Environmental Hearing Board

Adjudications and Opinions

2003

Volume II

COMMONWEALTH OF PENNSYLVANIA
Michael L. Krancer, Chairman

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OF THE

ENVIRONMENTAL HEARING BOARD

2003

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2003.

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

ADJUDICATIONS

OPINIONS

2003 DECISIONS

UNITED STATES CONSTITUTION

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COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-004-CP-C**
RICHARD C. ANGINO, ESQUIRE, KING DRIVE CORPORATION, and SEBASTIANI BROTHERS	:	**Issued: May 13, 2003**

OPINION AND ORDER GRANTING A MOTION TO DISQUALIFY COUNSEL

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department's motion to disqualify Respondent Richard C. Angino as trial counsel for Respondents King Drive Corporation and Sebastiani Brothers is granted. Pennsylvania Rule of Professional Conduct 3.7 prohibits Mr. Angino from acting as an advocate at the hearing for the two corporate respondents. Rule 3.7 does not prohibit Mr. Angino from continuing to represent the corporate defendants in pre- and post-hearing proceedings, nor from representing himself throughout all stages of this appeal.

OPINION

This matter was commenced by the filing of a Complaint for Assessment of Civil Penalty by the Department of Environmental Protection (DEP) against Richard C. Angino, Esquire, King Drive Corporation (KDC) and Sebastiani Brothers (Sebastiani) pursuant to Section 605 of the

Clean Streams Law[1] and Board Rule 1021.71, 25 Pa. Code § 1021.71. DEP's complaint requests the Board to calculate and assess a civil penalty for violations of the Clean Streams Law and implementing regulations allegedly committed in connection with earth disturbance activities conducted by Respondents. The law firm of Angino & Rovner, P.C., and specifically Richard C. Angino, Esquire, entered their appearance as attorneys for all three Respondents by filing an amended Answer to the Complaint on March 7, 2003.

Presently before me is a Motion to Disqualify Counsel, filed by DEP on March 24, 2003, seeking to disqualify Mr. Angino from acting as an advocate at trial for KDC and Sebastiani. DEP's Motion does not seek to disqualify the law firm Angino & Rovner from acting as counsel for Respondents, nor to disqualify Mr. Angino from representing himself throughout the proceedings. The Motion is also limited to seeking Mr. Angino's disqualification only from acting as an advocate at the hearing for the two corporate defendants; there is no challenge to Mr. Angino acting as counsel to the other Respondents during pre- and post-hearing proceedings.

Respondents' opposition to the Motion was due on April 8, 2003, see 25 Pa. Code § 1021.95(c) (responses to miscellaneous motions due within fifteen days of service unless otherwise ordered). However, they did not file any response until April 22, 2003. The Board may consider an untimely response as a failure to respond and decline to consider an untimely response when ruling on a motion. *See, e.g., Berwick Township v. DEP*, 1998 EHB 487, 489; *Duquesne Light Company, Inc. v. DEP*, 1998 EHB 381, 383-84. Nevertheless, in this particular exceptional case I will grant Mr. Angino's request for leave to file a response out of time, and I have considered Respondent's opposition papers when deciding this motion.[2]

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[1] Act of 1937, P.L. 1987, as amended, 35 P.S. § 691.605.

[2] Appellants are cautioned, however, that failure to file and serve papers in a timely manner during the remainder of this proceeding will be considered as a failure to respond.

I. Factual Background

KDC owns the Felicita Golf, Garden, Spa Resort—an approximately 650-acre resort located in Harrisburg, Pennsylvania (Felicita Resort). The Felicita Resort and an adjacent property are part of a common plan of development or sale that involves five or more acres of earth disturbance over the life of the project. Sebastiani is a contractor that performs earth disturbance activities for KDC at the Felicita Resort.

Richard Angino is the President and the sole stockholder of KDC. Mr. Angino is also listed as the owner and operator on NPDES Permits Nos. PAR 101201 and PAR 101141; these permits relate to the conduct of certain earth disturbance activities at the Felicita Resort property, at least part of which activities are at issue in this appeal. Mr. Angino has direct responsibility for the implementation of these NPDES Permits. He also controls and directs the activities of KDC's employees, and he contracts for and directs the earth disturbance activities performed by Sebastiani for KDC.

DEP's Complaint alleges that on various occasions between October 2001 and July 2002, Respondents were conducting earth disturbance activities at the Felicita Resort which constituted violations of the Clean Streams Law. DEP specifically alleges that Respondents: (1) conducted certain activities without a required NPDES Permit for Stormwater Discharges Associated with Construction Activities; (2) conducted activities without a required erosion and sediment control plan in place; and, (3) failed to install, implement and maintain the required Best Management Practices necessary to minimize accelerated erosion and sedimentation. Respondents have denied committing the alleged violations.

II. Discussion

DEP argues that Mr. Angino's representation of KDC and Sebastiani at the hearing would violate Rule 3.7 of the Pennsylvania Rule of Professional Conduct (RPC), and should

therefore be prohibited by the Board. RPC 3.7 states:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

RPC 3.7. DEP asserts that Mr. Angino will be a necessary witness at the hearing of this appeal and that none of the exceptions provided for in RPC 3.7(a) are applicable.

Noting that Pennsylvania courts have enforced the RPC when they are implicated in a particular case, Judge Labuskes concluded in *DEP v. Whitemarsh Disposal Corporation, Inc.*, 1999 EHB 588, that:

> the Board has the authority to disqualify counsel in a particular case, not for purposes of imposing discipline or even necessarily for purposes of protecting the interests of a represented party, but rather, for purposes of protecting the interests of the opposing party and ensuring the orderly and just conduct and disposition of proceedings that are before it.

Id. at 590. *See Estate of Pedrick*, 505 Pa. 530, 542 (1984) (court has the power to regulate the conduct of attorneys practicing before it and counsel can be disqualified for violations of the RPC where disqualification is necessary to ensure the parties "receive the fair trial which due process requires"); *McCarthy v. SEPTA*, 772 A.2d 987, 991 (Pa. Super. 2001) (same).[3] The parties do not dispute the Board's authority to apply RPC 3.7 through disqualification of counsel

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[3] The comment to RPC 3.7 provides in part:

> The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

RPC 3.7 cmt. (1988)

where necessary, and I consequently turn to the merits of DEP's argument.

Pursuant to RPC 3.7, Mr. Angino should only be disqualified as an "advocate at a trial" if he "is likely to be a necessary witness." An attorney will be a necessary witness if his proposed testimony is "material and unobtainable elsewhere." *Albert M. Greenfield & Co., Inc. v. Alderman*, 52 Pa. D. & C.4th 96, 115 (2001). *See also Electronic Laboratory Supply Company, Inc. v. Motorola, Inc.*, Civil Action No. 88-4494, 1990 U.S. Dist. LEXIS 8315, at *7 (E.D. Pa. July 3, 1990) (lawyer likely to be a necessary witness is one "who has crucial information in his possession which must be divulged").

DEP has satisfactorily demonstrated that Mr. Angino will be a necessary witness at the hearing. Mr. Angino was responsible for implementation of the NPDES permits at issue, he controlled and directed the KDC employees, and he contracted for and directed the earth disturbance activities of Sebastiani at the Felicita Resort property. The earth disturbance activities conducted at the Felicita Resort property by KDC employees and Sebastiani form the core subject matter of this appeal. Mr. Angino's testimony will consequently be necessary to prove many of the allegations in the Complaint. Respondents have not contested the fact that Mr. Angino will be a necessary witness at the hearing or that he will offer testimony on contested issues, and I conclude that the prohibition of RPC 3.7 applies here. The question is whether Mr. Angino's disqualification is necessary to protect the interests of the opposing party and to ensure the orderly and just disposition of the proceedings before us. *Whitemarsh Disposal Corporation, Inc.*, 1999 EHB at 590.

Generally, the "appearance of an attorney as both advocate and witness at trial is considered highly indecent and unprofessional conduct to be avoided by counsel and to be strongly discountenanced" by the courts. *Commonwealth v. Gibson*, 670 A.2d 680, 683 (Pa.

Super. 1996). "Granting a motion to disqualify and removing the offending lawyer is the usual remedy employed when a breach of ethics is made to appear." *Albert M. Greenfield & Co., Inc.*, 52 Pa. D. & C.4th at 107. On the other hand, motions to disqualify are generally not favored because disqualification deprives parties of their counsel of choice and such motions may be motivated by tactical concerns. *See, e.g., Slater v. Rimar, Inc.*, 462 Pa. 138, 149-50 (1975); *Greenfield & Co., Inc.*, 52 Pa. D. & C.4th at 107-08; *see also Vanguard Savings and Loan Association v. Barton M. Banks*, No. 93-CV-4627, 1994 U.S. Dist. LEXIS 8697, at *3 (E.D. Pa. June 28, 1994). I am persuaded that Mr. Angino should be prohibited under RPC 3.7 from acting as an advocate at the hearing on behalf of the two corporate respondents on account of the prejudice to DEP that would otherwise result.

Whether DEP is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. *Whitemarsh Disposal*, 1999 EHB at 591; RPC 3.7 cmt. (1988). This action concerns a complaint for assessment of civil penalty which will require proof of the underlying violations and the application of statutory penalty assessment factors such as willfulness and the willingness of the respondents to cooperate with the agency in resolving the alleged violations. Given the undisputed central role that Mr. Angino plays in the affairs of KDC and the activities of Sebastiani at issue here, his testimony will be fundamental to the presentation of DEP's case. It will be difficult and unfair for DEP to cross-examine a witness who is also an adversary counsel on matters of fact or other matters impeaching his credibility. Moreover, there is a distinct possibility that Mr. Angino's testimony will conflict with the testimony of Sebastiani's or KDC's employees. Finally, DEP has provided undisputed evidence that the tenor of Mr. Angino's testimony may be emotionally charged, making it difficult to

separate factual testimony from advocacy.

Disqualification of Mr. Angino from acting as hearing counsel for the two corporate respondents will also assure a more orderly conduct of the hearing. One purpose of the advocate-witness rule "is the protection of the legal process itself. . . . [T]he rule preserves the distinction between advocacy and evidence, and maintains the integrity of the advocate's role as an independent and objective proponent of rational argument." *Golomb & Honik, P.C. v. Ajaj*, 51 Pa. D. & C.4th 320, 325 (2001) (citation omitted). Although the complications arising from a lawyer-witness in the jury trial context are not presented here, a significant amount of confusion over advocacy/testimony at the hearing will necessarily result from the current situation in which Mr. Angino is representing all three respondents and plays a central role in the underlying facts to be proven. This confusion, and its potentially detrimental impact on the conduct of the hearing, can be avoided by requiring the two corporate respondents to obtain their own counsel. Disqualification in this limited manner will thus ensure that all parties "receive the fair trial which due process requires." *Estate of Pedrick*, 505 Pa. at 542.

Respondents argue that disqualifying Mr. Angino from acting as advocate for KDC and Sebastiani at the hearing would cause substantial hardship to the corporate respondents. *See* RPC 3.7(a)(3). However, they do not explain how that result would occur, or the nature of the hardship that would allegedly be suffered. I can discern no substantial hardship that will result to KDC and Sebastiani from disqualification of Mr. Angino as their hearing counsel. Mr. Angino is not precluded by my decision from participating in all pre- and post-hearing procedures on behalf of KDC and Sebastiani. *See First Republic Bank v. Brand*, 51 Pa. D. & C.4th 167, 190 (2001) (consensus in Pennsylvania is that an attorney-witness is still permitted to participate in pretrial activity); *see also Caplan v. Fellheimer, Eichen, Braverman & Kaskey*, 876 F. Supp.

710, 711 (E.D. Pa. 1995). Thus, Mr. Angino will still be able to apply his knowledge of the events giving rise to this action for the benefit of all the respondents during pre-trial proceedings and trial preparation. Moreover, RPC 3.7 specifically provides that a lawyer/witness's law firm is not vicariously disqualified along with an attorney unless either RPC 1.7 or RPC 1.9 is violated, and DEP has not asserted any violation of RPC 1.7 or 1.9. *See Davisair Inc. v. Butler Air Inc.*, 40 Pa. D. & C.4th 403, 406 (1998) (RPC 3.7 "disqualifies only the lawyer who will offer testimony on contested issues; other lawyers within the law firm may continue to represent the client at trial").[4] The other members of Mr. Angino's law firm, Angino & Rovner, are not prohibited from presenting the case at the hearing on behalf of KDC and Sebastiani. Mr. Angino may select another member of his law firm as hearing counsel and continue to direct the litigation on behalf of all the respondents. Finally, it is still early enough in the prosecution of this action that KDC and Sebastiani should have no difficulty in obtaining other counsel for the hearing.

Accordingly, I enter the following Order.

[4] I also note that Mr. Angino is not precluded from representing himself throughout this action. *See Angino v. Confederation Life Insurance Co.*, 37 Pa. D. & C.4th 38 (1997) (holding that "a party-attorney's right to represent himself must prevail over the policy considerations underpinning" RPC 3.7); *Electronic Laboratory Supply Company, Inc.*, 1990 U.S. Dist. LEXIS 8315, at *7 ("the attorney-witness rule is inapplicable to attorneys representing themselves pro se").

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-004-CP-C**
RICHARD C. ANGINO, ESQUIRE, KING DRIVE CORPORATION, and SEBASTIANI BROTHERS	:	

ORDER

AND NOW, this 13th day of May, 2003, it is hereby ORDERED as follows:

1. The Department's Motion to Disqualify Counsel is granted;

2. Richard C. Angino, Esquire is precluded from acting as advocate at the hearing on behalf of King Drive Corporation (KDC) and Sebastiani Brothers, but he may continue to represent KDC and Sebastiani Brothers during pre- and post-hearing procedures, and he may continue to represent himself *pro se* throughout all stages of this action; and

3. The law firm of Angino & Rovner, P.C. shall not be disqualified from representing KDC and Sebastiani Brothers at the hearing of this action.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: May 13, 2003

Service list on next page.

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TJS MINING, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-136-L**
	:	**(Consolidated with 2002-137-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 22, 2003**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

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

Synopsis:

The Department issued two compliance orders to the operator of an underground coal mine because the operator evacuated miners using battery-operated equipment during a ventilation-fan stoppage. The Board denies the Department's motion for summary judgment in the operator's consolidated appeals from those orders due to the existence of genuine issues of material fact and genuine issues of mixed fact and law.

OPINION

It would appear that certain facts in this matter are undisputed. TJS Mining, Inc. ("TJS") is a Pennsylvania corporation that owns and operates the Darmac #2 Mine (the "Mine"), an underground bituminous coal mine located in Plumcreek Township, Armstrong County. The Mine is ventilated by a single fan. On May 2, 2002, an interruption in electrical power caused the fan to stop operating for more than fifteen minutes. (The exact duration of the stoppage is not a matter of record.) Due to the fan stoppage, thirteen TJS employees working in the Mine

were evacuated using battery-powered equipment known as "jeeps." The Department determined that the use of the jeeps for the evacuation violated Sections 221(d) and 279 of the Pennsylvania Bituminous Coal Mine Act ("BCMA"), 52 P.S. §§ 701-221(d) and 701-279. It issued compliance orders for those violations on May 14 and 21, 2002. This case constitutes TJS's consolidated appeals from those orders.

Section 221(d) of the BCMA reads in part as follows:

> In case of accident to a ventilating fan or its machinery, or if the fan stoppage is a planned interruption whereby the ventilation of the mine is interrupted, the mine foreman shall order the power to be disconnected from the affected portions and withdraw the men immediately from the face areas....If the fan has been stopped for a period of time in excess of fifteen minutes in a gassy mine, and thirty minutes in a non-gassy mine, the mine foreman shall order the men withdrawn from the mine.

52 P.S. § 701-221(d). The Department's application of Section 221(d) to the evacuation of the Mine has raised several questions of fact and mixed questions of fact and law that are the subject of legitimate dispute. For example, although the Department has classified the Mine as a "gassy mine,"[1] TJS contends that "there is no evidence that methane collects in the Mine." (Response ¶ 3.) Beyond the issue of the statutory labeling of the Mine, which could be material in and of itself, the particulars of the hazard presented by methane accumulation in the Mine might prove to be relevant to determining whether the Department's interpretation of the BCMA under the circumstances is reasonable.

In addition, the parties dispute whether the use of battery-operated equipment to effect an evacuation is inconsistent with the operator's duty to "disconnect the power." The parties also

[1] The term "gassy mine" is defined in Section 103 of the BCMA as "a bituminous coal mine where methane has been ignited therein, or has been detected therein...containing methane in an amount of twenty five one hundredths percent or more." 52 P.S. § 701-103.

appear to dispute whether the entire Mine was appropriately considered to be included in "the portions" that were "affected" by the fan stoppage.

More generally, TJS points out that much of the Mine is 36 inches high. The distance from the farthest working section to the surface in May 2002 was more than 7,500 feet. TJS contends that, without the jeeps, the men would have needed to crawl on their hands and knees over significant distances. (The Department notes that the workers could also have "squat walked," and that they are accustomed to such perambulation.) While the use of jeeps allowed for an evacuation to be completed in 24 minutes, TJS asserts that requiring even a healthy employee to crawl out would have taken at least two and one-half hours. The miners' self-rescue devices allowed them to breathe in a contaminated atmosphere for one hour.

TJS further argues that the Department has interpreted the statute inconsistently by permitting evacuation during fan stoppages at other mines using battery-operated equipment. (The Department appears to concede this point, although it claims that the practice is not *currently* authorized at any Pennsylvania mine.) TJS argues that federal regulations allow for mechanized evacuation in circumstances such as those that were presented here. Finally, TJS notes that the equipment that it used was designed so that it would not cause fires or explosions. For all of these reasons, TJS disputes that the Department has interpreted the BCMA reasonably or in a way that is designed to maximize the health and safety of miners.

As our Supreme Court recently reaffirmed, albeit in a different context, an inquiry into the question of whether something is "reasonable" is "essentially a factual inquiry." *Machipongo Land and Coal Co. v. Commonwealth, DEP,* 799 A.2d 751, 773 (Pa. 2002). *But see Starr v. DEP,* EHB Docket No. 2002-049-C, slip op. at 16 (May 5, 2003) (appellants' arguments insufficient to create an issue of material fact regarding reasonableness). We have no hesitation

here in concluding that there are genuine and important disputes in this matter regarding the reasonableness of the Department's actions that should be resolved by the full Board following a hearing on the merits.

There are similar legitimate disputes of fact or of mixed fact and law relating to the Department's interpretation and application of Section 279 of the BCMA. That section provides as follows:

> It shall be the duty of the operator...to comply with and to see that others comply with the provisions of this act. Reasonable rules and regulations of an operator for the protection of employees and preservation of property that are in harmony with the provisions of this act and other applicable laws shall be complied with.

52 P.S. § 701-279. The Department's case is that the Mine has an approved fan-stoppage plan, that plan constitutes a "reasonable rule and regulation of the operator," that the plan is in harmony with the BCMA, and that the plan prohibited the use of the jeeps in the evacuation. TJS disputes each of these components. Among other things, it points to facts that raise questions regarding whether the Mine has an extant plan, and if it does, the meaning of the plan. It more generally argues that Section 279 does not apply in the situation presented here. In light of these disputes, we are not in a position to conclude that the Department is entitled to judgment in its favor as a matter of law.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TJS MINING, INC.	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2002-136-L (Consolidated with 2002-137-L)**

ORDER

AND NOW, this 22nd day of May, 2003, the Department's motion for summary judgment is **DENIED.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 22, 2003

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

SOUTHWEST DELAWARE COUNTY MUNICIPAL AUTHORITY & ASTON TOWNSHIP	:	
v.	:	**EHB Docket No. 2002-255-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and BETHEL TOWNSHIP and UPPER CHICHESTER TOWNSHIP, Permittees	:	**Issued: June 2, 2003**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

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

Synopsis:

A motion for partial summary judgment in a sewage facilities planning case is denied where the respondents have produced sufficient evidence to make out a *prima facie* case and there are otherwise genuine issues of disputed fact on the points in question.

OPINION

This appeal concerns the Department of Environmental Protection's (the "Department's") approval of a sewage facilities planning decision made by Bethel Township and Upper Chichester Township to allow for the diversion of significant flows that had been going to the Southwest Delaware County Municipal Authority's ("Southwest's") treatment plant in Aston Township to a treatment plant operated by the Delaware County Regional Authority ("DELCORA"). Southwest and Aston Township filed the appeal, claiming for a variety of

reasons that the Department should not have approved the decision. In lieu of a hearing on Southwest's petition for supersedeas, the parties have agreed to expedited resolution on the merits. The Appellees have filed a motion asking us to issue partial summary judgment in their favor on three of the objections set forth in the Appellants' amended notice of appeal.[1] The matter has now been fully briefed. We deny the motion.

The Appellants complain in their amended notice of appeal that the Department "failed to consider the short-term and long-term economic impact on Appellants resulting from the Act 537 Plan Update approval." The Appellees ask us to assume for current purposes that the economic impact suffered by the Appellants has some relevance, but they argue that the Appellants have failed to establish a *prima facie* case that the Appellants have suffered any adverse economic impact.

