tipple as to steam coal. Interstate Traveller Services Inc. v. Commonwealth, 486 Pa. 536, 406 A.2d 1020, (1979), Bortz Coal Co. v. Commonwealth, 7 Pa. Cmwlth. 362, 299 A.2d 670 (1973), footnote continued

Since under Pengrove Coal Company, supra, we must review DER's motion in the light most favorable to Scurfield, we are compelled to deny same at this time.

---

continued footnote
Bethlehem Steel Corp. v. Commonwealth, 37 Pa. Cmwlth. 479, 390 A.2d 1383 (1978) Also see all of the cases before this Board on this issue chronicled in part at 71 P.S. §510-21. This issue is not ripe to be addressed in this matter because this is the appeal of the Order itself. DER may elect to raise it subsequently, however.

ORDER

AND NOW, this 27th day of December, 1989, DER's Motion to Dismiss the instant appeal is denied. DER shall file its Pre-Hearing Memorandum within fifteen days of this date as provided in our order of February 10, 1989.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 27, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Ward T. Kelsey, Esq.
Western Region
For Appellant:
Thomas V. Geblies Jr., Esq.
Pittsburgh, PA
nb

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

M. DIANE SMITH
SECRETARY TO THE BOARD

WHARTON TOWNSHIP	:	
	:	
V.	:	**EHB Docket No. 88-421-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 27, 1989
and NWL CORPORATION, Intervenor	:	

OPINION AND ORDER
SUR
PETITION FOR RECONSIDERATION

Synopsis

DER's Petition for Reconsideration of our Order imposing sanctions on DER for noncompliance with our Order is denied. The Petition is based solely on Intervenor's failure to serve a copy of its Pre-Hearing Memorandum on DER's counsel at his Pittsburgh Office though one was timely served the central office of DER's Office of Chief Counsel. Such a fact fails to establish grounds for reconsideration under 25 Pa. Code §21.122(a).

OPINION

Wharton Township ("Wharton") filed a timely appeal from DER's letter of September 20, 1988, which denied a proposed revision to Wharton's Official Sewage Facilities Plan. In due course we issued our Pre-Hearing Order No. 1 dated October 27, 1988 which required the parties to prepare and file their respective Pre-Hearing Memorandums. Thereafter NWL Corporation ("NWL") was allowed to intervene. On June 9, 1989, the Board received Wharton's Pre-Hearing Memorandum, which, pursuant to the terms of Pre-Hearing Order No. 1,

started the clock on the filing of DER's responding Pre-Hearing Memorandum. DER was to file its Pre-Hearing Memorandum by June 26, 1989 at the latest.

On July 18, 1989, DER's counsel was notified by certified mail from this Board to file DER's Pre-Hearing Memorandum by July 28, 1989 or we might apply sanctions. A second similar notice from this Board dated August 7, 1989, also sent to DER's attorney by certified mail, advised him that we would impose sanctions unless he filed DER's Pre-Hearing Memorandum by August 17, 1989. Our file reflects that neither our Pre-Hearing Order nor those two notices produced a response from DER, so on August 31, 1989, Board Chairman Maxine Woelfling issued the order imposing sanctions. That order stated that DER would be precluded from presenting its case-in-chief.

Apparently, our order of August 31, 1989 finally woke up DER's counsel. He responded by filing a Petition for Reconsideration with this Board on September 18, 1989. Written notice of this Petition was provided by our Board to counsel for Wharton and NWL, who were given the opportunity to object thereto, but declined to do so. Thereafter this case was reassigned to Board Member Richard S. Ehmann.

The sole basis on which DER makes its request for reconsideration is the failure of NWL to serve a copy of its Pre-Hearing Memorandum on DER's counsel. NWL did send a copy of its Pre-Hearing Memorandum to DER's Office of Chief Counsel, but mailed it to the Central Office of the Office of Chief Counsel in Harrisburg, rather than to the Office of Chief Counsel in Pittsburgh, which is where the specific attorney for this case is stationed. We presume DER's Harrisburg office also failed to forward a copy of NWL's Pre-Hearing Memorandum to the Pittsburgh office although this fact is not stated in DER's Petition.

25 Pa. Code §21.122(a) sets forth our rules governing reconsideration.

reconsideration. As stated therein, we will do so only for compelling and persuasive reasons and generally will be limited to two types of cases described at length therein.

No compelling or persuasive reasons to reconsider are presented by DER's Petition. Spooner v. DER, 1987 EHB 546, Marcon v. DER, 1988 EHB 1316. DER's Petition fails to state why DER's counsel failed to contact this Board in response to either of our two notices to him to file a Pre-Hearing Memorandum. DER's Petition states that DER's counsel did not request a second copy of NWL's Pre-Hearing Memorandum from NWL's counsel until after our Order was issued, but does not explain why . This does not explain or excuse his failure to respond to us on our notices to him. Further comment on counsel's conduct is unnecessary. Such conduct cannot and will not be tolerated by this Board. Rothermel v. DER, 1988 EHB 39, Benjamin Coal Co. v. DER, 1988 EHB 317.

ORDER

AND NOW, this 27th day of December, 1989, DER's Petition for Reconsideration of our Order of August 31, 1989 sanctioning DER is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 27, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Zelda Curtiss, Esq.
Western Region
For Appellant:
Steve P. Leskinen, Esq.
Uniontown, PA
For Intervenor NWL Cop.:
William M. Radcliffe, Esq.
and
Ernest P. DeHaas III, Esq.
Uniontown, PA

nb