We do not know whether the Department had any obligation to consider an "economic impact" on the Appellants. But accepting the Appellees' invitation to assume *arguendo* that the Department had such an obligation, we view the Appellees' limited argument that there is insufficient proof of *any* adverse economic impact to border on the frivolous. Among other things, the Appellants have pointed to evidence that the Department's decision has resulted in a significant reduction in Southwest's annual revenues. The loss represents a significant percentage of Southwest's annual sewer rental revenue. The Appellees do not appear to deny that there has been no concomitant reduction in treatment costs. This evidence is sufficient to establish a *prima facie* case of an adverse "economic impact."[2] The scope, and perhaps more fundamentally, the legal significance of the economic impact, remain to be seen.

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[1] The standards that apply to the review of a motion for summary judgment are set forth at Pa.R.C.P. 1035.1-1035.5.
[2] On this and the procedural point discussed below, there is ample record evidence to defeat the Appellants' motion without considering the materials that are the subject of the Appellants' motion to strike. Accordingly, that motion is denied as moot.

Secondly, the Appellees ask us to grant summary judgment with respect to "all issues regarding infiltration and inflow." The Appellees are referring to the Appellants' contention that the Department erred by failing to consider the potential environmental impacts that could result from allowing the planning entities to avoid inflow and infiltration remediation. The Appellees question the factual record in support of this objection and the Appellants' standing to raise it.

The way the Appellants tell it, at the acknowledged risk of some oversimplification, the planning entities were faced with a choice of dealing expeditiously with an inflow and infiltration problem or rerouting flow to DELCORA. They chose the latter course and the Department approved that choice. In the process, the salutary goal of avoiding unnecessary sewerage of inflow/infiltration was effectively sacrificed or at least delayed. Whether this theory will ultimately hold water remains to be seen. For our immediate purposes only, we agree with the Appellants that there is sufficient record evidence to survive the Appellees' motion for partial summary judgment. Furthermore, the Appellants have presented sufficient evidence to explain how they were directly harmed by the Department's decision to allow the Appellees to purportedly back out of their alleged commitment and responsibility to address the inflow/infiltration problem. Had the Department insisted upon such remediation, Southwest assertedly might not have lost the contributing flow and, therefore, its revenue. Therefore, the Appellants undoubtedly must survive the Appellees' standing challenge at this point in the litigation as well.

Finally, the Appellants' Amended Notice of Appeal states as follows:

> Approval of the Act 537 Plan Update submitted by Bethel Township and Upper Chichester Township by the Pennsylvania Department of Environmental Protection ("Department") violates the Sewage Facilities Act, the Clean Streams Law, and Article I, Section 27 of the Pennsylvania Constitution, and is unreasonable,

> unlawful, arbitrary, capricious, and an abuse of discretion for the reasons, *inter alia*, set forth below:
>
> * * * * *
>
> > The Department failed to comply with **procedural requirements** by failing to conduct a hearing or responding in writing to the public comments submitted to it in response to the proposed Act 537 Plan Update (emphasis added).

The third basis for the Appellees' motion for partial summary judgment is that there are no such "procedural requirements." The Appellants essentially concede in response that there is no statutory or regulatory provision that expressly required the Department to conduct a "hearing" or respond in writing to public comments. Although the Department did not violate any specific statutory or regulatory provision, the Appellees argue that it nevertheless was unreasonable and inappropriate not to hold a hearing or respond to comments under the circumstances presented here. The circumstances required a hearing and written comments, the Appellees continue, because the Department otherwise lacked sufficient information to make an informed decision, and because of the gravity and wide-ranging impact of its action.

Given the absence of express statutory or regulatory procedural requirements, the Appellants' argument might very well be something of a stretch. Nevertheless, we are not prepared to hold at this juncture and as a matter of law that it is *never* under any circumstances appropriate or necessary for the Department to hold a public meeting or respond to public comments in the course of reviewing a planning decision. The Department is required to give a planning decision its full and informed consideration, and it is not entirely inconceivable that a greater public dialogue than that which occurred here at the Departmental review stage may be necessary or appropriate in some situations. Whether such a situation was presented here and, if

so, what difference it would have made or should now make are questions that are beyond the scope of this opinion and order.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOUTHWEST DELAWARE COUNTY MUNICIPAL AUTHORITY & ASTON TOWNSHIP	:	
v.	:	**EHB Docket No. 2002-255-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and BETHEL TOWNSHIP and UPPER CHICHESTER TOWNSHIP, Permittees	:	

ORDER

AND NOW, this 2nd day of June, 2003, the Appellees' motions for partial summary judgment and to strike are denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: June 2, 2003

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

B & W DISPOSAL, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-052-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 4, 2003**

ADJUDICATION

By: Michael L. Krancer, Administrative Law Judge, Chairman

Synopsis:

The Board dismisses an appeal from a civil penalty assessment totaling $6,000 for four separate violations of the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.* or the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. § 4000.1010 *et seq.* committed by Appellant, a waste hauling company. Appellant admitted the violations occurred and that the Department was authorized to assess the civil penalty. DEP did err, in part, by applying a state-wide across the board minimum penalty assessment established for application to violations occurring during Operation Clean Sweep which had been established without reference to the specific circumstances of Appellant's violations. The statutes require that in determining the amount of a penalty assessment the statutory factors be considered and applied to each case individually. However, the Board concludes, upon its review of the circumstances of the violations with reference to the statutory factors to be considered in assessing penalty amounts that the amount assessed, $1,500 per violation, was reasonable and supported by the evidence.

BACKGROUND

This is an appeal of a civil penalty assessed by the Department of Environmental Protection (DEP) against B & W Disposal, Inc. (B & W) for violations of the Solid Waste Management Act (SWMA),[1] the Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101),[2] or their implementing regulations. The penalty was levied by DEP for five violations committed by B & W during Operation Clean Sweep—a highly-publicized systematic inspection operation in which DEP, in conjunction with the State Police and the Department of Transportation, conducted inspections of trash-hauling vehicles at landfills throughout Pennsylvania during the course of a week in May 2001. DEP assessed a penalty of $1,500 per violation, for a total penalty of $7,500. While this appeal was pending DEP withdrew one violation and the associated penalty; the hearing consequently addressed four violations and a total penalty amount of $6,000. Appellant having admitted to committing the violations and conceded DEP's statutory authority to assess the civil penalty, the hearing focused on whether DEP properly applied the statutory criteria and whether the penalty amount was reasonable and appropriate for the circumstances.[3]

Judge Michael L. Krancer presided over a hearing on the merits conducted on November 18, 2002. Filing of post-hearing briefs was completed on March 14, 2002, and the matter is now ripe for adjudication. The record consists of a 240-page hearing transcript, seventeen exhibits, and a joint stipulation. After a careful review of the record, the Board makes the following findings of fact.

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

[2] Act of July 28, 1988, P.L. 556, No. 101, as amended, 53 P.S. § 4000.101 *et seq.*

[3] We have issued one prior opinion in this matter denying DEP's Motion in Limine seeking to exclude certain evidence from being presented at the hearing. *B & W Disposal, Inc. v. DEP*, 2002 EHB 946.

FINDINGS OF FACT

1. DEP is the agency with the authority and duty to administer and enforce the SWMA, 35 P.S. § 6018.101 *et seq.*, Act 101, 53 P.S. § 4000.101 *et seq.*, and the regulations promulgated pursuant to those statutes. (Joint Stipulation (Jt. Stip.) at ¶ 1).

2. Appellant B & W Disposal, Inc. is a Pennsylvania corporation with a mailing address of P.O. Box 190, Dewart, PA 17730. B & W provides refuse and garbage collection services and among other things transports municipal waste for disposal at the Lycoming County Landfill, Brady Township, Lycoming County, Pennsylvania. Appellant's operations are limited almost entirely to DEP's Northcentral Region. (Jt. Stip. at ¶¶ 2, 3, 5).

3. B & W has been in operation for about 40 years, and the company is the second largest waste hauler in Lycoming County. During the relevant period, B & W had eighteen trucks in operation, employed eighteen drivers, and owned approximately 500 waste-hauling containers. (Hearing Transcript (Tr.), at pages 198-99, 201-04).

A. The B & W Violations During Operation Clean Sweep

4. During the period from May 21-29, 2001, DEP implemented a systematic trash-hauling vehicle inspection program dubbed "Operation Clean Sweep" in which DEP, in conjunction with the Pennsylvania State Police and Pennsylvania Department of Transportation, conducted inspections of trash-hauling vehicles at landfills and transfer stations throughout Pennsylvania. (Jt. Stip. ¶¶ 4, 10).

5. Operation Clean Sweep was the largest vehicle inspection program of its kind. Unlike regional TrashNet operations previously conducted by DEP (which typically involve inspections at only a few facilities), Operation Clean Sweep was a statewide initiative in which DEP staff performed vehicle inspections at virtually every waste disposal or processing facility in Pennsylvania. (Tr. 25-26, 77-78, 122-25; Exhibit C-6).

6. As part of Operation Clean Sweep, inspectors were instructed to inspect as many vehicles as possible at each inspection site, and they were directed to issue a summary citation to the vehicle driver for each violation discovered. DEP also generally issued Notices of Violation (NOV) to the vehicle owner for each violation detected by DEP inspectors during Operation Clean Sweep. The operation ultimately resulted in more than 2,400 violations being cited across the Commonwealth. (Tr. 55-56, 149-52; Exh. C-6; Exh. B&W-2).

7. During Operation Clean Sweep, four different trash-hauling vehicles owned by B & W were cited with a total of five different violations of the SWMA, Act 101 or relevant implementing regulations: one violation for not properly enclosing a load of municipal waste; three for not having signs on the vehicles indicating the specific type of waste being hauled; and one instance of waste being loaded higher than the solid sides of the vehicle. (Jt. Stip. ¶ 6).

8. Prior to hearing, DEP withdrew the citation for the alleged violation involving failure to properly enclose a load of municipal waste, and reduced the overall penalty amount by the $1,500 assessed for this specific violation. The parties stipulated that Appellant's objections to the civil penalty for the withdrawn citation were thereby rendered moot. (Jt. Stip. ¶ 7-9).

9. The four violations at issue are as follows. On May 21, 2001, a vehicle owned by B & W and driven by Daniel Fisher transported municipal waste to Lycoming County Landfill. The vehicle did not have a sign on it indicating the type of waste being hauled, as required by Section 1101(e) of Act 101, 53 P.S. § 4000.1101(e). (Jt. Stip ¶ 11; Exh. C-4a; Exh. C-5a).

10. On May 21, 2001, a vehicle owned by B & W and driven by Brian Berger (PA license plate no. ZM23561) transported municipal waste to Lycoming County Landfill. The vehicle did not have a sign on it indicating the type of waste being hauled, as required by 53 P.S. § 4000.1101(e). (Jt. Stip. ¶ 14; Exh. C-4b; Exh. C-5b).

11. On May 22, 2001, a vehicle owned by B & W and driven by Randall Bieber, Sr. (PA license plate no. ZM23561) transported municipal waste to Lycoming County Landfill. The vehicle contained municipal waste loaded higher than the vehicle's solid sides, in violation of the prohibition on transporting waste higher than the solid sides of the vehicle set forth in 25 Pa. Code § 285.214(b)(1). (Jt. Stip. ¶ 14; Exh. C-4c; Exh. C-5c).

12. On May 29, 2001, a vehicle owned by B & W and driven by Brian Berger (PA license plate no. ZM23561) transported municipal waste to Lycoming County Landfill. The vehicle did not have a sign affixed to it indicating the type of waste being hauled, as required by 53 P.S. § 4000.1101(e). (Jt. Stip. ¶ 14; Exh. C-4d; Exh. C-5d).

13. DEP issued NOVs to B & W for each of these four cited violations. B & W admitted that each of the four violations for which it was cited (the three sign violations and the one level load violation) were in fact committed on the dates indicated on the respective DEP inspection reports. (Exhs. C-5a through 5d ; Jt. Stip. ¶¶ 11-14).

14. B & W stipulated that failing to have a sign on a waste-hauling vehicle stating the specific type of waste being hauled constitutes unlawful conduct under Act 101, 53 P.S. § 4000.1701(a), and a public nuisance pursuant to 53 P.S. § 4000.1701(b). (Jt. Stip. ¶ 21).

15. B & W stipulated that transporting a load of waste that is placed higher than the solid sides of the vehicle constitutes unlawful conduct under Section 610 of the SWMA, 35 P.S. §§ 6018.610(4), -610(6), and -610(9), constitutes a public nuisance pursuant to 35 P.S. § 6018.601, and violates 25 Pa. Code § 285.214(b). (Jt. Stip. ¶¶ 22-23).

B. The "July Meeting" and the Calculation of the Civil Penalty Assessment

16. On July 18-19, 2001, DEP central office personnel and pertinent staff from DEP's six regional offices met to discuss the results of Operation Clean Sweep (the "July Meeting"). William Pounds, chief of the Division of Municipal and Residual Waste in DEP's Bureau of

Land Recycling and Waste Management, conducted the July Meeting. (Tr. 31-32, 49-50, 120, 126-27, 170-71).

17. One of the topics discussed at the July Meeting was how DEP would assess civil penalties for the violations that had occurred during Operation Clean Sweep. A concern expressed at the July Meeting was that the various DEP regions apply a consistent approach to the calculation of the civil penalties for various types of violations that were cited during the operation. Another consideration was establishing a civil penalty amount high enough to act as a deterrent to future violations by the trash-hauling industry—to put the industry on notice that DEP expects a higher level of compliance with the statutes and regulations enforced during Operation Clean Sweep. Finally, the large scope of the operation and the resulting administrative costs borne by the agency factored into the discussion of an appropriate civil penalty assessment. (Tr. 135-37, 170-71, 175-76, 187-94).

18. Those attending the July Meeting decided to establish a minimum penalty amount for the various types of violations as a means of addressing the concern for consistency, general deterrence and operation scale. The minimum penalty amount would be applied globally by the six DEP regions, with the individual actually calculating the final penalty amount having discretion to add to the minimum penalty after considering the individual facts pertinent to each violation for which a penalty was assessed. (Tr. 30-33, 60-65, 130-33, 170-72, 187-94).

19. In setting the minimum penalty amount for each category of violation, those attending the July Meeting did not consider the individual circumstances pertinent to each actual violation, did not examine the individual inspection reports and NOVs issued for each violation, and did not apply the relevant statutory criteria individually to each violation. (Tr. 170-77).

20. The minimum penalty amount set at the July Meeting for the two types of

violations at issue in this appeal—failure to have a sign and level load violations—was $1,500 per violation for each type. (Tr. 30-33, 132, 170-71; Exh. B&W-1).

21. There was no discussion at the July Meeting of B & W's violations specifically or how to apply the statutory factors for penalty calculation to the specific circumstances of B & W's violations. (Exh. B&W-1, Tr. 60-61).

22. At the July Meeting, the participants did not review B & W's case individually to arrive at a $1,500 minimum categorical penalty assessment amount for its particular cases. (Tr. 60).

23. The global minimum categorical penalty assessments set at the July Meeting were not promulgated as Department regulations pursuant to notice and comment under the Commonwealth Documents Law, 45 P.S. § 1102 *et seq.* (Exh. B&W-1).

24. James E. Miller is employed by DEP as a Solid Waste Manager for the solid waste program in DEP's Northcentral regional office; he has been employed by DEP for approximately twelve years. Prior to being promoted to his current position, Mr. Miller initially worked as a solid waste specialist, was promoted to compliance specialist, and again promoted to solid waste supervisor. His duties include oversight of the day-to-day activities of the operation section of the waste management program in the Northcentral region. (Tr. 18-20).

25. Due to a vacancy in the Northcentral region, Mr. Miller has been performing the tasks normally performed by a compliance specialist, including calculating civil penalties for SWMA and Act 101 violations. He has extensive experience with penalty assessment, having performed that task while a compliance specialist and solid waste supervisor. He was responsible for calculating the amount of the penalty assessed against B & W. (Tr. 18-23, 30-31).

26. Mr. Miller attended the July Meeting. After attending that meeting, over the

course of the next several months, he calculated the individual civil penalties for each violation that had occurred during Operation Clean Sweep in DEP's Northcentral Region, including those of B & W. When determining the penalty amount for the B & W violations, he reviewed the inspection reports and the NOVs prepared for the B & W violations committed in May 2001. (Tr. 20-23, 30-36, 58-72, 95-102).

27. Mr. Miller did apply the minimum global penalty amount of $1,500 when calculating B & W's penalty assessments as a starting point. (Tr. 60-63).

28. In using and applying the base $1,500 minimum assessment set at the July Meeting to B & W's penalty assessment calculations, Mr. Miller did not consider specifically and individually B & W's cases nor did he apply any of the statutory factors required to be considered in assessing a penalty amount to B & W's specific cases. (Tr. 60-63).

29. In calculating the penalty assessments for B & W's specific violations, Mr. Miller operated under the parameters that the penalty amounts could have been increased from the global minimum amount based on the statutory factors, but not decreased below the global categorical minimum for each violation. (Tr. 62).

30. In calculating the penalty amount, Mr. Miller utilized DEP's published Guidance Policy Document No. 250-4180-302, designed to aid in the calculation of civil penalties for violations of the waste management statutes. The criteria in the Guidance Policy generally track the criteria established in relevant statutory and regulatory provisions, and include the following factors: degree of severity of incident caused by the violation; degree of willfulness; past history of violations; deterrence; costs incurred by the Commonwealth; and, savings to the violator. (Tr. 21-24, Exh. C-3; 35 P.S. § 6018.605; 25 Pa. Code § 287.412).

31. Mr. Miller examined each of the factors described in the Guidance Policy with

respect to the B & W violations and applied those factors which were relevant. However, he commenced his calculation of the B & W penalty with the $1,500 global minimum amount set for sign and level load violations at the July Meeting and then he considered whether to add additional amounts for factors specifically appropriate to the B & W violations. He did not consider reducing the amount of penalty below the $1,500 minimum set at the July Meeting. (Tr. 20-23, 30-36, 58-72, 95-102).

32. When calculating the penalty, Mr. Miller correlated the $1,500 minimum amount to three criteria in the Guidance Policy: degree of severity, degree of willfulness, and deterrence. The "Degree of Severity" factor is divided into three categories, severe, moderate or low, and the range of penalty amounts suggested by the Guidance Policy for a "Low Severity" violation is from $1,000 to $5,000. Mr. Miller determined that a portion of the $1,500 minimum penalty set at the July Meeting corresponded with, and was based upon, the lowest figure in the proposed range for degree of severity (*i.e.*, $1,000). (Tr. 20-23, 30-36, 58-72, 95-102).

33. The Guidance Policy provides four categories of willfulness—accidental, negligent, reckless and willful—and recommends no penalty for an accidental violation, a range of $500 to $5,000 for negligent, $5,000 to $12,500 for reckless, and from $12,500 to the statutory maximum of $25,000 for a willful violation. As with the degree of severity factor, Mr. Miller determined that a portion of the $1,500 minimum penalty set at the July Meeting corresponded with, and was based upon, the lowest figure in the proposed range for a negligent degree of willfulness (*i.e.*, $500). (Tr. 20-23, 30-36, 58-72, 95-102).

34. Finally, Mr. Miller believed that the $1,500 minimum set at the July Meeting already incorporated a general deterrence factor, and he did not increase the amount for B & W based on general deterrence. Mr. Miller reviewed B & W's past history of violations when

calculating the penalty amount; (according to 25 Pa. Code § 274.412(b)(5) the penalty may be increased by 5% for each violation of the same type committed by the violator within the past five years). He ascertained from his review of B & W's compliance history that the company had not committed any similar violations within the past five years, so he did not increase the penalty based on specific deterrence. (Tr. 20-23, 30-36, 58-72, 95-102; Exh. B&W-3).

35. He also considered costs to DEP and savings to the violator; although the Northcentral region had incurred significant costs during Operation Clean Sweep, Mr. Miller decided not to add on to the $1,500 amount for this factor. He concluded that any savings to the violator were likely negligible and did not merit any increase. Finally, he decided that the other statutory criteria were not relevant to the B & W violations. (Tr. 20-23, 30-36, 58-72, 95-102).

36. Mr. Miller calculated a civil penalty amount of $1,500 for each of the five alleged violations committed by B & W during Operation Clean Sweep, and a Civil Penalty Assessment of $7,500 was issued to B & W on January 29, 2002. (Tr. 30-36, 58-72, 95-102; Exh. C-2).

C. Additional Evidence Relevant to the Penalty Calculation Presented at the Hearing

37. Kevin Witmer is employed by B & W as a Vice-President, and he has been involved in the waste-hauling industry for over twenty years. His duties as vice-president for B & W include oversight of B & W's operations—assuring the smooth running of B & W's operations, taking care of problems that arise, and setting operational policies and practices. He is responsible for implementing procedures that will ensure B & W's compliance with DEP regulations applicable to waste-hauling vehicles. (Tr. 199-200).

38. Mr. Witmer has been aware since at the latest 1988 that the regulations required a certain size and type of signage on trucks. (Tr. 200-01).

39. Checking for proper signage is on the routine checklist for drivers to review as part of their job responsibilities. (Tr. 207; Exh. J-2).

40. The drivers who were driving the vehicles should be aware of the signage requirements. (Tr. 208; Exh. J-2).

41. It takes virtually no time, maybe one minute, to have the appropriate signage on the truck or container. (Tr. 209-10).

42. It is very easy to assure that the appropriate signage is affixed to the vehicle. (Tr. 210).

43. That vehicles were without the proper signage is a breakdown of the system which had due care been exercised, would not have occurred. Mr. Witmer conceded that this was a matter of something "falling through the cracks" and a "screw-up." (Tr. 209, 221, 226-27).

44. Mr. Witmer was not aware of the load limit regulation until B & W received the Operation Clean Sweep violation. (Tr. 211-12).

45. Mr. Witmer should have been aware that the load limit regulation existed. (Tr. 212).

46. Both Mr. Pounds and Mr. Miller considered the degree of severity of the violations committed by B & W to be low, but Mr. Pounds considered both types of violation to be serious nevertheless. The requirement for a sign indicating type of waste being hauled is a statutory requirement and is important for public safety purposes. In the event of an accident or a spill, emergency personnel need to be able to easily identify the type of waste being hauled because residual waste may possess chemical properties that can present hazards or need special treatment and municipal waste can be prone to catching fire. Trucks carrying waste loaded above the vehicle's solid sides create potential traffic hazards if waste blows off during transport, or the potential for trash to escape and litter roadside areas. (Tr. 32-33, 138-41).

47. The costs to DEP's Northcentral region in carrying out Clean Sweep Operation

were significant. The region had staff performing inspections at ten to twelve different facilities for six days. To adequately perform the workload, Mr. Miller had to draw on personnel from the region's permitting sections and its air quality program who do not normally perform solid waste-related inspections. Prior training was given to enable all staff to perform the inspections properly. DEP staff expended time preparing inspection reports and NOVs for the B & W violations, Mr. Miller spent time calculating the civil penalty, and administrative costs were incurred in taking photographs of the B & W trucks and preparing and issuing the Civil Penalty Assessment document. (Tr. 25-27, 141-42, 145).

48. The cost savings to B & W from committing the violations were negligible. No property damage was caused by, and no interference with the use and enjoyment of property resulted from, the B & W violations at issue. (Tr. 34, 61, 68-71).

49. B & W has not committed any violations of the same type (*i.e.*, sign and level load) during the past five years. During the period from 1992 until Operation Clean Sweep in May 2001, DEP had issued a total of thirteen NOVs to B & W—six in 1992; one in 1994; four in 1996; and two in 1997. Prior to the violations committed during Operation Clean Sweep, B & W had not been cited for a violation for nearly four years. For each of the NOVs issued to B & W between 1992 and Operation Clean Sweep, DEP had imposed no more than a $300 civil penalty assessment. (Tr. 68-71, 214, 220; Exh. B&W-3).

DISCUSSION

I. Standard of Review

The Board reviews all DEP final actions *de novo*. *See, e.g., Pequea Township v. Herr*, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998); *Smedley v. DEP*, 2001 EHB 131, 155-60. DEP bears the burden of proof with respect to the civil penalty assessed against B & W. 25 Pa. Code §

1021.122(b)(1). To carry its burden, DEP must prove by a preponderance that: (1) the underlying violations of law giving rise to the assessment in fact occurred; (2) the penalty imposed is lawful; and, (3) the amount of the penalty is reasonable and appropriate. *See, e.g., Clearview Land Development Co. v. DEP*, No. 2001-191-K, slip op. at 20 (EHB, May 13, 2003).

In reviewing DEP's penalty calculation, the Board must ascertain whether DEP properly applied the relevant statutory penalty-assessment criteria to the facts of the case. Our review includes a determination whether the penalty amount DEP assessed is reasonable and appropriate for each violation and the surrounding circumstances. *See, e.g., Clearview Land Development Co.*, No. 2001-191-K, slip op. at 20; *Keinath v. DEP*, No. 2001-253-MG, 2003 Pa. Envirn. LEXIS 9, at *14-*15 (EHB, Jan. 31, 2003); *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679, 690; *see also F.R. & S., Inc. d/b/a/ Pioneer Crossing Landfill v. DEP*, 761 A.2d 634, 639 (Pa. Cmwlth. 2000) (penalty amount must be reasonable). Where DEP has erred in its application of the statutory criteria, or has assessed an unreasonable penalty amount, the Board may substitute its discretion and modify the penalty. *See, e.g., F.R. & S., Inc. d/b/a/ Pioneer Crossing Landfill v. DEP*, 1999 EHB 241, 262, *aff'd*, 761 A.2d 634 (Pa. Cmwlth. 2000); *Pickelner Fuel Oil, Inc. v. DEP*, 1996 EHB 602, 609.

II. The Civil Penalty Assessment

Pursuant to Section 1704 of Act 101:

> The Department may assess a civil penalty upon a person for [a violation of Act 101]. Such a penalty may be assessed whether or not the violation was willful or negligent. In determining the amount of the penalty, the Department shall consider the willfulness of the violation; the effect on the municipal waste planning process; damage to air, water, land or other natural resources of this Commonwealth or their uses; cost of restoration and abatement; savings resulting to the person in consequence of such violation; deterrence of future violations; and other relevant factors.

53 P.S. § 4000.1704(a). The maximum penalty per violation is $10,000 as set forth in Section

1704(c), which provides as follows:

> The maximum civil penalty which may be assessed pursuant to this section is $10,000 per violation. Each violation for each separate day and each violation of any provision of this Act, any regulation promulgated hereunder, any order issued hereunder or the terms or conditions of any approved municipal waste management plan shall constitute a separate offense under this section.

53 P.S. § 4000.1704(c).

Section 605 of the SWMA provides:

> In addition to proceeding under any other remedy available at law or in equity for a violation of any provision of this act, any rule or regulation of the department or order of the department or any term or condition of any permit issued by the department, the department may assess a civil penalty upon a person for such violation. Such a penalty may be assessed whether or not the violation was willful or negligent . . . .

35 P.S. § 6018.605. The maximum penalty under the SWMA is $25,000 per violation per day. *Id.* DEP's solid waste regulations set forth in greater detail the penalty-assessment criteria applied by DEP for violations of the solid waste statutes or their implementing regulations. *See* 25 Pa. Code § 274.412.

B & W admitted to committing each of the four violations charged. It admitted that with respect to the signage violations that it was aware of the requirement, that compliance therewith was easy and that the violations were due to its own lack of due diligence. As for the high load violation, B & W said it had been unaware of that particular requirement but that it should have been aware thereof. B & W admits that DEP is authorized by law to assess a civil penalty for each of the four violations in question. B & W's complaint is two-fold. First, B & W complains about DEP's application of the statutory penalty-assessment criteria to the facts of this case or, more precisely, its failure to apply those criteria to this particular case. Second, B & W contends that the penalty amounts assessed were unreasonable.

The heart of B & W's first point about process is the fact that DEP applied the $1,500

minimum penalty amount that was derived at the July Meeting relating to Operation Clean Sweep penalty assessments to B & W's violations. B & W asserts that in doing so DEP failed to comply with SWMA and Act 101 because DEP did not determine the penalty by applying the statutory criteria to the individual facts of this case. Instead, DEP simply "plugged in" or mechanically applied the minimum amount for sign and level load violations established at the July Meeting as a global minimum penalty to be assessed by all DEP regions for these two types of violations regardless of individual circumstances. B & W argues that the statutes require DEP to apply the penalty-assessment criteria on a case-by-case basis. Accordingly, DEP's use of the global minimum penalty set by officials at the July Meeting was contrary to the statutory mandate. B & W maintains that DEP's improper application of the statute in this manner renders the penalty *per se* unreasonable and inappropriate.

As for the second of B & W's points, it argues that, if the statutory criteria are properly applied to the individual facts and circumstances surrounding these particular B & W violations, the penalty amounts here are unreasonably excessive and should be modified based on the evidence presented to the Board. B & W asks the Board to reduce the penalty to either zero (because B & W paid the fines for the summary citations issued to its drivers for the same violations), or to no more than $300 per violation—the penalty amount typically assessed in DEP's Northcentral region for similar trash-hauling violations committed in the past few years prior to Operation Clean Sweep.

DEP contends that it was acceptable to utilize the $1,500 global minimum penalty amount set at the July Meeting when Mr. Miller was calculating the penalty for the individual B & W violations because the minimum amount was based upon relevant statutory and regulatory criteria (*i.e.*, severity, DEP costs and general deterrence). Alternatively, DEP argues that even if

it erred in using the global minimum a penalty of $1,500 per violation is still reasonable for the B & W violations based on the evidence presented at the hearing, and therefore the amount assessed by DEP should be sustained by the Board.

We agree with B & W that Act 101 and the SWMA each require that when DEP assess a civil penalty under either or both statutes that it do so by particular application of the statutory factors to particular individual cases. The SWMA, Act 101, and DEP's implementing regulation all require the agency to apply the prescribed assessment criteria to the facts and circumstances surrounding the violation for which the penalty is being assessed. Both statutes provide that *when the Department assesses a civil penalty*, that "in determining *the* amount of *the* penalty, the department *shall* consider" the enumerated factors. 35 P.S. § 6018.605, 53 P.S. § 4000.1704(c) (emphasis added). This language is clear and specific that DEP shall apply the statutory criteria to each particular penalty assessment case in determining the amount of the penalty for that assessment. This mandates the conclusion that, under the SWMA and Act 101, DEP was required here to have assessed the penalties for B & W's violations by applying the statutory penalty assessment criteria to the individual facts and circumstances surrounding these particular violations. *See Gemstar Corporation v. Department of Environmental Protection*, 726 A.2d 1120, 1122-24 (Pa. Cmwlth. 1999); *Westinghouse Electric Corporation v. Department of Environmental Protection*, 705 A.2d 1349, 1356-57 (Pa. Cmwlth.), *appeal denied*, 556 Pa. 717 (1998).

DEP's argument that it was appropriate to use the $1,500 global minimum penalty amount set at the July Meeting because the minimum amount was based upon relevant statutory and regulatory criteria misses the point. Obviously, the pronouncement of the July Meeting regarding an across the board minimum $1,500 penalty for a certain generic type of violation is

not a duly promulgated regulation subject to notice and public comment. Moreover, the July Meeting did not involve a discussion of B & W's particular violations and the circumstances surrounding those four particular violations. The statutes require that the criteria listed therein be applied to each case individually to determine an appropriate penalty amount for the particular violation or violations at hand. Mechanical application in a particular case or cases of a so-called categorical global minimum penalty amount set at a meeting which did not involve consideration of the statutory penalty factors with respect to those particular cases is not in keeping with the SWMA's or Act 101's penalty provisions.

B & W's contention that DEP failed to apply the statutory criteria on a case-by-case basis is only partially correct however. The evidence showed that, after the July Meeting, Mr. Miller examined the B & W violations and, using the Guidance Policy, applied the statutory criteria he considered specifically relevant to B & W. Mr. Miller attempted to correlate the $1,500 global minimum with the criteria of severity, willfulness and general deterrence when calculating B & W's penalty. He also reviewed B & W's history of past violations, considered cost savings B & W may have obtained from the violations, and costs expended by DEP as a result of the B & W violations. On the other hand, Mr. Miller conceded that he would not have considered reducing the penalty below the global minimum, that he effectively plugged the minimum into the Guidance Policy framework, and he only decided whether to add to the minimum amount based on other statutory criteria he found relevant to the individual B & W circumstances.

To the extent that DEP relied in assessing these four penalty amounts against B & W upon the global minimum amount set at the July Meeting and, based thereon, either did not consider a lower penalty amount or considered it impossible to set a lower penalty, DEP erred. Simply plugging in the global minimum, which was set by officials at the July Meeting without

consideration of the individual circumstances surrounding the actual B & W violations, did not fully comply with the statutory directive to engage in an individualized determination of the civil penalty appropriate for the violations committed.

DEP's partial failure to properly apply the statutory criteria does not render the penalty assessed here invalid or inappropriate *per se*. We will review the amount of the assessments and determine whether they are supported by the statutory criteria and are reasonable. "Where the EHB finds DEP abused its discretion, it may substitute its discretion for that of DEP and order the relief requested." *Leatherwood, Inc. v. DEP*, 819 A.2d 604, 611 (Pa. Cmwlth. 2003) (citing *Pequa Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998)). The question for us is whether in light of the evidence entered at trial the $1,500 penalty amounts for these four violations was reasonable. Our own review of the evidence leads us to conclude that the four assessments here are not unreasonable.

Statutory Range. The penalty amounts assessed were all well within the range allowed by the statutes. As we have noted, under Act 101 a penalty of up to $10,000 per violation per day may be assessed and under the SWMA a penalty of $25,000 per violation per day may be assessed.

Willfulness. DEP determined that B & W was negligent in committing the four violations. We think that the violations were at least negligent. Negligent conduct is behavior which results in a violation that could have been foreseen and prevented through the exercise of reasonable care. *See DEP v. Leeward Construction, Inc.*, 2001 EHB 870, 886-87, *aff'd* 2003 Pa. Commw. LEXIS 180 (Pa. Cmwlth. Jan. 9, 2003). Mr. Witmer testified that B & W and its drivers were aware of the signage requirements, that those requirements were easy to comply with, that the drivers should have looked to make sure the proper signs were present, and that the

matter "[fell]" through the cracks" and that it was a "screw up". (Tr. 200-01; 206-08; 226-27). In other words, there was a failure to exercise due care which should have and could have easily been exercised, the exercise of which would have prevented the violations. For the overload violation, Mr. Witmer conceded that although he had previously been unaware of that particular requirement, he should have been aware of it. (Tr. 211-12) Again, an exercise of due diligence, which should have been exercised, and easily could have been, was not, and had it been, the violation would not have occurred. Commendably, Mr. Witmer did not attempt to evade responsibility or try to characterize the violations as beyond the company's control or the fault of another. He truthfully conceded that there was a breakdown in his system for assuring compliance with the DEP regulations and that these matters "fell through the cracks".

Severity/Damage to Property or the Environment. The violations here cannot be considered of high severity.[4] They are, however, not so picayune as would counsel either the Department or us to ignore them. Mr. Pounds credibly testified that the sign and level load requirements are intended to prevent potential hazards to public health and safety. The sign requirement in particular should not be considered as merely clerical or administrative, but was specifically enacted by the Legislature in Act 101 because of public health and safety concerns.

Appellant does not controvert Mr. Pounds' testimony but instead argues that the violations should be considered *de minimis* and, therefore, only a nominal penalty, if any, would

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[4] The SWMA and Act 101 direct DEP to consider the "damage to air, water, land or other natural resources of the Commonwealth or their uses [and the] cost of restoration and abatement" when calculating a civil penalty for violations of those statutes. 35 P.S. § 6018.605; 53 P.S. § 4000.1704(a). DEP's regulation elaborates on these factors in terms of the "seriousness" or severity of the violation. Pursuant to 25 Pa. Code § 274.412(b), civil penalties shall be assessed:

> based on the seriousness of the violation, including the following: (i) Damage or injury to the land or waters of this Commonwealth or other natural resources or their uses. (ii) Cost of restoration. (iii) Hazards or potential hazards to the health or safety of the public. (iv) Property damage. (v) Interference with a person's right to the use or enjoyment of property. (vi) Other relevant factors.

25 Pa. Code § 274.412(b)(1).

be appropriate, because no environmental or property damage in fact resulted from the B & W violations. That argument is completely misplaced. The fact that the statutes require DEP to consider actual damage to the environment and to property in setting a penalty amount does not mean that where there has been no damage, the nature of the violation is to be marginalized and the penalty amount *de minimis*. This is a "dodge the bullet" or "no harm, no foul" theory of law and law enforcement and, either way, such a theory has no place here. It is contrary to the very idea of these regulations, which are prophylactic in nature. The point of such laws and regulations, which have been enacted not only in the environmental field but in many other fields as well, is to ensure that measures are in place that either prevent a mishap altogether or lessen the adverse impact should one occur. Prophylactic regulations, such as the ones here and others like it, are passed either in light of, and building upon, the tough lessons which have been learned through past experience with public safety mishaps, or in light of projected, anticipated courses and causes of future mishaps, with the idea of prevention and/or mitigation of the adverse effects thereof. Under Appellant's theory, the sinking of the Titanic would have been irrelevant to present ocean-going vessel safety law, and the only public facilities subject to penalties for fire code violations would be the ones that have already burned down. The fact that nothing actually happened here is coincidental good luck, not a cause for commending B & W or marginalizing its violations of these prophylactic regulations.

Cost to DEP/Savings to the Violator. Mr. Miller considered the costs to DEP arising from the B & W violations but decided not to include such costs though he was clearly authorized to do so. *See* 25 Pa. Code § 274.412(b)(2). We will not revisit that decision here although we are authorized to do so and, moreover, we could add a cost factor to the penalty assessments if we deemed it appropriate and there were evidence to support such a surcharge.

We do think that the fact that DEP did not factor administrative costs into this penalty amount as a surcharge is supportive of the proposition that the penalty amounts assessed here are reasonable. On the savings side of the economic equation, the testimony indicated that the potential savings to B & W from the violations were negligible. For that reason, DEP was correct to not consider that factor in setting this penalty. We will likewise not do so.

Other Factors and the Reasonableness of these Particular Penalties. The other factor DEP considered in assessing the B & W penalty was deterrence—both specific and general deterrence. Mr. Miller considered the specific deterrence criteria by examining B & W's compliance history to determine whether B & W had committed violation of the same type in the past five years. *See* 25 Pa. Code § 274.412(b)(5).[5] Having ascertained that no such violations had been committed, he disregarded the specific deterrence factor. With respect to a general deterrence factor, Mr. Miller concluded that the $1,500 global minimum was already derived in part on the basis of a general deterrence criterion.

B & W contends that under the pertinent statutory and regulatory provisions DEP was only authorized to consider the factor of specific deterrence—*i.e.*, the deterrent effect of the penalty on the individual violator being penalized—because all penalty-assessment criteria must be applied on a case-by-case basis. B & W points to language in DEP's Guidance Policy in support of this assertion. Appellant argues that it was inappropriate for DEP to consider general deterrence—the deterrent effect of the penalty amount on all those subject to the trash-hauling regulations—when assessing the B & W penalty.

B & W also meshes its arguments regarding the deterrence factor with its argument that the penalties in this case are unreasonable. Evidence at the hearing showed that in the years prior

[5] Pursuant to regulation, DEP "will increase the civil penalty by 5% for each violation of the applicable laws for which the person or municipality has been found responsible in a prior adjudicated proceeding, agreement, consent order or decree which became final within the previous 5-year period." 25 Pa. Code § 274.412(b)(5).

to Operation Clean Sweep DEP's Northcentral region typically assessed only a $300 penalty for the same type of violations committed by B & W. *See* Tr. 47-49. B & W argues that the specific deterrence factor does not justify an increase in the historic penalty amount from $300 in past cases to $1,500 for these penalties. Also, B & W argues that in light of its very good compliance history over the last ten years that this increase in the penalty amount by a multiple of five over the past practice makes the penalty amount unreasonable.

Further, B & W maintains that statistical evidence of compliance levels during Operation Clean Sweep, when compared with estimated compliance levels prior to the operation, (see Tr. 75, 157-58; Exh. B & W-2), did not support a conclusion that a fivefold increase in the penalty amount was necessary to deter the trash-hauling industry from committing future violations. In other words, B & W argues that there is no factual foundation for DEP's conclusion that a substantial increase in the penalty amount over past recent practice was necessary to curb future violations of the trash-hauling regulations in the Northcentral region.

We agree with B & W that, other than these violations at issue here, its compliance history has been quite good over the past ten years. Thus, we agree that no particular increase in these penalty calculations for these particular violations was called for. This agreement, however, is of little assistance to B & W because DEP did not apply such an enhancement component to these penalty calculations in the first place. We do not either. Moreover, we do not agree with either the premises or the conclusions of the remainder of B & W's arguments.

We disagree with B & W that general deterrence cannot be considered. In our view, DEP is authorized to consider the general deterrent effect when assessing a penalty for violations of the SWMA and Act 101. Section 1704 directs DEP to consider "deterrence of future violations" as a penalty-assessment criterion. 53 P.S. § 4000.1704(a). Notably, the statutory text speaks only

of "deterrence" and there is no qualification or limitation to "specific deterrence." Moreover, both Act 101 and Section 605 of the SWMA direct DEP to consider "other relevant factors" when assessing penalties. *Id.*; 35 P.S. § 6018.605. The general deterrent effect on the regulated community can be a relevant consideration when the agency determines a penalty for engaging in unlawful conduct. *Cf. Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 117-18, *aff'd* 745 A.2d 1277 (Pa. Cmwlth. 2000) (Board considered general deterrence factor when Board assessed penalty pursuant to Clean Streams Law).

Although the statistical evidence of compliance presented at the hearing was inconclusive, DEP is not required to establish a perfect statistical harmony between the amount of the penalty assessed, or the deterrence component thereof, and general deterrence which calibrates one to the other with numerical exactitude. DEP is allowed to consider general deterrence in assessing a penalty and, when it assesses a penalty, all it is required to do is to set the amount of the penalty at a number that is reasonable. Nothing that B & W has shown us regarding the general deterrence factor leads us to conclude that the penalties here are such that they are unreasonable. Moreover, the fact that other penalties in the past have been $300 and these penalties were $1,500 does not, in itself, establish that the $1,500 amount is unreasonable. The question is whether these penalty amounts for these violations at this time were reasonable. We find that given the particular circumstances of these violations, the nature and quality of these violations, and the statutory penalty allowances, the penalties imposed cannot be said to be unreasonable.

CONCLUSIONS OF LAW

1. DEP bears the burden of proving by a preponderance that the four underlying violations of law giving rise to the civil penalty assessments for each of the four violations in fact

occurred, the penalty imposed is lawful and, the amount of the penalty is reasonable and appropriate.

2. Appellant conceded that each of the four the violations occurred.

3. The SWMA and Act 101 require that the statutory factors set forth therein to be considered in assessing penalty amounts be applied individually, to each specific case.

4. DEP was authorized to assess a penalty for each of the four violations. 35 P.S. § 6018.605; 53 P.S. § 4000.1704.

5. DEP erred by mechanically applying a generic categorical minimum penalty amount established at the July Meeting to the four penalty assessments directed to B & W for its four violations. *Id.*

6. The amount DEP assessed for each of the four violations was within the statutory allowances under both the SWMA and Act 101. *Id.*

7. Based upon the evidence presented at the hearing, as considered in light of the statutory factors required to be considered in establishing a penalty assessment amount, DEP's assessment of a civil penalty of $1,500 per violation, resulting in a total penalty of $6,000 for the four violations of the SWMA or Act 101 committed by B & W, was reasonable and appropriate. *Id., Clearview Land Development Co. v. DEP*, No. 2001-191-K, slip op. at 20 (Opinion issued May 13, 2003); *Keinath v. DEP*, No. 2001-253-MG, 2003 Pa. Envirn. LEXIS 9, at *14-*15 (EHB, Jan. 31, 2003); *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679, 690; *F.R. & S., Inc. d/b/a/ Pioneer Crossing Landfill v. DEP*, 761 A.2d 634, 639 (Pa. Cmwlth. 2000) (penalty amount must be reasonable).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

B & W DISPOSAL, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-052-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 4, 2003**

O R D E R

And now, this 4th day of June, 2003, it is hereby ORDERED as follows:

1. The appeal of B & W Disposal, Inc., docketed at EHB Docket. No. 2002-052-K is hereby dismissed, and the docket shall be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2002-052-K

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Dated: June 4, 2003

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

SUNOCO, INC. (R & M)	:	
	:	
v.	:	**EHB Docket No. 2002-268-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 5, 2003**

OPINION AND ORDER ON THE DEPARTMENT'S MOTION IN LIMINE TO EXCLUDE FROM EVIDENCE THE EXPERT REPORT OF DARREN J. TAPP

By Michael L. Krancer, Administrative Law Judge, Chairman

Synopsis:

The Board denies the Department's Motion In Limine to exclude from evidence the expert report of Appellant's expert, which the Board treats as a motion to bar expert testimony, because the motion merely advances cross-examination material and arguments why the witness should not be credited, as opposed to being barred from testifying altogether.

Discussion

Before the Board is the Department's Motion In Limine to Exclude From Evidence the Expert Report of Darren J. Tapp filed on May 16, 2003. Sunoco, Inc. R & M (Sunoco) filed its Opposition papers (Sunoco Opposition) on June 3, 2003. Trial in this matter is scheduled to begin on June 17, 2003. Very briefly, this is a $3.4 million dollar penalty case against Sunoco for its delay in installing Reasonably Available Control Technology (RACT) on Boilers Nos. 6 and 7 at Sunoco's facility in Marcus

Hook, Delaware County. Sunoco agrees that it was dilatory in installing RACT and the case is about how much the penalty against Sunoco ought to be. Part of the calculation of the penalty is the application of the so-called BEN model. Paraphrasing from the BEN User's Manual, the primary purpose of the BEN model is to calculate the economic benefit to the violator on non-compliance. The reason for doing so, again according to the BEN User's Manual, "is that civil penalties should at least recover the economic benefit from non-compliance to ensure that members of the regulated community have a strong economic incentive to comply with environmental laws."[1]

The Department will have an expert witness testify as to its use of the BEN model to calculate the penalty in this case. Mr. Tapp will be proffered by Sunoco as its expert in the field of accounting, finance or economics for his analysis of the application of the BEN model to this case. The essence of the Department's Motion is that the expert report of Mr. Tapp is allegedly based, in large part, upon unsupported conclusions, hearsay, and documents which either do not exist or have not been produced to the Department.

First, we note that the expert testimony, not the expert report, is typically the expert evidence in a case. Generally, we do not see the expert reports, as such, entered into evidence. Thus, a motion in limine directed at an expert report is a bit off the mark.

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[1] The undersigned has opined in the past that this denial of economic benefit or profit disgorgement concept is indeed a salutary goal for penalty calculation and should be a prominent factor in the calculation of penalties in some cases. *See DEP v. Leeward Construction Company*, 2001 EHB 870 (Krancer, J., concurring). In *Leeward*, I concurred with the majority in its conclusion on the penalty amount but wrote separately to stress that in cases where the violations were proved to be flagrant, systematic and intentional, the violator should not be able to retain any profit from the job inasmuch as allowing the retention of the wrongdoer's profit in such cases would put at a competitive disadvantage companies that take the steps and incur the costs to perform their activities in a law abiding fashion. Thus, allowing the flagrant and intentional violator to retain profit attributable to such conduct creates a synergy of adverse effect by simultaneously promoting the degradation of the environment and undermining the competitive free market system.

However, the expert report is obviously, and of necessity, very closely parallel to the anticipated expert testimony. Pa. R.C.P. 4003.5(c)(direct testimony of an expert cannot be inconsistent with or go beyond the fair scope of the expert report). Thus, we will treat the motion as one to exclude the expert testimony of Mr. Tapp.

In our view, the Motion sets forth a script for cross-examination, not grounds for exclusion. The Department states that it is "not merely attempt[ing] to argue that the Appellant's proffered expert is wrong about his conclusions" but we see the Motion doing just that. The Motion is replete with arguments and points why Mr. Tapp's opinions are allegedly not supported or are allegedly not credible. Basically, the Department is arguing that the opinion is flawed. There is no legitimate basis proffered why the opinions should not be heard in the first instance. Moreover, on the point about Mr. Tapp's reliance on supposed hearsay, expert opinion is allowed, to some extent, to be based on what would be considered hearsay. *See* Pa.R.E. 703 (fact or data relied upon by an expert need not be admissible in evidence).

The Department's citation to *Al Hamilton v. DER*, 659 A.2d 31 (Pa. Cmwlth. 1995) does not support pre-emptive exclusion of the testimony of Mr. Tapp. While it is so that the Court in *Al Hamilton* stated the black letter principle which the Department quotes, *i.e.*, an expert cannot express a conclusion based on facts not in evidence, the Court, in the next sentence, points to the equally well known principle that "experts by necessity may rely on the reports of others not admitted into evidence". *Id.* at 36. The Department's citation to *Kresge v. DEP*, 2001 EHB 511, is equally unavailing to it and, indeed, proves the point contrary to its position. First, *Kresge* did not deal with expert testimony at all. Mr. Kresge, a lay person, tried to convince the Board of his inability to

pre-pay a penalty or post a bond therefore. He testified that he did not even try to obtain a loan because he had no reason to believe he could have obtained one. The Department is apparently latching onto the part of the *Kresge* opinion which states in that regard as follows:

> That is insufficient. In *Goetz* [*v. DEP*, 1998 EHB 955], Mr. Goetz's testimony that his attorney and his bonding agent told him that he would not be able to get an appeal bond was inadequate. The Board said that, "appellant's attorney and bonding agent never took the stand, or otherwise gave evidence to support Appellant's hearsay statements." *Geotz*, 1998 EHB at 967-68. The same principle applies here as to the potential for a loan. Nobody took the stand and no documentary evidence was offered to corroborate and substantiate Mr. Kresge's assertion that he had no reason to believe that he could have obtained a loan for the penalty amount.

Kresge, 2001 EHB at 518. The point of that discussion in *Kresge* and we think the point of the discussion it cites from *Goetz*, is not that testimony is barred or prohibited but that the Appellant had not sufficiently or credibly established the fact asserted. In other words, the Board was not excluding testimony, it was not crediting it.

For these reasons, we think that the Department's motion is deniable on its face. Also, in reviewing the motion together with Sunoco's Opposition, we find that many of the allegations of lack of documentation and the like are not well taken. For example, the allegation that regulatory cost manuals were not provided to the Department is off the mark altogether. Mr. Tapp's expert report does indeed identify the manuals in question and they are EPA public documents. We do not believe that Sunoco's not having produced them or Mr. Tapp's not having brought them to his deposition are legitimate grounds for excluding his testimony in advance.

Another example is the Department's allegation that Mr. Tapp's evidence should be barred because he supposedly relied upon hearsay input from a "Mr. Paul Frost" who

had not been identified as a witness by Sunoco. Even if that argument had merit in its own right, which is questionable, it turns out that the reference to "Mr. Paul Frost" in the transcript was a transcription error which should have read "Mr. Paul Braun". The corrections to the transcript, including this one, were telecopied to the Department's counsel on May 23, 2003. Sunoco Opposition Ex. C. Mr. Braun is a Sunoco employee whose identity as a potential witness was disclosed to the Department in Sunoco's January 31, 2003 Objection and Answers to the Department's First Set of Interrogatories. Sunoco Opposition Ex. E. We agree with Sunoco's counsel that this supposed "problem" could have been cleared up by a simple telephone call from counsel for the Department to counsel for Sunoco. In any event, we would have expected the Department to have brought this situation to our attention before Sunoco had to do so in its Opposition and before we had to deal ourselves with the matter of the phantom "Mr. Paul Frost" -- or, alternatively stated, the "Mr. Paul Frost" phantom matter.[2]

We, therefore, enter the following Order:

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[2] These are just two examples we choose to write about. We have reviewed carefully each and every allegation of alleged inadequacy stated by the Department and Sunoco's responses thereto. These are not the only attempted points of the Motion which do not complete a circuit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SUNOCO, INC. (R & M)	:	
	:	
v.	:	**EHB Docket No. 2002-268-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

And now this 5th day of June, 2003, upon consideration of the Department's Motion In Limine to Exclude From Evidence The Expert Report of Darren J. Tapp and Sunoco, Inc. (R & M)'s Opposition thereto, it is HEREBY ORDERED that the Motion is **DENIED.**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

DATED: June 5, 2003

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

CITY OF ERIE	:	
	:	
v.	:	**EHB Docket No. 2003-018-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ERIE CITY WATER AUTHORITY, Permittee	:	**Issued: June 6, 2003**

OPINION AND ORDER ON PETITION FOR RECONSIDERATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board denies a Petition for Reconsideration of a Final Order. The Board will not reconsider a final order where the Petition for Reconsideration fails to set forth compelling and persuasive reasons for reconsideration.

OPINION

On May 7, 2003 we granted the Motion to Withdraw Appeal filed by City of Erie Solicitor Paul Curry. In so ruling, we held that the filing of an Appeal on behalf of the City of Erie before the Environmental Hearing Board is specifically entrusted to the executive branch of the City of Erie through the office of the Mayor by the City Solicitor. We reached this determination after close review of the parties' legal papers including extensive legal memoranda

filed by the parties. Attorney Tinko, still purporting to represent the City of Erie, requests that we reconsider our Opinion and Order.

The reconsideration of a final Board Order is an extraordinary remedy and "will be granted only for compelling and persuasive reasons."[1] The reasons set forth in the Petition for Reconsideration of a Final Order (Petition) were already carefully considered but rejected by the Board in ruling on the original Motion to Withdraw Appeal. Therefore, the Petition does not set forth any "compelling and persuasive reasons" to grant reconsideration.

We do wish to address one of the reasons advanced in the Petition. Attorney Tinko renews his argument that the Motion to Withdraw Appeal is a dispositive motion and since the Motion to Withdraw Appeal was not initially accompanied by a supporting memorandum of law we should have denied the Motion on that basis alone.

This argument is a classic example of elevating form over substance to reach a result that would only delay a resolution of the issue raised in the Motion to Withdraw Appeal. First, as we acknowledged on the first page of our Opinion, "although the end result of the Motion is dispositive we do not believe it is a dispositive motion as envisioned by our Rules." Second, after directing the City of Erie through Solicitor Curry's office to file a legal memorandum in support of its Motion to Withdraw Appeal we provided Attorney Tinko an opportunity to file a responsive memorandum of law to the legal memorandum filed by Attorney Curry. Attorney Tinko indeed did file a responsive memorandum of law. Therefore, Attorney Tinko was not prejudiced in any way by the filing of the legal memoranda. He was able to file a responsive legal memorandum to Attorney Curry's legal memorandum which is exactly the procedure set forth under the Pennsylvania Code regarding dispositive motions.[2] The procedure fashioned by

[1] 25 Pa. Code § 1021.152(a); *Potts Contracting Co. v. DEP*, 2000 EHB 145.
[2] 25 Pa. Code § 1021.94

the Board is the sort expressly authorized by the Pennsylvania Code which states as follows:

> The rules in this chapter shall be liberally construed to secure the just, speedy and inexpensive determination of every appeal or proceeding in which they are applicable. The Board at every stage of an appeal or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.[3]

Since Attorney Tinko has not satisfied the criteria for reconsidering our Order of May 7, 2003 the Board will deny his Petition accordingly.

[3] 25 Pa. Code § 1021.4.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITY OF ERIE	:	
	:	
v.	:	**EHB Docket No. 2003-018-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ERIE CITY WATER AUTHORITY, Permittee	:	

ORDER

AND NOW, this 6th day of June, 2003, the Petition for Reconsideration of a Final Order is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: June 6, 2003

See following page for service list.

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SECRETARY TO THE BOARD

TINICUM TOWNSHIP	:	
	:	
v.	:	
	:	**EHB Docket No. 2001-263-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DELAWARE VALLEY CONCRETE CO., INC.	:	**(Consolidated with 2002-101-L)**
	:	
	:	**Issued: June 18, 2003**
	:	

OPINION AND ORDER ON MOTION TO DISMISS

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

Synopsis:

Where the permittee in two third-party appeals surrenders the appealed permits, thereby voiding authorization for the activities objected to by Appellants, the appeals are dismissed as moot.

OPINION

Before the Board are the Permittee's motions to dismiss the Appellant's appeals as moot. Permittee Delaware Valley Concrete Co., Inc. ("DVCC") owned and operated a quarry in Tinicum Township, Bucks County from 1987 through 2003. In EHB Docket No. 2001-263-L, Appellant Tinicum Township ("Tinicum") appealed the Department of Environmental Protection's (the "Department's") issuance of Noncoal Surface Mining Permit No. 09870302C3 ("Mining Permit") to DVCC. The Mining Permit included modifications that allowed DVCC's mining operations to expand and include blasting and extraction of shale from the quarry. Under

EHB Docket No. 2002-101-L, Tinicum appealed the Department's issuance of National Pollutant Discharge Elimination System Permit No. PA0036721 ("NPDES Permit") to DVCC, which authorized pumping of water from the quarry.

On September 17, 2002 this Board superseded the NPDES Permit appealed in EHB Docket No. 2002-101-L, but dewatering continued. Thereafter, Tinicum sought to enjoin DVCC from dewatering in *Tinicum v. DVCC*, in Bucks County, No. 02-01876-26-5. DVCC asserted a counterclaim against Tinicum for millions of dollars in damages based upon allegations of improper litigation as related to the appeals before the Board. That matter is ongoing.

During the pendency of the two separate appeals, an agreement was reached for sale of the site of the quarry to the Commonwealth of Pennsylvania Department of Conservation and Natural Resources ("DCNR"). (Motion Exhibit A.) On February 14, 2003, DVCC filed in each appeal essentially identical motions to dismiss Tinicum's appeals as moot in light of the pending sale of the site to DCNR. On March 7, 2003 the Department concurred in DVCC's motions. Appellant responded to the motions on March 18, 2003 and DVCC filed its reply on April 1, 2003.

On April 4, 2003, upon the Board's own motion, the appeals were consolidated at EHB Docket No. 2001-263-L. Following a conference call on April 8, 2003 among the parties and the Board, the Board took the pending motions under advisement, which allowed the parties additional time to discuss settlement. On May 14, 2003, DVCC filed a "Supplemental Reply" to the responses to the motions to dismiss. In its reply DVCC indicated that (1) on March 24, 2003 the quarry had been conveyed to the Commonwealth of Pennsylvania; (2) DVCC surrendered the Mining Permit and the NPDES Permit to the Department; and (3) DVCC was no longer authorized by the Department to blast or discharge water as described in the NPDES Permit at

the site. (Supp. Reply Exhibits A-C). The permits have not been transferred to the Commonwealth. Pursuant to the Board's order, Tinicum filed its response to the "Supplemental Reply" on June 2, 2003.

DVCC and the Department seek dismissal of the appeals and argue that surrender of the permits has rendered the appeals moot and left the Board incapable of providing the relief sought. Tinicum responds that the appeal should not be dismissed and asserts that this matter falls within the exceptions to the mootness principle. Tinicum argues that the case involves issues of public importance and that it will suffer a detriment without the Board's decision.[1]

The Board will grant a motion to dismiss only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1281. After careful review, we now grant DVCC's motions to dismiss the appeals relating to the Mining and NPDES permits because they are moot.

"It is axiomatic that a court should not address itself to moot questions and instead should only concern itself with real controversies, except in certain exceptional circumstances." *Goetz v. DEP*, 2001 EHB 1127, 1131 (quoting *In re Glancey*, 518 Pa. 276, 282 (1988)); *See also Horsehead Resource Development Company, Inc. v. DEP*, 780 A.2d 856 (Pa. Cmwlth. 2001) (an appeal before the Environmental Hearing Board is moot where the orders that were basis of the appeal are withdrawn). Exceptions have been made where the conduct complained of is capable of repetition yet likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision. *Sierra Club v. Pennsylvania Public*

[1] Tinicum also made several arguments relating to the fact that the sale of the quarry to DCNR had not been consummated. Since filing of the motion and response, the property transfer has been finalized. Therefore, we need not address those arguments.

Utility Commission, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *a'ffd,* 557 Pa. 11 (1999). The appropriate inquiry in determining if a case is moot is whether the litigant has been deprived of the necessary stake in the outcome or whether the court or agency will be able to grant effective relief. *See Horsehead Resource Dev. Co*, 780 A.2d at 858 (citing *Al Hamilton Contracting Co. v. DER*, 494 A.2d 516 (Pa. Cmwlth. 1985)); *see also Goetz*, 2001 EHB at 6.

The Board has previously addressed the question of mootness in a case where an appealed permit has been relinquished by the permittee. In *Au v. DEP*, 2001 EHB 527, we dismissed an appeal of a surface coal-mining permit as moot where the permittee indicated to the Department that it wished to withdraw its permit and the Department later cancelled the permit. Because the permittee had voluntarily withdrawn its permit and the Department cancelled it, we determined that no effective relief could be granted. In the present case, DVCC has surrendered to the Department the permits that formed the bases of the appeals. The Department has stated, "any blasting, or discharge of water as described in the NPDES Permit . . . are no longer authorized" at the site.[2] Surrender of the permits has effectively voided consent for the activities Appellants find objectionable and left the Board unable to provide the relief requested.

Appellant argues that the appeal should not be dismissed because of the counterclaim filed by DVCC in the pending Bucks County Common Pleas Court action. Tinicum argues that the exceptions to the mootness principle apply. Specifically, Tinicum argues that the millions of dollars at stake in the counterclaim questioning the propriety of filing the subject appeal is a matter of great public importance. It asserts that a determination on the merits of the appeal by the Board is needed to establish that the appeal was not improperly filed. Similarly, Tinicum

[2] Mining activities directly related to satisfactory reclamation and stabilization of the quarry are authorized.

asserts that it will suffer detriment in the form of damages if the Board does not decide this appeal.

While we might agree that the millions of dollars at stake in DVCC's counterclaim against Tinicum is of particular significance to the citizens of Tinicum, we cannot agree that it creates an issue of "such public importance" that we should overlook the mootness of this appeal. The public interest exception is granted only in rare circumstances. *See Pequea Township v. DER*, 1994 EHB 755, 765 (citing *Strax v. DOT*, 588 A.2d 87 (Pa. Cmwlth. 1991)). The Board's failure to reach a decision in this case will not lead to significant environmental damage; nor will the public health be threatened. Furthermore, DVCC's point that there exists another forum for resolution of the issues that concern Tinicum is well taken. The Court of Common Pleas is more than merely another forum. It is the forum in which the issues that Tinicum point to for maintaining the instant appeal were initially raised. Tinicum will be able to fully litigate the counterclaim filed by DVCC in the Common Pleas action. *See Au, supra* (need to create a factual record to support an award of fees and costs was not a basis for retaining jurisdiction over an otherwise moot appeal). We are not persuaded that Tinicum will be harmed in any way or that its rights will be adversely affected as a result of the dismissal of these consolidated appeals.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TINICUM TOWNSHIP	:	
	:	
v.	:	
	:	EHB Docket No. 2001-263-L
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DELAWARE VALLEY CONCRETE CO., INC.	:	(Consolidated with 2002-101-L)

ORDER

AND NOW, this 18th day of June, 2003, Tinicum Township's appeals are dismissed as moot.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: June 18, 2003

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

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Southcentral Regional Counsel

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Harrisburg, PA 17101

tdt

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

LAUREL LAND DEVELOPMENT, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-033-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 20, 2003**

OPINION AND ORDER
ON DEPARTMENT OF ENVIRONMENTAL PROTECTION'S
MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Under the unique facts of this case, where the Department personally serves the permittee with a copy of an Administrative Order but then serves the original Administrative Order by certified mail the 30 day Appeal period begins to run from the date the Administrative Order is received by certified mail. Looking at the facts in this case practically rather than technically we conclude that at the time of personal service of the Administrative Order it was a draft, non-final and conditional document. The Department's Motion to Dismiss is denied.

Introduction

Appellant Laurel Land Development, Inc. ("Laurel Land" or "the mining company"), is engaged in the surface mining of bituminous coal. Mr. Kenneth Morchesky is the President of Laurel Land. This Appeal involves a bituminous coal mine (the McDermott Mine) in Cambria

County operated by Laurel Land pursuant to a permit issued by the Pennsylvania Department of Environmental Protection. ("Department" or "DEP")

This area of Pennsylvania has been extensively mined over the years. There are two abandoned Lower Kittanning deep mine discharges designated as MD3 and MD5 on land adjacent to the McDermott Mine site. After a hydrogeologic investigation completed in September, 2001, the Department determined that Laurel Land's mining operations at the McDermott Mine resulted in water quality degradation of the discharges at MD3 and MD5. The parties subsequently engaged in extensive discussion and the Department, at Laurel Land's request, conducted a second hydrogeologic review. The results of the second hydrogeologic review were similar to the first hydrogeologic review. In January, 2003, the Department issued an Administrative Order directing Laurel Land to take various steps to correct the water quality degradation of the discharges at MD3 and MD5. Laurel Land appealed the Administrative Order contending that its mining operations did not cause or contribute to the problems with the discharges.

The Department's Motion to Dismiss

Presently before the Board is the Department's Motion to Dismiss Laurel Land's Appeal as untimely.[1] The Board will grant a motion to dismiss only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law.[2] The Board evaluates motions to dismiss in the light most favorable to the non-moving party.[3]

The Department contends the Appeal is untimely because it issued the Administrative Order on January 2, 2003, personally served it on Laurel Land's President that same day, and

[1] The Department's Motion to Dismiss and supporting papers were filed on April 14, 2003. Laurel Land's Response and supporting papers were filed on May 14, 2003. The Department's Reply was filed on June 9, 2003.

[2] *Borough of Chambersburg v. DEP*, 1999 EHB 92, *Smedley v. DEP*, 1998 EHB 1281, 1282.

[3] *Solebury Twp. and Buckingham Twp. v. DEP and Penn Dot*, EHB Docket No. 2002-323-K (Opinion issued

Laurel Land's Appeal was docketed with the Board more than 30 days later – on February 12, 2003. The Board's Rules of Practice and Procedure[4] provide that the jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of the action unless a different time is provided by statute. Laurel Land contends that it was its belief that the Administrative Order handed to Mr. Morchesky on January 2, 2003 was not a final order. Instead, the actual Order would only be sent to the mining company by certified mail if Laurel Land was unable to persuade the Department to reconsider its position.

According to the Department's Motion and supporting affidavits, the Administrative Order was final once it was signed by Cambria Office District Mining Manager Donald A. Barnes on January 2, 2003. Moreover, "upon Mr. Barnes' signature, the Order was final and ready to be issued."[5] In what the Department contends was a courtesy, Mr. Rodgers "telephoned Mr. Morchesky in an attempt to notify him that an Administrative Order had been signed and *would be issued that day.*"[6] Mr. Morchesky received the voice mail message from Mr. Rodgers but instead of returning the call he traveled to the Cambria District Mining Office, met with Mr. Rodgers and two other Department officials, and was handed a copy of the Administrative Order. The Department contends it informed Mr. Morchesky that the Order was final but that a copy of the Order would be mailed to him "for his files."

Instead of mailing the Administrative Order to Laurel Land on January 2, 2003 the Department waited an entire week and then mailed the original Administrative Order (which now contained a Department docket number) by *certified mail.* The Department letter enclosing the

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February 20, 2003). *O'Reilly v. DEP and JDN Development Company, Inc.*, 2000 EHB 723.
[4] 25 Pa. Code § 1021.52.
[5] ¶ 11, Affidavit of Raymond Rodgers, Department Compliance Specialist.
[6] ¶ 13, Affidavit of Raymond Rodgers. (*emphasis added*).

Order is dated January 9, 2003. The letter was received by Laurel Land on January 14, 2003.

Discussion

As the Department is well aware its mission is to serve and protect the public and the environment. Therefore, it is absolutely essential that when the Department orders a member of the public to take some action that there be no doubt as to when the thirty day appeal clock starts. The facts of this case are very similar to the facts in *Soil Remediation Systems, Inc. v. Department of Environmental Protection.*[7] In *Soil Remediation* the Department sent a letter constituting final agency action to Soil Remediation by both facsimile and certified mail. The cover sheet of the facsimile was marked "advanced copy." The letter sent by facsimile was received that same day while the letter sent by certified mail was received three days later.

Soil Remediation appealed the Department's action to the Board. The Department filed a motion to dismiss contending the appeal was untimely. The appeal had been filed 29 days after receipt of the certified letter but 32 days after receipt of the letter sent by facsimile.

The Board granted the Department's motion and dismissed the appeal.[8] Commonwealth Court reversed. In an opinion written by Judge Colins, Commonwealth Court indicated that what constitutes a final administrative action is determined by looking at the facts practically rather than technically. Applying this standard, the court held as follows:

> In the present case, Soil Remediation was not apprised of the finality of DEP's determination until it received the certified letter on December 9, 1996. This Court's practical construction of the "advanced copy" notification on the facsimile leads to the conclusion that it was reasonable for Soil Remediation to have believed that this was not the operative notice for purposes of appeal. The inclusion of the conditional language in and of itself made the notice defective. Moreover, when viewed in conjunction with the receipt of the certified letter sometime thereafter, which included the language "appeals must be filed with the Environmental Hearing Board within

[7] 703 A.2d 1081 (Cmwlth. Ct. 1997).
[8] *Soil Remediation Systems, Inc. v. DEP*, 1997 EHB 390.

> 30 days of receipt of written notice of this action"(as did the so called "advanced copy"), we feel that it was even more understandable that Soil Remediation relied on the certified letter as the operative notice for purposes of the 30 day appeal period."[9]

The Department does not explain why it took a week to mail the original order to the permittee. This is especially important to our consideration in conjunction with the Department's Motion and Mr. Rodgers' affidavit which states that the Administrative Order would be mailed that same day, January 2, 2003. What is readily apparent is the Department had intended to mail the Administrative Order to Mr. Morchesky on the day it was signed but instead chose to wait an entire week after he conferred with three Department officials. Why?

The Department's delay of one week when all it was doing was adding a docket number to the original order certainly leads to the inference that it might be reconsidering its earlier decision. In addition, why did the Department even need to send the Order by mail since Mr. Morchesky had already been personally served? If this Order is "just for Laurel Land's files" why was it sent by certified mail rather than ordinary mail? Finally, why is the Department sending a *file copy* of the Order to Laurel Land anyway? Did it not think the hard copy would be the file copy or that Laurel Land did not have a photocopier? Why would this even matter?

When Mr. Morchesky was personally served with a copy of the Administrative Order it could properly be viewed as a draft, non-final, and conditional document. This conclusion is strongly supported by the Department's forwarding days later the original Administrative Order by certified mail. This step, when viewed in the context of the facts of this case, effectively nullified the earlier service of the Order and started a new "30 day appeal clock." When considering all of these facts and inferences in a practical manner as instructed by the Commonwealth Court, we have no choice but to conclude that the final Department action did

[9] *Soil Remediation Systems, Inc. v. Department of Environmental Protection*, 703 A.2d 1081, 1084 (Cmwlth. Ct.

not occur until the certified letter enclosing the original Administrative Order was received by Laurel Land. It was certainly understandable, after a period of lengthy administrative negotiations with the Department, that the final action of the Department did not take place until the original Order was sent to Laurel Land by certified mail. Thus, Laurel Land was justified in relying on the Order sent by certified letter as the operative notice for purposes of the 30 day Appeal period. Consequently, Laurel Land's Notice of Appeal was timely filed.

1997).

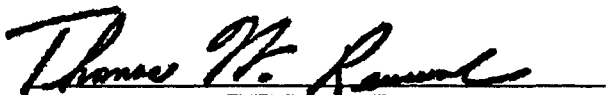
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LAUREL LAND DEVELOPMENT, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-033-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 20th day of June, 2003, after reviewing the facts in the light most favorable to the non-moving party and in a practical rather than a technical manner, the Department's Motion to Dismiss is **denied.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administration Law Judge
Member

DATE: June 20, 2003

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TJS MINING, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-136-L**
	:	**(Consolidated with 2002-137-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 2, 2003**

OPINION AND ORDER ON PETITION TO INTERVENE

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

Synopsis:

The Board denies UMWA's petition to intervene in an appeal involving miner safety issues because UMWA has failed to explain why it has a direct interest in the outcome of this appeal, as opposed to a general interest in the precedent that may be set. UMWA has also expressly declined to explain with any specificity what issues it would pursue if permitted to intervene and its position on those issues.

OPINION

TJS Mining, Inc. ("TJS") filed these consolidated appeals from two compliance orders issued by the Department of Environmental Protection (the "Department") because TJS evacuated miners using battery-operated equipment during a ventilation-fan stoppage. The United Mine Workers of America ("UMWA") has petitioned the Board to allow it to intervene in this matter.

It does not take much to be able to intervene in Board proceedings. 35 P.S. § 7514(e) ("Any interested party may intervene in any matter pending before the Board."); *Browning-Ferris, Inc. v. Department of Environmental Protection*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991) ("any person or entity interested, i.e., concerned, in the proceedings before the Board" may intervene). The Board's proceedings, however, are different in nature from a town hall meeting or other public fora where virtually everyone who cares to speak his or her mind may do so. Board proceedings constitute adversarial litigation, which means that a party-participant must have an actual stake in the outcome of the appeal at hand. *LTV Steel Company, Inc. v. DEP*, 2002 EHB 605, 606. A person who would participate as a party in an appeal must show that it will gain or lose by direct operation of the Board's determination. *Id.*; *Jefferson County v. DEP*, 702 A.2d 1063, 1065 n.2 (Pa. Cmwlth. 1997). The person's interest must be substantial, direct, and immediate. *Conners v. State Conservation Commission*, 1999 EHB 669, 671.

One would think that it would almost go without saying that UMWA would have a direct interest in any Board proceeding involving the safety of miners. Almost, but not quite. Here, UMWA has failed to explain why it has any direct interest in whether this Board upholds the issuance of the compliance orders to TJS. Instead, its sole basis for seeking intervention is that it is prosecuting a separate and unrelated appeal before the Board that is said to involve issues that are similar to the issues presented here. In other words, the result in this case may have an indirect impact on the case that UMWA actually cares about. This is the very definition of an interest that is indirect, and therefore, insufficient to confer standing or support a right to intervention.

UMWA's concern regarding the legal precedent that may be established in this case is similar to a steel manufacturer's concern in *Joseph J. Brunner, Inc. v. DEP*, EHB Docket No.

2002-304-L (February 14, 2003). The manufacturer petitioned to intervene in that case because it produced material utilized as alternate daily cover at landfills. It had an interest in whether a new disposal fee could be applied to such cover materials. The manufacturer, however, had no connection whatsoever with the Brunner landfill. Its interest was in the underlying legal issue--the precedent to be set. That precedent could have an indirect impact on how the Department assessed fees at those landfills that the manufacturer did use.

We rejected the manufacturer's petition, holding as follows:

> What USS is really arguing is that it has a keen interest in the legal issue that is presented in this appeal. A party with such an interest may very well be entitled to participate as an *amicus curiae*, but such as interest, without more, is insufficient to justify standing as a party. USS will not gain or lose by *direct* operation of anything that we decide *vis-à-vis* the Brunner landfill. *Cf. McCutcheon v. DER*, 1995 EHB 6, 9 (interest in trying to protect private business interest in use of certain cover material insufficient to confer standing); *Shoff v. DER*, 1995 EHB 140, 145-146 (same).

Id., slip op. at 4.

UMWA is in the same position here. In its own words, it has a general interest in ventilation fan stoppage plans, and what equipment may be used and how miners must evacuate when a mine fan stops, but it has pointed to no particular interest in or connection with the TJS mine. We would welcome UMWA's valuable input as *amicus curiae*, but we have no basis for granting it the equal rights and privileges of a *party* in this appeal.

The precedents established by this Board may relate to a limited audience, but they can nevertheless have a significant impact on a particular industry. For example, every landfill in the state probably has some interest in how this Board decides major appeals that relate to other landfills. But that interest in the precedent being established is not enough by itself to support

intervention by those unrelated landfills. A potential intervenor's interest must relate to a particular case and the outcome of *that* case, not just the topic being addressed.

UMWA's lack of an immediate interest is further evidenced by its failure to comply with the Board's rule regarding intervention. Although the Commonwealth Court has dictated that intervention is to be liberally allowed, it still must be pursued in accordance with the Board's rules. A person who would intervene in Board proceedings must describe in its petition the "specific issues upon which the petitioner will offer evidence or legal argument." 25 Pa. Code § 1021.81(b)(4). Instead of complying with this requirement, UMWA has stated as follows:

> The UMWA cannot now determine with specificity on which specific issues it will offer evidence or legal argument, though the UMWA may wish to participate in all aspects of this case.

This approach is not only inconsistent with the Board's rules, it provides further demonstration that UMWA has no specific interest in the fate of the orders that the Department issued to TJS.

Any time a party intervenes, it necessarily adds to the complexity of a case. The existing parties, and the Board, are entitled to know where a prospective party stands and how it intends to participate. A petition that does nothing more than note that it will "let us know" is unacceptable. Among other things, we do not even know where UMWA would have us place it in the caption.[1]

Neither TJS nor the Department filed any response in favor of or opposed to UMWA's petition. Therefore, we will deny UMWA's petition without prejudice to its right to a file a new petition if it (1) explains why it has a direct stake in the outcome of the compliance orders at the

[1] TJS recently defeated a Departmental motion for summary judgment by pointing to evidence and argument that would support a finding that the Department's enforcement position jeopardizes the health and safety of miners. The Department, of course, is convinced that its approach is in the better interest of the miners. We have no idea at this point who is right, and it would be entirely inappropriate for us to simply assume that UMWA agrees with the Department or TJS, or that it has some third position.

TJS mine, and (2) complies with the Board's rules. In any event, UMWA remains free to participate as an *amicus curiae*.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TJS MINING, INC.	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2002-136-L (Consolidated with 2002-137-L)**

ORDER

AND NOW, this 2nd day of July, 2003, the UMWA's petition to intervene is denied without prejudice.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: July 2, 2003

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BETH A. PIROLLI, Appellant	:	
	:	
v.	:	**EHB Docket No. 2003-031-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION; LOWER BUCKS COUNTY JOINT MUNICIPAL AUTHORITY, Permittee; WASTE MANAGEMENT OF PENNSYLVANIA, INC., Intervenor	:	**Issued: July 24, 2003**

OPINION AND ORDER ON MOTION TO DISMISS AND MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

By Michael L. Krancer, Administrative Law Judge, Chairman

Synopsis:

The Board grants a joint motion to dismiss filed by Intervenor and Permittee and a Motion to Dismiss or for Summary Judgment filed by the Department. The Appellees raised important legal questions in their motions concerning, among other things, the scope of the Board's jurisdiction and mootness. Appellant failed to file any response to either motion. Rather than engage in discussion of these issues creating precedent in an "empty-chair" litigation, the Board takes the failure to respond as a sign of Appellant's lack of further interest in the appeal, her abandonment of the appeal, *non pros* of the appeal, or all of those things. Accordingly, and in further light of Pa. R. Civ. P. 1035.3(d), the Board grants both motions and dismisses this appeal.

I. Background

Before us today is the Joint Motion to Dismiss of Intervenor Waste Management of Pennsylvania, Inc. and Permittee Lower Bucks County Joint Municipal Authority (Joint Motion

to Dismiss), filed on June 4, 2003, and the Department's Motion to Dismiss or for Summary Judgment (DEP Motion), filed on June 23, 2003.[1] No response to either the Joint Motion to Dismiss or the DEP Motion has been filed.

This appeal purportedly concerns the Department's concurrence in a joint proposal of the Lower Bucks County Joint Municipal Authority (LBCJMA) and Waste Management of Pennsylvania, Inc. (WMPI) to undertake an initial phase of a pilot study for the proposed introduction of landfill leachate flow into LBCJMA's publicly-owned wastewater treatment works in Levittown, Pennsylvania. Intervenor, WMPI owns two municipal landfills, GROWS and Tullytown Landfill, located respectively in Falls Township and Tullytown Borough, which accept municipal waste from lower Bucks County.[2] For years, the two landfills have channeled their leachate to the GROWS Landfill where the leachate is stored on site and then introduced into GROWS Landfill's captive leachate treatment plant. Sometime before May of 2002, WMPI approached LBCJMA about the possibility of WMPI discharging the landfill leachate being treated at the GROWS captive facility into the LBCJMA wastewater treatment plant. If this project came into fruition, the quantity of discharged leachate would ultimately range from between 50,000 and 100,000 gallons per day on a monthly average. The LBCJMA treatment plant has sufficient available capacity to accept this new waste stream. After consulting with the Department, LBCJMA decided to conduct a pilot study in which the leachate would be temporarily accepted by the treatment plant and testing would be performed to ascertain the effect, if any, on plant effluent from introduction of the new waste stream.[3]

---

[1] The Joint Motion to Dismiss was served by mail upon Ms. Pirolli on June 2, 2003 and the DEP Motion was served on Ms. Pirolli by mail on June 17, 2003.

[2] WMPI filed a petition to intervene on April 14, 2003 which was granted on April 28, 2003.

[3] *See* Notice of Appeal (attached letter from Department to August Baur, dated August 30, 2002, re: Phase 1 of pilot study to accept landfills leachate at POTW Levittown Wastewater Treatment Plant, Bristol Township, Bucks County); Department Memorandum in Response to Motion, at 2-3.

In May 2002, LBCJMA submitted to the Department a description of the parameters of a pilot study for the discharge of the WMPI leachate to the LBCJMA facility. The pilot study was envisioned to be conducted in progressive phases. The Phase I portion of the pilot study called for introducing leachate flow into the LBCJMA treatment plant starting at 10,000 gallons per day and increasing over several months to 50,000 gallons per day. During the study period the raw leachate, plant influent and plant effluent would be sampled and analyzed for 180 parameters.

The Department issued a letter to LBCJMA, dated August 30, 2002, which stated that,

> We have completed our review of your proposal . . . to conduct a pilot study for the discharge of leachate from [the WMPI landfills] to the [LBCJMA plant]. Phase I of this study is limited to 50,000 gallons per day of leachate at the plant. The approval to conduct the pilot study is granted with the following requirements.

Joint Motion to Dismiss, Ex. A (the August 30, 2002 Letter). The August 30, 2002 Letter then outlines nine separate requirements and provisos. Eight of the nine conditions/provisos relate to technical and/or monitoring issues. The ninth enumerated proviso, which we quote because it figures prominently in the Joint Motion to Dismiss and the DEP Motion, states that, "this approval shall expire 180 days from the date of this letter." The date which is 180 days from August 30, 2002 is **February 26, 2003**.

Appellant Beth Pirolli, a resident of Tullytown Borough, appealed the Department's August 30, 2002 Letter. Ms. Pirolli filed her appeal, *pro se*, on February 11, 2003 in the form of a letter dated February 4, 2003, after having learned of the pilot study from a local newspaper article.[4] Appellant objects to the Department's approval of the pilot study on various grounds. She contends that the physical condition of the LBCJMA treatment works is not adequate to withstand the addition of the leachate waste stream. She asserts that the system pipes are over

[4] The appeal was subsequently perfected on March 19, 2003 by the submission of information required by Board Rules.

fifty years old, and that the corrosive characteristics of the leachate will result in damages to the system and unintended harmful discharges from the pipes into the environment. According to Appellant, the Department improperly failed to account for the potential adverse effects on the sewer system and the environment when approving the pilot study. Ms. Pirolli also contends that a public meeting should have been held by LBCJMA and township officials concerning the pilot study prior to its implementation. She also alleges improprieties and conflicts of interest were involved in the LBCJMA's approval of embarking on the pilot study.

The Joint Motion to Dismiss and DEP Motion raise several substantial legal issues. First, all appellees argue that the August 30, 2002 Letter is not a final action, is, therefore, not appealable, and, therefore, the Board does not have jurisdiction over this appeal. They argue that the pilot program was not required to have Department approval to implement and that Department concurrence was sought only as a protective measure just in case the parties wanted to graduate the pilot program into a permanent one. The Department points out in this regard that at such time as the LBCJMA and WMPI may want to have the leachate sent to and treated at the LBCJMA facility on a permanent basis an amendment to the LBCJMA NPDES permit would be required. As such, there is no Department "action" involved at this stage and, as the Department puts it, Ms. Pirolli's appeal letter amounts to no more than a "letter of protest". The appellees also argue that, even if the August 30, 2002 Letter could be considered a final appealable action, the matter is now moot since the August 30, 2002 Letter, by its terms, expired 180 days hence which was on February 26, 2003.

II. Discussion

As we said before, Pirolli has filed no response to the Joint Motion to Dismiss filed on June 4, 2003 or to the DEP Motion filed on June 23, 2003. The Joint Motion to Dismiss was served on Ms. Pirolli by mail on June 2, 2003 and the DEP Motion was served on Ms. Pirolli by

mail on June 17, 2003. The time under the Rules for responses has passed. *See* 25 Pa. Code §§ 1021.35, 1021.94(d) (thirty days for response to which three days are added if service was by mail). We think that it is not beneficial to anyone to engage in a dissertation about the important legal issues raised by LBCJMA, WMPI and the Department in their respective motions, thus creating precedent, in the context of "empty-chair" litigation. Rather than engage in discussion of difficult and important legal issues such as appealability, our jurisdiction, and mootness in the vacuum of and without the benefit of any response from the opposing party, we will simply take Pirolli's twin failure to respond as a sign that she now lacks interest in this appeal, has abandoned her appeal, has fallen into a *non pros* mode for her appeal, or all of those things. Accordingly, in light of that, and in further light of Pa. R. Civ. P. 1035.3(d) (summary judgment may be entered against a party who does not respond to the motion against it) we grant the Joint Motion to Dismiss and the DEP Motion and dismiss this appeal.

We thus enter the following Order.

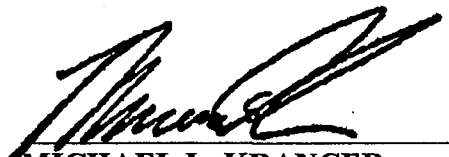
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BETH A. PIROLLI, Appellant	:	
	:	
v.	:	**EHB Docket No. 2003-031-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION; LOWER BUCKS COUNTY JOINT MUNICIPAL AUTHORITY, Permittee; WASTE MANAGEMENT OF PENNSYLVANIA, INC., Intervenor	:	

ORDER

AND NOW, this 24th day of July, 2003, it is hereby ordered that the Joint Motion to Dismiss of Waste Management of Pennsylvania, Inc. and the Lower Bucks County Joint Municipal Authority filed on June 4, 2003 and the Motion of the Department to Dismiss or for Summary Judgment filed on June 23, 2003 are both GRANTED, and the appeal at EHB Docket No. 2003-031-K is hereby dismissed.

ENVIRONMENTAL HEARING BOARD



MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

EHB Docket No. 2003-031-K

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Dated: July 24, 2003

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

EARTHMOVERS UNLIMITED, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-108-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 31, 2003**
	:	

OPINION AND ORDER ON
MOTION TO DISMISS

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

Synopsis:

The Board denies the Department's motion to dismiss a contractor's appeal from a Departmental determination that the contractor is ineligible to enter into a grant-funded tire remediation contract with a township. The Department's motion is premised upon the incorrect characterization of the appeal as a disappointed bidder's challenge to a contract award.

OPINION

At this point in this somewhat unusual appeal, it appears that Earthmovers Unlimited, Inc. ("Earthmovers") is appealing from the determination by the Department of Environmental Protection (the "Department") that Earthmovers was not eligible to enter into a grant-funded contract with Antis Township to perform a waste-tire remediation project. The Department's determination of ineligibility was apparently based upon the Department's view that Earthmovers had unresolved violations of the Solid Waste Management Act, 35 P.S. §§

6018.101-6018.1003. Earthmovers challenges the factual and legal bases for this ineligibility determination.

The Department has moved to dismiss the appeal. It characterizes Earthmovers as a disappointed bidder and argues that Earthmover's appeal is essentially a bid challenge. (Motion, ¶ 11.) It contends that any decision that this Board might make in this appeal "necessarily impacts the Antis contract itself." It asserts that, due to the absence of "indispensable parties," the absence of an appealable action, and the fact that Earthmovers lacks standing because it is not a taxpayer of Antis Township, this Board cannot or should not adjudicate this appeal.

The Department seems to be under the mistaken impression that Earthmovers is attempting to challenge the actual award of the waste-tire contract to another party. If that were the case, the Department's arguments might have had some merit. As we understand the case, however, Earthmovers' disagreement is not with the Township or the successful bidder, and it does not implicate the award of the contract itself. Earthmovers does not seek any relief from this Board regarding the award of the contract, and we do not agree that any action that this Board could take in the exercise of its defined jurisdiction in this matter would "necessarily impact the Antis contract itself." Rather, it is clear to us that Earthmovers is appealing from the *determination* by the *Department* that Earthmovers was not an eligible contracting party. The Department concedes (*see* Motion ¶¶ 4, 17, and 19), as it must, *see* 2 Pa.C.S. § 101; 25 Pa. Code § 1021.2; S*ee also* 35 P.S. § 7514(a), that Departmental "determinations" are appealable.[1]

In its reply memorandum, the Department seems to retreat from the references that it made to "determinations" in its motion, instead arguing that the Department's finding of ineligibility must qualify as a "decision" before this Board may review it. (Reply p. 7.) We

[1] The Department denies that it in fact made such a determination (Reply p. 6 n.3), but the motion before us is not the proper context in which to resolve that factual dispute.

believe the Department got it right the first time, but even if we were inclined to engage in semantics, *deciding* that a party is ineligible to work on a grant-funded project qualifies as an appealable action as readily as *determining* that a party is ineligible.

A governmentally imposed contract bar is a serious matter. The Department's determination that is at issue in this matter may well have been the equivalent of such a bar. The Department is simply incorrect in stating that such a bar has no significance separate and apart from the Antis contract. As far as we know, the bar is still in place and will have a continuing impact on Earthmovers' ability to enter into state-funded projects. Absent relief from this Board, the Department presumably remains free and unfettered in its ability to broadcast Earthmovers' purported ineligibility throughout the Commonwealth.[2] The Department's suggestion that Earthmovers' interest in this matter is anything other than substantial, direct, and immediate is difficult to understand and impossible to accept. Furthermore, neither the Township nor the successful bidder played any apparent role in the Department's determination and their absence in the litigation will have no effect or significance. Earthmovers was the lone object of the Department's determination, and whether Earthmovers is a taxpayer of the Township also has no relevance. In short, the Department's demur to this appeal, premised as it is upon the incorrect characterization of the case as a disappointed-bidder action, is without merit.

Accordingly, we issue the order that follows.

---

[2] We suggest nothing regarding Earthmovers' claims on their merits. The Department's motion has forced us to accept all of the Earthmovers' assertions as true at this stage in the proceedings, and that is the limit of our intent.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EARTHMOVERS UNLIMITED, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-108-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 31st day of July, 2003, the Department's motion to dismiss is DENIED.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: July 31, 2003

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CITY OF ERIE and JAMES B. POTRATZ	:	
	:	
v.	:	**EHB Docket Nos. 2003-084-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ERIE CITY WATER AUTHORITY, Permittee	:	**Issued: July 31, 2003**

OPINION AND ORDER ON MOTION TO WITHDRAW APPEAL

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

In this companion Appeal to the one filed in *City of Erie v. DEP and Erie City Water Authority* [1] the Board reaches the same result regarding the Motion to Withdraw filed by the Erie City Solicitor. Pursuant to Plan A of the Optional Third Class City Charter Law the executive power of the City of Erie shall be exercised by the Mayor. Since the Mayor neither directed nor approved the filing of a Notice of Appeal before the Environmental Hearing Board, the Motion to Withdraw Appeal filed by the Erie City Solicitor is granted.

Discussion

Two appeals have been filed before the Environmental Hearing Board opposing the Pennsylvania Department of Environmental Protection's (Department) issuance of permits allowing the fluoridation of city water by the Erie City Water Authority. The first Appeal filed

[1] EHB Docket No. 2003-018-R.

by Attorney Joseph Tinko in the name of the City of Erie as Appellant involved the permit issued by the Department for the operation of a fluoridation facility at the Sommerheim Water Treatment Plant located in Millcreek Township, Erie County, Pennsylvania. The second Appeal filed by Attorney Joseph Tinko on behalf of the City of Erie and James B. Potratz involves the permit issued by the Department for the operation of a fluoridation facility at the Chestnut Street Water Plant located in the City of Erie.

In the first appeal, we granted the Motion to Withdraw Appeal filed by the Erie City Solicitor. We held that the initiation of an action including the filing of an appeal before the Environmental Hearing Board was specifically entrusted by law to the executive branch through the office of Erie's Mayor. Since the Mayor of the City of Erie neither directed nor authorized the City Solicitor to appeal the issuance of the permit issued by the Department we granted the City Solicitor's Motion to Withdraw Appeal.[2]

Presently before the Board is a Motion to Withdraw (Motion) filed again by Erie City Solicitor Paul Curry and again raising the same objections in somewhat greater detail. Likewise, Attorney Tinko expands on his same arguments in opposition.

After carefully reviewing the Motion, Response, and Legal Memoranda with supporting documents, we remain convinced that we were correct in our original holding. Actions such as this appeal before the Environmental Hearing Board on behalf of the City of Erie must be brought by the City Solicitor or his designee.

This does not in any way prohibit Erie City Council from hiring special counsel for the purpose of representing City Council's interest and filing appeals in the name of City Council.

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[2] *City of Erie v. DEP and Erie City Water Authority*, EHB Docket No. 2003-018-R. (Opinion issued on May 7, 2003).

For example, see *City Council of Pittsburgh v. City of Pittsburgh*[3] illustrating the clear ability of a city council to bring an action as a legal entity against a city administration. To adopt Attorney Tinko's position would negate the specific provisions of state law setting up this form of city government for the citizens of Erie. It would also result in an absurd race to the courthouse and result in a usurpation of the power of Erie's executive branch of government. As stated in our first Opinion, and which we emphasis again, passing a resolution and executing an employment agreement with a private attorney does not enable City Council to wield the executive power of the City of Erie.

Since, this appeal was brought both in the name of the City of Erie and James Potratz, our opinion and order does not affect the merits of the action brought by Mr. Potratz. The appeal may proceed in his name alone.

We will issue an Order accordingly.

[3] 625 A.2d 138 (Pa. Cmwlth. 1993).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITY OF ERIE and JAMES B. POTRATZ	:	
	:	
v.	:	**EHB Docket No. 2003-084-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ERIE CITY WATER AUTHORITY, Permittee	:	

ORDER

AND NOW, this 31st day of July, 2003, it is ordered as follows:

1) The Motion to Withdraw Appeal on behalf of the City of Erie filed by City of Erie Solicitor Paul Curry is ***granted.***
2) The Appeal will proceed in the name of Appellant, James B Potratz, ***only***. The caption is amended accordingly.
3) The parties, on or before **Thursday, August 14, 2003**, will file separate status reports with the Board discussing, *inter alia*, discovery extensions to the deadlines set forth in Pre-Hearing Order No. 1, whether they plan on filing any dispositive motions, when they will be ready for a hearing on the merits of this Appeal, and estimated trial days.

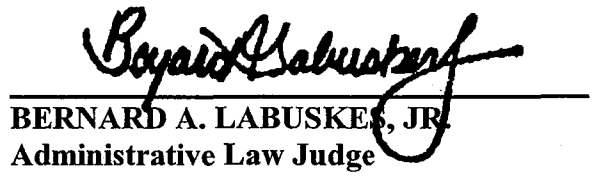
ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: July 31, 2003

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

NEVILLE CHEMICAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 2002-170-R**
	:	**(Consolidated with 2003-061-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 4, 2003**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board denies the Department's motion to dismiss and holds that the Department's denial of a revised conceptual cleanup plan submitted as part of an Act 2 remediation is appealable. Section 308 of Act 2 does not limit appealable actions to decisions made only on those documents specified in Chapter 3 of Act 2, but simply clarifies that such decisions are to be considered final, appealable actions. The attachment of a copy of the revised conceptual cleanup plan to the appellant's brief as opposed to its response may be disregarded under Section 1021.104 of the Board's rules.

OPINION

This matter involves two appeals filed by Neville Chemical Company (Neville), the owner and operator of the Neville Chemical Plant (facility) along the Ohio River in Neville

Township, Allegheny County. The first appeal, docketed at No. 2002-170-R, is from a June 26, 2002 Order of the Department of Environmental Protection (Department) that charges Neville with violations of the Clean Streams Law and Solid Waste Management Act and directs Neville to take a number of steps with regard to alleged contamination resulting from Neville's operation of the facility. Subsequent thereto, and pursuant to the Land Recycling and Environmental Remediation Standards Act (Act 2), Neville submitted to the Department a number of documents including a notice of intent to remediate the site and a proposed conceptual cleanup plan. On November 22, 2002, Neville submitted a revised conceptual cleanup plan, which the Department denied. Neville filed an appeal from the denial which was docketed at No. 2003-061-R. The two appeals were consolidated. Presently before the Board is the Department's motion to dismiss the appeal of the denial of the revised conceptual cleanup plan, asserting it is not a final appealable action.

Standard of Review

The Board evaluates motions to dismiss in the light most favorable to the non-moving party.[1] A motion to dismiss may only be granted where there are clearly no material factual disputes and the moving party is entitled to judgment as a matter of law.[2]

Procedural Argument

Procedurally, the Department asserts we should dismiss Neville's response because it fails to comply with § 1021.94(f) which states that "an affidavit or other document relied upon in support of a dispositive motion or response, that is not already part of the record, shall be

[1] *Ainjar Trust v. DEP*, 2000 EHB 505, 507, *aff'd*, 806 A.2d 482 (Pa. Cmwlth. 2002).
[2] *Laurel Land Development, Inc. v. DEP*, EHB Docket No. 2003-033-R (Opinion issued June 20, 2003); *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281.

attached to the motion or response or it will not be considered by the Board in ruling thereon."[3] Although Neville did submit a copy of the revised conceptual cleanup plan in support of its response, the document was attached to the brief rather than the response.

While the Department is technically correct with regard to the attachment of exhibits to a response to a dispositive motion, pursuant to Board Rule 1021.4 we may disregard this technical error. Rule 1021.4 states as follows:

> The rules in this chapter shall be liberally construed to secure the just, speedy and inexpensive determination of every appeal or proceeding in which they are applicable. The Board at every stage of an appeal or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.[4]

Rule 1021.4 is even more pertinent here where the Department is asking us to dismiss Neville's appeal. Doing so on the basis of an exhibit being attached to a brief instead of a response would be a harsh result. As set forth in *Kleissler v. DEP*,[5] "the Board's preference is to decide motions based on the merits rather than procedural technicalities, so long as the substantive rights of the parties are unaffected."[6] Here, the Department has not been prejudiced by the physical attachment of the exhibit to the brief as opposed to the response. On the contrary, justice would not be served if we were to dismiss this appeal based on such a

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[3] 25 Pa. Code § 1021.94(f).
[4] 25 Pa. Code § 1021.4.
[5] 2002 EHB 737, 739.
[6] *Goheen v. DEP*, 2002 EHB 909, 910, n.1 ("...in the interests of deciding the motion on the merits, we will disregard [the appellant's] alleged procedural error"). *See also Palmer v. Helm*, 219 A.2d 349 (Pa. 1966) (J. Musmanno dissenting), which addressed whether supplemental nominating petitions could be filed on behalf of a candidate where they were not attached to the original petitions. In a dissent, Justice Musmanno stated, "It is almost incredible that in this advanced state of common sense interpretations of technical formalisms of the law, a fundamental privilege of citizenship is denied because a 't' is not crossed or an 'i' not dotted."

technicality. As Chief Judge Krancer noted in *Kresge v. DEP*,[7] the purpose of Rule 1021.4 is to prevent such an outcome for "justice is to be assigned an important role in our decision-making....we think that Rule 1021.4 enunciates the salutary policy that cases should be decided on their merits and not based on procedure or a lawyer's possible mistake about a particular procedural nuance."

Substantive Argument

The Department argues that we should dismiss Neville's appeal because the denial of the revised conceptual cleanup plan is not an appealable action. It is the Department's position that the denial of the revised conceptual cleanup plan has no impact on Neville's rights or obligations and, therefore, judicial economy would not be served by the Board's review of it.

The Board uses the following analysis for determining whether an action of the Department is appealable:

> Section 4(a) of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended,* 35 P.S. §§ 7511-7514, § 7514(a), provides that the Board has jurisdiction over "orders, permits, licenses, or decisions of the Department". Our jurisdiction attaches over an "adjudication" as defined under the Administrative Agency Law or an "action" as defined under the Board's Rules of Practice and Procedure. Under the Administrative Agency Law an "adjudication" is defined as, "[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made." Administrative Agency Law, Act of April 28, 1978, P.L. 202, *as amended*, §§ 101-754, 2 Pa. C.S.A.§101. Under Board Rule 1021.2 an "action" is "[a]n order, decree, decision, determination, or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including but not limited to a permit, a license, approval or certification". [8]

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[7] 2001 EHB 1169, 1174.

[8] *Felix Dam Preservation Assn. v. DEP*, 2000 EHB 409, 421-22.

According to the Department, the revised conceptual cleanup plan is not a report required by Act 2 and, whether approved or denied, it is pure speculation as to whether Neville will develop the revised conceptual cleanup plan into a cleanup plan that comports with the requirements of Act 2. The Department contends that the appropriate time for an appeal to be taken is when the Department makes a decision on any final cleanup plan that is submitted.

In response, Neville argues that Act 2 does not limit appealability to only those documents specifically required by the act. Neville further asserts that the Department's denial of the revised conceptual cleanup plan does, in fact, affect its rights and obligations since it determines whether Neville will proceed with the project, thereby meeting the test for whether its action is appealable.

We first address the Department's assertion that only the approval or denial of those documents specifically required by chapter 3 of Act 2 are appealable. The Department bases its argument on the language of Section 308 of the Act which is entitled "Appealable Actions" and reads as follows:

> Decisions by the Department involving the reports and evaluations required under this chapter shall be considered appealable actions under the act of July 13, 1988 (P.L. 530, No. 94), known as the Environmental Hearing Board Act.[9]

The Department reads this section as saying that only Department decisions made on reports and evaluations enumerated in chapter 3 of Act 2 (the chapter containing remediation standards) may be considered final, appealable actions. Accordingly, argues the Department, it follows that decisions on non-enumerated reports are not appealable.

Neville asserts that Section 308 should not be read as limiting which Department actions

may be appealed, and if the Legislature had intended that result, Section 308 would have read "*only* decisions by the Department involving the reports and evaluations required under this chapter shall be considered appealable actions...."

Chapter 3 of Act 2 discusses a variety of documentation that may be required by a participant in the Act 2 process, depending on which course of action is taken. These include a remedial investigation report, a risk assessment report, a cleanup plan and a final report. Section 308 clarifies that decisions by the Department on *all* of these submissions, and not just the document labeled *final* report, are to be considered final actions that may be appealed to the Environmental Hearing Board. Based on the clear language of Section 308, we find that the Legislature did not intend to limit appealability to only the documents listed in Chapter 3; rather, its intent was to clarify that decisions on all of these documents are appealable.[10] In fact, we see Section 308 as a strong indication that the Legislature wanted to make sure that decisions at each level of the Act 2 process are appealable. Were we to follow the Department's argument, any decisions on submissions made to the Department not specifically listed in Chapter 3 of Act 2, even if they met the criteria for being a final, appealable action, would not be treated as such since they were not listed by name in Chapter 3.[11] As we have said on a number of occasions, it is the substance of the document being appealed and not its label that determines its

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[9] 35 P.S. § 6026.308.

[10] "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921.

[11] In footnote 5 of its brief, Neville states that an argument could be made that the revised conceptual cleanup plan is, in fact, a document listed in Chapter 3 since it falls into the category of "cleanup plan." Neville states that the plan was submitted, with the Department's concurrence, as a preliminary assessment tool and the definition of "cleanup or remediation" includes "preliminary actions to study or assess the release." 35 P.S. § 6026.103. However, because Neville did not pursue this argument other than mention of it in a footnote, we will not address it.

appealability.[12]

This takes us to the next question which is whether the Department's denial of Neville's revised conceptual cleanup plan meets the criteria for being a final action. In *Borough of Kutztown v. DEP*,[13] Judge Labuskes wrote:

> [T]he cases illustrate that it is impossible to paint a bright line between those Departmental actions that affect a party's personal or property rights to such a degree that immediate Board review is warranted, and those Departmental actions that do not. Therefore, the determination must be made on a case-by-case basis. *Ford City v. DER*, 1991 EHB 169, 172. Although the results may vary, the same factors should be considered in every case. In deciding whether a Departmental letter constitutes a final "action" or "adjudication," we consider such factors as the wording of the letter, the substance, meaning, purpose, and intent of the letter, the practical impact of the letter (with an eye to what actions a reasonably prudent recipient of the letter would take in response to the letter), the regulatory and statutory context of the letter, the apparent finality of the letter, what relief the Board can offer (i.e., the practical value of immediate Board review), and any other indicia of a letter's impact upon its recipient's personal or property rights.[14]

To determine appealability, we start with the specific wording of the letter. Here the Department's letter concluded with the following language:

> In summary, the 11/02 Act 2 RCCP [revised conceptual cleanup plan] is hereby denied because it does not meet the conditions of the September 1, 2000 Act 2 Remedial Investigation Report approval letter and is not designed to eliminate the unauthorized

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[12] *Felix Dam, supra.; Bituminous Processing Co., Inc. v DEP*, 2000 EHB 13; *United Refining Company v. DEP*, 2000 EHB 132.

[13] 2001 EHB 1115, 1121.

[14] *See also, County of Berks v. DEP*, EHB Docket No. 2002-286-K (Opinion and Order issued February 4, 2003) ("A review of the caselaw reveals certain principles which guide the determination of whether a particular DEP action is appealable. Although formulation of a strict rule is not possible...the Board has articulated certain factors which should be considered. These include: the specific wording of the communication; its purpose and intent, the practical impact of the communication; its apparent finality; the regulatory context; and, the relief which the Board can provide.), *slip op.* at 6 (citations omitted) (quoting from *Beaver v. DEP*, 2002 EHB 666, 673.)

> discharges of Oils from the facility to off-site properties and into the Ohio River. We consider Neville Chemical to be in non-compliance with Paragraph 2 of the 2002 Order and intend to pursue additional enforcement actions. I hope that you will reconsider the approach Neville Chemical has taken to date and offer to significantly modify your proposal in accordance with this letter.

The purpose of the letter is to require Neville to take immediate action, i.e. modify its proposed cleanup plan and take steps to prevent future discharges or be prepared for further enforcement action. As stated in *Kutztown*, the letter "is imperative, not advisory...It is not just descriptive, it is prescriptive."[15] The Department argues that the denial of the revised conceptual cleanup plan is simply provisional and that no appeal should follow unless and until Neville submits a final cleanup plan that is denied by the Department. In response, Neville asserts as follows:

> [T]he Denial is not a small or provisional decision. Neville Chemical and its experts have spent considerable time ensuring that the RCCP [revised conceptual cleanup plan] is a remediation plan that protects public health and the environment, meets the Act 2 site-specific standards and is technically and economically feasible. The RCCP is the structure and framework upon which Neville Chemical will develop its full cleanup plan and base its future decisions in remediating the Facility. If appeal of the Denial is not allowed, Neville Chemical will be forced to either change its approach in a way that is not technically or economically feasible or spend additional time and money preparing a fully developed cleanup plan from the RCCP, knowing that the Department will almost certainly deny the full cleanup plan. An appeal at a later date would only delay remediation efforts and waste Neville Chemical's time and money. When the Legislature enacted Act 2, it sought to promote cleanup, not hamstring well-intentioned remediation efforts by encouraging remediators to work with the Department early in the remediation process, yet, at the same time, preventing them from appealing Departmental decisions which

[15] *Id.* at 1122 (citations omitted).

would alter the course of all future work at a site.[16]

We agree with Neville that the intent of the Legislature, as evidenced by Section 308 of Act 2, was to allow participants in the Act 2 process to appeal decisions of the Department throughout each phase of the process, not spend time and money developing a final cleanup plan that ultimately will not be approved.

In *Decker v. DEP*,[17] the Board addressed whether approval of a special study recommending the expansion of a sewage treatment plant was a final, appealable action. The approval was appealed by a resident of one of the municipalities served by the plant. The sewer authority sought to dismiss the appeal based on a number of factors, including that the approval of the expansion was not an appealable action. In making its argument for dismissal, the sewer authority pointed out that subsequent permits and approvals would be necessary before the plant could be expanded. In dismissing this argument, Judge Labuskes noted that the appeal involved a planning case and the fact that subsequent permits would be necessary did not make the conceptual approval of the plant expansion any less appealable.

While this is not a "planning case," the Department's position is inconsistent with the apparent intent of Act 2, which is to encourage voluntary remediation and to allow appeals earlier in the approval process. Here, the Department's decision on the revised conceptual cleanup plan has certainly affected Neville's personal and property rights and obligations. Neville is left with two choices. It can spend additional time and money developing the revised conceptual cleanup plan into a final cleanup plan, submit it to the Department, await the Department's denial and further enforcement action, and then file an appeal. Or, it can go back to the drawing board and start over. The first choice makes no sense; the second is a strong

[16] Neville Brief, p. 13-14.

indication as to the finality of the Department's decision on the revised conceptual cleanup plan.

We noted earlier that we must look to the wording of a Department letter to determine whether it is appealable. A second factor to consider is whether we are able to grant any meaningful relief. As noted in *Kutztown*:

> At the most basic level, the requirement that a Departmental act be an "action" or an "adjudication" before this Board may get involved is based on the principle that Board review is unnecessary and inappropriate in academic disputes or in cases where a person does not have anything at stake. *See Boyle Land and Fuel Co. v. DER*, 1982 EHB 326 (Board does not issue advisory opinions). Thus, analyzing whether the Board could offer any meaningful relief to a particular party with respect to a particular letter is helpful in assessing whether it constitutes an appealable action.[18]

As in *Kutztown*, the Board's review involves more than merely the issuance of an advisory opinion. We might well conclude that the Department erred in denying the revised conceptual cleanup plan and relieve Neville of the expense and time of developing another plan.

Finally, we note that had Neville not appealed the denial of the revised conceptual cleanup plan but then appealed the denial of any cleanup plan based thereon, it could have been met with a challenge based on administrative finality. This would have precluded it from appealing any of the requirements or findings of the Department's denial of its revised conceptual cleanup plan in a subsequent proceeding. Although we will not speculate as to whether such a challenge based on administrative finality would have prevailed, we agree with the holding in *Kutztown* that "if a letter is definitive enough to possibly support a claim of administrative finality, it is likely that it is definitive enough to constitute an appealable

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[17] 2002 EHB 108.
[18] 2001 EHB at 1124.

action."[19]

Accordingly, we issue the following order:

[19] *Id.* at 1124-25.

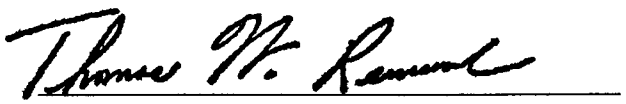
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEVILLE CHEMICAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 2002-170-R**
	:	**(Consolidated with 2003-061-R)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 4th day of August, 2002, the Department's motion to dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administration Law Judge
Member

DATE: August 4, 2003

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

MON VIEW MINING CORP.	:	
	:	
v.	:	**EHB Docket No. 2003-102-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 12, 2003**

OPINION AND ORDER ON DEPARTMENT'S MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where the Department of Environmental Protection forfeits bonds covering a deep mine and a coal refuse disposal area it is an appealable action of the Department. The mining company to whom the action is directed has 30 days from when it receives written notice of the Department's action to file an appeal with the Environmental Hearing Board. In this case, because of alleged inadvertence, the mining company did not file its Appeal with the Board until after the 30 day appeal period had expired. It did serve its Appeal with the Department of Environmental Protection within the 30 day period. The Appeal is untimely. The jurisdiction of the Board does not attach to untimely appeals which include those served only on the Department. In this case, there are no legal grounds to allow an appeal *nunc pro tunc*. The alleged inadvertence was not caused by any action of the Board.

OPINION

Factual Background

Appellant, Mon View Mining, is a Pennsylvania Corporation and is the permittee for the Mathies Mine. Mon View Mining was authorized by the Pennsylvania Department of Environmental Protection (Department) to mine coal pursuant to a Coal Mining Activity Permit and a Coal Refuse Disposal Permit. The Mathies Mine is located in Washington County, Pennsylvania. It consists of underground mine workings, a coal refuse pile, a coal preparation plant, water treatment plant, and a slurry impoundment.

As part of its permit obligations and as required by various provisions of the Mine Subsidence Act,[1] Coal Refuse Disposal Act,[2] the Surface Mining Act,[3] and various regulations,[4] Mon View Mining posted bonds in the amount of $1,852,650 for the Mathies deep mine and $293,806.30 for the Mathies coal refuse permit area.

Mining has ceased at the Mathies deep mine and Mon View Mining stopped operating the pumping and treatment system at the Mathies mine in the spring of 2002. Since that time the Department of Environmental Protection has sought to address various environmental issues arising from the mine including discharges of acid mine water, problems with the flooding of a public road caused by an overflowing pond, and the need to provide temporary water supplies to residents whose water supplies have been adversely affected by the mining.

On October 25, 2002, because of various alleged failures of Mon View Mining to follow

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1 Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, Special Sess. No. 1, P.L. 31, *as amended*, 52 P.S. §§ 1406.1 - 1406.21.

2 Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, No. 318, *as amended*, 542 P.S. §§ 30.51 - 30.206.

3 Surface, Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, No. 418, *as amended*, 52 P.S. 1396.1 - 1369.31.

4 25 Pa. Code §§ 86.143, 86.148 - 86.152, and 86.155 - 86.167.

specific provisions of the mining statutes and regulations, the Department issued a written Notice of Intent to Forfeit Bonds held for the Mathies deep mine and the associated coal refuse disposal area to Mon View Mining. The written Notice of Intent to Forfeit Bonds was followed by the Department's certified letter forfeiting the bonds. This letter was dated March 7, 2003 and was received by Mon View Mining on March 10, 2003. The Department stated that "[b]ecause you have continued to fail to correct the violations and to reclaim the area affected by your mining operations at the above-referenced site, the Department hereby declares forfeit, in the full amount, the bonds posted for the above-referenced surface mining operations." The letter indicates that appeals of this action of the Department "must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action...." It clearly lists the Environmental Hearing Board's address and telephone number and further advises that "[c]opies of the appeal form and the Board's rules of practice and procedure may be obtained form the Board."

According to Mon View Mining, on or about April 3, 2003, it served its appeal with the Department of Environmental Protection, Office of Chief Counsel and Mr. Joseph G. Pizarchik, the Director of the Bureau of Mining and Reclamation. Sometime thereafter, "it was discovered that a copy was inadvertently not sent to the Environmental Hearing Board." Therefore, on April 28, 2003 Appellant "did take steps to notify the [Environmental] Hearing Board immediately of its decision to appeal and file another appeal with them."

The Department's Motion to Dismiss

Presently before the Board is the Department's Motion to Dismiss (Motion). In its Motion, the Department asserts that the Board lacks jurisdiction over Mon View Mining's appeal of the Department's decision to declare Mon View Mining's bonds forfeit because Mon View Mining filed

its appeal more than thirty days after it received notice of the Department's action.[5] The Department, therefore, contends that the appeal is untimely. The Department argues that timely filing with the Board is a jurisdictional matter and the jurisdiction of the Board will not attach to an appeal from a Department action if the appeal is not filed within the thirty day time period established by the Board's Rules and Regulations.[6]

Mon View Mining opposes the Department's Motion. Appellant argues that approximately twenty-four days after it received written notice of the Department's action it served its "Notice of Appeal with the Department of Environmental Protection, Office of Chief counsel as well as Mr. Joseph G. Pizarchik, Director of the Bureau of Mining and Reclamation."[7] However, "a copy was inadvertently not sent to the Commonwealth of Pennsylvania Environmental Hearing Board."[8] When it eventually realized that it had not sent a copy of the Notice of Appeal to the Environmental Hearing Board, Appellant "did take steps to notify the [Environmental] Hearing Board immediately of its decision to appeal and file another appeal with them."[9] The Appeal was faxed to the Board and docketed on April 28, 2003 – approximately 49 days after Appellant received written notification of the Department's action.

Appellant implores the Board to ignore its late filing because:

1) It took all necessary steps to timely appeal the Department's action except for filing its Notice of Appeal with the Environmental Hearing Board:

2) The Department was well aware of Appellant's Notice of Appeal prior to the

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5 *Milford Township Board of Supervisors v. Department of Environmental Resources*, 644 A.2d 216, 219 (Pa. Cwlth. 1994; *Burnside Township v. DEP*, 2002 EHB 700, 702; *Weaver v. DEP*, 2002 EHB 273, 276-277; 25 Pa. Code § 1021.52 (a)(1)

6 25 Pa. Code § 1021.52(a)(1); *Falcon Oil v. Department of Environmental Resources*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992).

7 Appellant's Memorandum of Law In Opposition to Department's Motion to Dismiss, page 2.

8 *Id.*

expiration of the thirty-day appeal period because it received a copy of its Notice of Appeal;

3) the Board should grant its request to allow it to appeal *nunc pro tunc* because there is a unique and compelling factual circumstance; and

4) any infractions of the requirements of filing were *de minimis* and the Board should exercise its discretion and hear the merits of this Appeal.

Discussion

The Board will grant a motion to dismiss only where there are no factual disputes and the moving party is clearly entitled to judgment as a matter of law.[10] The Board evaluates motions to dismiss in the light most favorable to the non-moving party.[11]

The Board's Rules of Practice and Procedure provide that the jurisdiction of the Board will not attach to an appeal from a Department action unless the Appeal is in writing and is filed with the Board within thirty days after the appellant has received written notice of the action[12] or when the Board allows appeals *nunc pro tunc*.[13] Board Rule 1021.52 governs the timeliness of appeals, providing as follows:

> (a) Except as specifically provided in § 1021.53 (relating to amendments to appeal; appeal *nunc pro tunc*), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute:

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9 *Id.*

10 *Laurel Land Development, Inc. v. DEP*, EHB Docket No. 2003-033-R (Opinion issued June 20, 2003); page 2; *Borough of Chambersburg v. DEP*, 1999 EHB 92, *Smedley v. DEP*, 1998 EHB 1281, 1282.

11 *Solebury Township and Buckingham Township v. DEP and PennDot*, EHB Docket No. 2002-323-K (Opinion issued February 20, 2003)

12 *Laurel Land Development*, page 3.

13 *Dellinger v. DEP*, 2000 EHB 976, 980; *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877, 886 (Pa. Cmwlth. 1986) *aff'd* 555 A.2d 812 (Pa. 1989).

(1) The persons to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.

(2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within one of the following:

(i) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin.*

(ii) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin.*

In this case, the facts are undisputed that Mon View Mining did not file its Notice of Appeal within the thirty day appeal period. The fact that it apparently served its appeal with the Department within the appeal period does nothing to cure this jurisdictional defect. As we recently pointed out, timely serving a notice of appeal on the Department instead of the Board does not meet the jurisdictional requirement of filing written notice of appeal with the Board within the thirty day appeal period.[14]

A long line of appellate and Board cases have upheld the thirty day appeal period as jurisdictional and have refused to recognize the serving of appeals with the Department rather than filing them with the Board. In *Rostosky v. Department of Environmental Resources*,[15] appellant's counsel served his notice of appeal with the Department rather than the Board. The Commonwealth Court, in upholding the Board's dismissal of the appeal, set forth the hornbook law in this area. "The

14 *Broscious Contracting Company v. DEP*, 1999 EHB 383, 385.
15 364 A.2d 751 (Pa. Cmwlth. 1976).

untimeliness of the filing deprives the Board of jurisdiction."[16]

The *Borough of Bellefonte v. Department of Environmental Resources* [17] is a case with arguably stronger facts in favor of the appellant's position than the case at bar. Appellant's attorney's secretary timely mailed the notice of appeal to the Department. However, because of emotional and mental distress caused by domestic problems and an upcoming change of jobs, the secretary delayed mailing the original notice of appeal to the Board until six days after the appeal period expired. The Commonwealth Court upheld the Board's dismissal of the appeal as being untimely filed depriving the Board of jurisdiction over the appeal.[18]

Tyson v. DER,[19] was a case where an appellant unrepresented by counsel served his appeal only with the Department. The Board granted the Department's motion and dismissed the appeal because it lacked jurisdiction over the appeal. The Board rejected Appellant's mistaken assumption that serving the notice of appeal with the Department constituted filing with the Board.[20]

Finally, in a case on point with the case at bar, the Commonwealth Court upheld the Board's dismissal of an appeal that was not timely filed with the Board. This involved the appeal of a civil penalty assessment by Falcon Oil Company (Falcon). Falcon's counsel prepared a notice of appeal and instructed his secretary to file it with the Environmental Hearing Board and insure that all necessary copies of the appeal were served. Eleven days after receiving written notice of the Department's action, Falcon's counsel's secretary mailed the original notice of appeal to the Department's Regional office and also forwarded a copy to the Department's Office of Chief Counsel. Just like in our case, the notice of appeal form in Falcon set forth in bold print that it must

16 364 A.2d at 763.
17 570 A.2d at 129 (Pa Cmwlth. 1990).
18 570 A.2d at 131, 132.
19 1994 EHB 868.
20 1994 EHB at 870.

be received by the Board within thirty days of the appellant's receipt of notice of the Department action. Three days after the expiration of the appeal period the Department's assistant counsel assigned to the appeal called Falcon's counsel to inquire why no docket number had been assigned to the appeal by the Environmental Hearing Board. Obviously, the reason why no docket number had been assigned was because the notice of appeal had never been filed with the Board. Three days later Falcon filed a petition for leave to appeal *nunc pro tunc*.[21]

The Commonwealth Court reiterated the well-established law that the timeliness of an appeal is a jurisdictional matter.[22] It held that the serving of the appeal on the Department did not equate to timely filing with the Board. In so holding, it distinguished this situation from the instance where an appeal is filed with the wrong tribunal.

> The defective appeal in *Suburban Cable TV Co., Inc. v. Commonwealth*, 570 A.2d 601 (Pa. Cmwlth. 1990), *aff'd* 591 A.2d 1054 (Pa. 1991), resulted from a filing with the wrong tribunal: the Board of Appeals of the Department of Revenue rather than the Board of Finance and Revenue. This Court held that the Judicial Code, 42 Pa. C.S. § 5103, required that such improperly filed appeals be transferred to the appropriate tribunal and treated as if filed on the date filed with the erroneous tribunal. (citations omitted). Because the filing with the Board of Appeals occurred before expiration of the appeal period, the transfer was ordered and the appeal allowed. *Neither the [Department's] Office of Chief Counsel nor the [Department's] Regional Office is a tribunal or court subject to 42 Pa. C.S. § 5103.* (emphasis added)[23]

Therefore, we reject Mon View Mining's first two arguments in opposition to the Department's Motion to Dismiss. Since Mon View Mining did not timely file its Notice of Appeal with the Environmental Hearing Board it omitted a necessary step to allow this Board to assume subject matter jurisdiction over its Appeal. The fact that the Department was well aware of Mon

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21 609 A.2d at 878 - 879.
22 609 A.2d at 880.

View Mining's intent to appeal the Department's action prior to the expiration of the thirty day time period is of absolutely no legal significance as to whether the Board has jurisdiction over Mon View Mining's Appeal. By not filing its Notice of Appeal with the Board in a timely manner it deprived this Board of jurisdiction in this case

Mon View Mining's Request to File Its Appeal N*unc Pro Tunc*

We now turn to Mon View Mining's argument that the Board should permit it to file its Appeal *nunc pro tunc* and thus cure its untimely filing. Board Rule 1021.53(f) governs appeals *nunc pro tunc* to the Board. It provides:

> (f) The Board upon written request and for good cause shown may grant leave for filing of an appeal nunc pro tunc, the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.[24]

The power of this Board or a court, for that matter, to allow an appeal *nunc pro tunc* is extremely limited.[25] "In *Bass v. Commonwealth*[26] the Pennsylvania Supreme Court explained that an appeal *nunc pro tunc* is appropriate only in cases where there is fraud or some breakdown in the court's operation or where there is a non-negligent failure to file a timely appeal."[27] Chief Judge Krancer, writing in *Dellinger v. DEP*,[28] summarized the law in this area and emphasized that in the absence of a non-negligent failure to file a timely appeal or fraud or breakdown in the Board's administrative process good cause is not established "for the application of the doctrine of appeal nunc pro tunc."[29]

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23 609 A.2d at 879.
24 25 Pa. Code § 1021.53(f).
25 *Rostosky v. Department of Environmental Resources*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976).
26 401 A.2d 1133 (Pa. 1979).
27 401 A.2d at 1135.
28 2000 EHB 976.
29 2000 EHB at 980.

The Commonwealth Court's decision in *Borough of Bellefonte v. Department of Environmental Resources,*[30] is most instructive. As discussed earlier in this Opinion, the Appellant's secretary timely mailed the Notice of Appeal to the Department, but forgot to mail the Notice of Appeal to the Board. Appellant claimed it should still be able to file its appeal *nunc pro tunc* even though it did not allege that the delay in filing was caused by fraud or breakdown in the operation of the Board. In rejecting this request, Commonwealth Court declared:

> It is clear that Petitioners have not presented a unique and compelling factual circumstance for which an appeal *nunc pro tunc* may be granted. Although the secretary mailed the appeal papers to all other interested parties, she just forgot to mail them to the EHB... The EHB did not err in rejecting this argument.[31]

Mon View Mining's citation to *Simons and J.J.H. Maguire, Inc. v. DEP*[32] provides no support for their request that the Board should allow them to file their Appeal *nunc pro tunc*. In *Simons*, Judge Miller denied a petition to file an appeal *nunc pro tunc* where the appellant was without counsel and had been trying to negotiate a settlement with the Board. The appellant's attempts to settle with the Department did not provide grounds for an appeal *nunc pro tunc*. Instead, the Board will grant permission to appeal *nunc pro tunc* "only where there is a showing of fraud, breakdown in the administrative process, or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal."[33]

Appellant's unique and compelling factual circumstance that it argues should persuade this Board to grant its petition to appeal *nunc pro tunc* is apparently that it took all necessary steps to appeal the decision to the Board except filing its Notice of Appeal with the Board. When coupled with the fact that the Department was well aware of Appellant's intent to appeal the Department's

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30 570 A.2d 129 (Pa. Cmwlth. 1990).
31 570 A.2d at 131.

action within the thirty day period, Appellant argues that its failure to mail the Notice of Appeal to the Board should be seen as a *de minimis* infraction of technical filing rules. Unfortunately for Mon View Mining, it is apparent that such facts fall far short of a showing of fraud, breakdown in the Board's administrative process, or unique and compelling factual circumstance establishing a non-negligent failure to file a timely appeal.

Under the law we must deny Mon View Mining's request to file its Appeal *nunc pro tunc* and grant the Department's Motion to Dismiss because we do not have subject matter jurisdiction over an appeal filed 49 days after receipt of written notification of the Department's action.

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32 1998 EHB 1131.
33 1998 EHB at 1133.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MON VIEW MINING, CORP.	:	
	:	
v.	:	**EHB Docket No. 2003-102-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 12th day of August, 2003, if is ordered as follows:

1) The Department's Motion to Dismiss is ***granted.***

2) Mon View Mining's request to appeal *nunc pro tunc* is **denied**.

3) Mon View Mining's Appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATE: August 12, 2003

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

GREENFIELD GOOD NEIGHBORS GROUP, INC. and COLLEEN and DARRELL BARNETT	:	
v.	:	**EHB Docket No. 2002-006-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LAKE ERIE PROMOTIONS, INC.	:	**Issued: August 20, 2003**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board dismisses an appeal of a water quality management permit where the Appellants have failed to demonstrate by a preponderance of the evidence that they have standing to pursue the appeal. Even though the Appellants survived a challenge to standing in a dispositive motion filed earlier in the proceeding by the permittee, where standing is again challenged at the hearing and in post-hearing briefs, the Appellants have an obligation to demonstrate by a preponderance of the evidence that they have a direct, immediate and substantial interest in the action being appealed. In addition, all issues related to the siting of the facility are barred by the doctrine of administrative finality.

BACKGROUND

This matter involves an appeal by Greenfield Good Neighbors and Colleen and Darrell

Barnett (hereinafter collectively, the Appellants) challenging the issuance of a Water Quality Management permit by the Department of Environmental Protection (Department) to Lake Erie Promotions, Inc. (Lake Erie Promotions) for the construction and operation of a spray irrigation system. The spray irrigation system will serve as a sewage treatment system for the Lake Erie Speedway that is owned and operated by Lake Erie Promotions. The Appellants have challenged the permit issuance on the grounds that it exposes them to potential groundwater contamination and interferes with their aesthetic and recreational enjoyment of the area.

Following a five-day hearing in this matter, the Board makes the following findings of fact:

FINDINGS OF FACT

1. The Appellant, Greenfield Good Neighbors Group, Inc. (Greenfield Good Neighbors), is a Pennsylvania non-profit corporation consisting of a number of individuals who have interests in property in and around Greenfield Township. (Stipulation 1; T. 17-18, 53-54))

2. Appellants Colleen and Darrell Barnett are members of Greenfield Good Neighbors. (Stipulation 3; T. 75) Greenfield Good Neighbors and the Barnetts are collectively referred to herein as the Appellants.

3. The Permittee, Lake Erie Promotions, Inc., is a Pennsylvania corporation that has constructed the facility known as the Lake Erie Speedway for the purpose of conducting auto racing. (Stipulation 4)

4. The Department of Environmental Protection (Department) is the agency with the duty and authority to administer and enforce the Clean Streams Law, 35 P.S. §§ 691.1 – 691.703.; the Sewage Facilities Act, 35 P.S. §§ 750.1 – 750.20a; Section 1917-A of the Administrative Code,

71 P.S. 510-17; and the rules and regulations promulgated thereunder.

5. Lake Erie Promotions owns property in Greenfield Township, Erie County, bordered by Delmas Drive on the south and State Route 89 on the east, upon which is constructed the Lake Erie Speedway (the LEP property). (T. 118; Ex. A-1; Ex. P-1)

6. A Pennsylvania State Game Land is located west and southwest of the LEP property. (T. 20, 33; Ex. A-1)

7. On or about June 14, 2001, Lake Erie Promotions submitted a Water Quality Management Permit application for a sewage collection, treatment and spray irrigation system (spray irrigation system or spray irrigation field) to be built on the LEP property. (T. 710)

8. On November 30, 2001, the Department issued a Water Quality Management Permit (the permit) to Lake Erie Promotions authorizing the construction and operation of the spray irrigation system. (Notice of Appeal)

9. On January 10, 2002, the Appellants appealed the issuance of the permit to the Environmental Hearing Board (Board). (Notice of Appeal)

10. Cheryl Grugin is a member of Greenfield Good Neighbors. She lives with her husband and three children at 9946 German Road, Greenfield Township. (T. 17-18)

11. The Grugin property is located approximately one mile directly east of the spray irrigation field. (T. 20-21, 31-32)

12. The Grugins use a well on their property for their water supply. (T. 46)

13. The Grugins have not had their well tested since the spray field was put into operation. (T. 46-47)

14. Mrs. Grugin used to walk or ride a horse past the LEP property on a regular basis. (T. 21)

15. She no longer walks or rides past the LEP property due to increased traffic, odor, dust and the paving of Delmas Road. (T. 21)

16. With regard to Mrs. Grugin's concerns, the only one related to the spray irrigation system is odor; the others relate to the operation of the speedway. (T. 34-35)

17. With regard to Mrs. Grugin's testimony regarding odor, we do not find it credible.

18. Mrs. Grugin is able to walk and ride horses in other areas that are not subject to the odor she believes emanates from the LEP property. (T. 45)

19. Wilhemina Seymour is a member of Greenfield Good Neighbors. (T. 54). She resides at 10008 Town Line Road, which is not in Greenfield Township. (T. 53)

20. Mrs. Seymour's property is approximately one and one-half miles west-northwest of the LEP property. She receives her drinking water from a well located on her property. (T. 55, 68; Stip. 5)

21. Mrs. Seymour does not believe she is harmed by the spray irrigation system but is concerned about the potential for future contamination of water tables. (T. 67)

22. Darrell Barnett is a member of Greenfield Good Neighbors. (T. 75)

23. Mr. Barnett resides at 10365 Calkins Road in Greenfield Township with his wife and two sons. In addition, his granddaughter spends time at this residence. (T. 75)

24. The Barnett property is between 2,500 and 4,500 feet west-southwest of the spray irrigation field on the LEP property and is separated from the LEP property by a four-lane, divided highway. (T. 77, 88, 110; Ex. P-2)

25. The Barnett property receives its water from a well located on the property. (Stip. 5)

26. Mr. Barnett used to hunt, trap and fish in the area to the rear of the spray irrigation field. He still hunts, traps and fishes in that area but not as frequently since the implementation of the

spray irrigation field. (T. 77)

27. Mr. Barnett had the permission of the prior owner to hunt, trap and fish in the area to the rear of the spray irrigation field. (T. 77-78)

28. Mr. Barnett has never hunted, trapped or fished in the area now occupied by the spray irrigation field because there were too many houses in this area. (T. 95)

29. When asked how his ability to hunt, trap or fish on the south side of Delmas Road has been affected by the spray irrigation field, Mr. Barnett responded that he was not sure. (T. 100)

30. Dr. Samuel Harrison is a consulting geologist who performed a hydrogeological assessment of the Lake Erie Promotions property. (T. 486-87) Dr. Harrison testified as an expert in the area of hydrogeology. (T. 487)

31. Groundwater monitoring wells were installed in or around the spray field. (T. 502-03)

32. The first five monitoring wells, all of which are shallow wells, were installed in the following locations: Monitoring well 1 is in the northeast corner of the spray field; Monitoring well 2 is at the southern edge of the spray field; Monitoring well 3 is in the area between the spray field and Delmas Road, approximately 20 feet southeast of a pond on the site; Monitoring well 4 is between the pond and Delmas Road; Monitoring well 5 is a few tens of feet west of the pond in the area between the spray field and Delmas Road. (T. 503)

33. Three additional groundwater monitoring wells were also installed: two to the north, or upgradient, of the spray field and one north of the pond, or downgradient of the spray field. (T. 503-04)

34. Deeper groundwater monitoring wells were also installed in the bedrock below the soil in and around the area of the spray field. (T. 504-05)

35. The purpose of the groundwater monitoring program at the site was twofold: first, to

track the direction of groundwater flow, both in the shallow soils and bedrock, and second, to track the nitrate content of the groundwater within the spray field and downgradient of the spray field. (T. 506)

36. Groundwater flow in the area of the spray field is to the south-southwest. (T. 501)

37. The Lake Erie Promotions property sits on the crest between the French Creek and Lake Erie watersheds. (T. 508-09)

38. In the area of the Lake Erie property, the groundwater mimics the flow of surface water. (T. 508)

39. Surface water and groundwater at the spray field drain into the French Creek watershed. (T. 510-11)

40. The Grugin, Seymour and Barnett wells are located in the Lake Erie Watershed. (T. 512-513)

41. Water from the spray irrigation field will not reach the groundwater of the Barnett, Grugin or Seymour properties. (T. 512-513)

42. Wells on the Chimera and Chihon properties are located in the French Creek Watershed. (T. 167-168)

43. The Chimera and Chihon wells are south of the spray irrigation field. (T. 168)

44. A well on property owned by Doug Chesley is south of the spray irrigation field but north of the Chimera and Chihon properties. The Chesley well has experienced no bacteriological problems. (T.182; 517)

45. Monitoring wells on the southern edge of Delmas Drive have shown no bacteriological problems. (T. 184)

46. If effluent from the spray irrigation field were causing bacteriological problems in the

Chimera and Chihon wells, it would also show up in the monitoring wells on Delmas Drive and in the Chesley well. (T. 184)

47. The record does not indicate that any member of the Chimera or Chihon household is a member of Greenfield Good Neighbors.

48. According to Dr. Harrison's calculations, it will take a minimum of 1.8 years and a maximum of 137 years for effluent from the spray field to reach the southern boundary of the Lake Erie Promotions property. (T. 507)

49. At the time of the hearing the spray irrigation field had been in operation for only three months. (T. 748)

50. Effluent from the spray field would not affect a well on property owned by Mr. Parameter due to its location east of the spray field. (T. 535-36)

51. The waste stream generated at Lake Erie Speedway is likely to consist more of liquid waste than solids. (T. 748)

DISCUSSION

In this third-party appeal of the issuance of a water quality management permit, it is the Appellants who bear the burden of proving their claims by a preponderance of the evidence. 25 Pa. Code § 1021.122(c)(2). The Board's review of this matter is *de novo* and, therefore, we are not limited to considering the evidence the Department had before it when it issued the permit but may consider all evidence presented to the Board. *Warren Sand & Gravel Co. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975); *Smedley v. DEP*, 2001 EHB 131, 155-60; *Township of Florence v. DEP*, 1997 EHB 763.

Standing

An essential element of the Appellants' case is that they must have standing to bring this appeal. In other words, they must be aggrieved by the action under appeal, i.e. the issuance of the water quality management permit. *Township of Florence*, 1997 EHB at 773-74. Writing for the Board in *Wurth v. DEP*, 2000 EHB 155, 170-71, Judge Miller explained the purpose of the standing doctrine as follows:

> The purpose of the standing doctrine in the context of proceedings before the Board is to determine whether an appellant is the appropriate party to seek relief from an action of the Department. *Valley Creek Coalition v. DEP,* EHB Docket No. 98-228-MG (Opinion issued December 15, 1999). In order to have standing to challenge a Department action, an appellant must be "aggrieved." *Florence Township v. DEP,* 1996 EHB 282. Accordingly, an appellant must show that he has a "substantial" interest in the subject matter of the particular litigation which surpasses the common interest of all citizens in seeking compliance with the law; a "direct" interest that was harmed by the challenged action; and an "immediate" interest that establishes a causal connection between the action complained of and the injury they suffered. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). An organization may have standing either in its own right or as a representative of its members if at least one of the individual members has a direct, immediate and substantial interest in the outcome of the litigation. *Valley Creek*; *Raymond Proffit Foundation v. DEP*, 1998 EHB 677.

In other words, we must ask whether the appellant has a special right that rises above the general interest of all citizens, based on what he or she has alleged, to challenge the Department action in question. In order to have standing in an environmental case, the appellant must demonstrate by his or her use of the site in question or relation thereto that his or her interest rises above that of the public at large. In *Friends of the Earth, Incorporated v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 693 (2000), the United States Supreme Court held that environmental plaintiffs adequately allege injury in fact if they aver that (1) they use the

affected area and (2) the defendant's conduct has (or will) adversely affect that use by lessening the aesthetic and recreational values of the area. *Id.*, 120 S. Ct. at 705, *quoting Sierra Club v. Morton*, 92 S. Ct. at 1361 (1972).

The evidentiary standard for reviewing a challenge to standing was set forth in *Giordano v. DEP*, 2000 EHB 1184, 1187:

> The appropriate evidentiary standard of review in evaluating a standing challenge depends upon when standing is challenged ....If the question is raised at or near the conclusion of discovery in the context of a summary judgment motion, we will only rule on the issue if there are no genuine issues of material fact and it is clear that the appellant does or does not have standing as a matter of law. Pa.R.C.P. 1035.2; *Ziviello [v. DEP*, 2000 EHB 999]. If the question is still contested after the evidentiary hearing, we determine whether the appellants have carried their burden of proving that they have standing by a preponderance of the evidence. 25 Pa. Code § 1021.101; *see, e.g., Township of Florence* [*v. DEP*], 1997 EHB 763, 773-74.

Likewise, the burden of proof is different depending on when a challenge to standing is brought. When standing is challenged in a dispositive motion, we must view it in the light most favorable to the non-moving party, in other words, the appellants. Issues of standing are intensely factual. *Beaver Falls Municipal Authority v. DEP*, 2000 EHB 1026. If there is any genuine issue of material fact, the motion must be denied. *Giordano, supra.* However, where standing is again raised at the hearing or in post-hearing briefs, the burden shifts to the appellants to demonstrate by a preponderance of the evidence that they do in fact have standing to challenge the action in question.

Earlier in this proceeding, Lake Erie Promotions moved for summary judgment on a number of grounds, including standing. The motion was denied in an Opinion and Order issued on September 24, 2002. Viewing the facts in the light most favorable to the Appellants as the non-moving party, the Board found that the Appellants had raised sufficient grounds to withstand

a challenge to their standing to bring this appeal. *Greenfield Good Neighbors, Inc. v. DEP*, 2002 EHB 861, 862-64. The Appellants had alleged they resided in the area of the spray field; enjoyed hunting, hiking, biking and fishing in the area; and were concerned about potential contamination of their water supplies. We determined these averments were sufficient to establish a substantial, direct and immediate link between the permit issuance and the harm alleged by the Appellants to proceed with the appeal.

At the hearing and in their post-hearing briefs, the Department and Lake Erie Promotions again challenged the Appellants' standing, and testimony was presented on this issue. It is the assertion of the Department and Lake Erie Promotions that the Appellants have not met their burden of demonstrating they have standing to bring this appeal. The test for standing was set forth in *Giordano* as follows:

> In order to establish standing, the appellants must prove that (1) the action being appealed has had – or there is an objectively reasonable threat that it will have – adverse effects, and (2) the appellants are among those who have been – or are likely to be – adversely affected in a substantial, direct, and immediate way [citations omitted]. . . .The second question cannot be answered affirmatively unless the harm suffered by the appellants is greater than the population at large (i.e. "substantial") and there is a direct and immediate connection between the action under appeal and the appellants' harm (i.e. causation in fact and proximate cause). . . .

2000 EHB at 1185.

The harm that has been alleged by the Appellants can be summarized in two categories: 1) fear of groundwater contamination and 2) interference with aesthetic and recreational enjoyment of the area.

Groundwater Contamination

The Appellants contend they are exposed to potential groundwater contamination from the spray irrigation system. It is their contention that the Department erred in approving the

permit without adequate protections against nitrate buildup and contamination. The Appellants presented no hydrogeologic testimony in support of their claims. The only hydrogeologic testimony presented was that of Lake Erie Promotions' expert, Dr. Samuel Harrison. Dr. Harrison is a geologist who performed a hydrogeologic assessment of the Lake Erie Promotions property. This assessment included the installation of groundwater monitoring wells for the purpose of tracking groundwater flow and nitrate content. Based on Dr. Harrison's monitoring, groundwater flow in the area of the spray irrigation field flows to the south-southwest into what is known as the French Creek watershed. The same is true for surface water in that area.

The members of Greenfield Good Neighbors who testified at the hearing all have properties with wells located in the Lake Erie watershed. According to the direction of groundwater and surface water flow in the area, water from the spray irrigation field will not reach the groundwater of these residents. The Appellants presented the testimony of no individuals with wells in the area in which the spray irrigation field drains.

The Appellants testified that wells on the Chimera and Chihon properties in the French Creek watershed have experienced bacteriological problems.[1] The Chimera and Chihon wells are located to the south of the spray irrigation field. However, no evidence was presented as to when the problems began, the extent of the alleged problems, or data indicating the presence of bacteria in the water supply. Moreover, monitoring wells and a well owned by Doug Chesley located between the spray irrigation field and the Chimera and Chihon wells showed no bacteriological contamination. According to Dr. Harrison's calculations, it would take a minimum of 1.8 years and a maximum of 137 years for effluent from the spray field to reach the southern boundary of the Lake Erie Promotions property and conceivably longer than that to

[1] Neither Mr. Chimera nor Mr. Chihon testified, and there is no evidence that any member of

reach the Chimera or Chihon properties. At the time of the hearing, the spray irrigation field had been in operation only three months and not full-time. Therefore, any alleged contamination of the Chimera and Chihon wells would not have been due to the spray irrigation field.

In order to have standing, an appellant must show more than a subjective apprehension; in other words, he or she must demonstrate that the likelihood of adverse effects occurring is not merely speculative. *Giordano,* 2000 EHB at 1186; *Ziviello v. DEP*, 2000 EHB 999, 1004-05. Here, based on the Appellants' failure to do more than speculate with regard to how the spray field is likely to affect their water supplies, coupled with Dr. Harrison's testimony regarding the hydrogeology of the area, we find that the Appellants have not met their burden of demonstrating they are at risk for groundwater contamination from the spray irrigation field.

Aesthetic and Recreational Enjoyment

The Appellants presented the testimony of three individuals who are members of Greenfield Good Neighbors: Darrell Barnett, Wilhemina Seymour and Cheryl Grugin. An organization can have standing either in its own right or as a representative of its members. *Barshinger v. DEP*, 1996 EHB 849. Where an organization is acting as a representative for its members, it has standing if at least one of those individuals has been aggrieved by an action of the Department. *Chestnut Ridge Conservancy v. DEP,* 1997 EHB 45; *RESCUE Wyoming v. DER*, 1993 EHB 839. In the present case, we find that none of the members of Greenfield Good Neighbors has demonstrated that they have standing in this matter and, as result, Greenfield Good Neighbors lacks standing to pursue this appeal.

Darrell Barnett is a member of Greenfield Good Neighbors and an appellant in this action along with his wife. Mr. Barnett testified that he used to hunt, trap and fish in the area to the rear

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these households is a member of or affiliated in any way with the Appellants.

of the spray irrigation field. He continues to be able to hunt, trap and fish in this area, and continues to take part in these activities but not as frequently. He has never performed any of these activities in the area now occupied by the spray field because there were too many houses in the area prior to the construction of the spray field. When asked how his ability to hunt, trap or fish has been affected by the construction and operation of the spray field, Mr. Barnett testified that he was not sure. Based on this testimony, we find that the Barnetts have not come forth with any evidence demonstrating that they have any standing to pursue this appeal. They have failed to demonstrate how the construction and operation of the spray field has or will cause them injury in fact.

Wilhemina Seymour resides approximately one and one-half miles west-northwest of the Lake Erie Promotions property. She testified that she does not believe she is harmed by the spray irrigation field; her only concern is the potential for future contamination of the water tables. Based on Mrs. Seymour's testimony and our earlier findings regarding the hydrogeology of the area, we find that she has failed to demonstrate standing to pursue this appeal. Since neither Mrs. Seymour nor the Barnetts have demonstrated standing to pursue this appeal in their own right, they convey no standing to Greenfield Good Neighbors.

The third witness to testify on behalf of Greenfield Good Neighbors was Cheryl Grugin. Mrs. Grugin lives approximately one mile directly east of the spray irrigation field. She is accustomed to walking or riding her horse in the surrounding area. She used to walk or ride past the Lake Erie Promotions property on a regular basis, but testified that she no longer does so due to increased traffic, odor and dust and the paving of Delmas Road. Of these complaints, the only one related to the spray irrigation system is odor. Mrs. Grugin believes an odor is generated when the spray irrigation system is in operation or immediately following its operation. She

describes the odor as "a musty smell," "like the wastewater treatment plant," and "like human feces waste." When asked whether she was affected by the smell of manure from cows, horses and llamas in the rural community in which she lived, she answered that there is no odor to llama manure and one can tell the difference between manure from a horse or cow and human feces. She testified that she is aware of the smell of horse and cow manure in the spring when fields are being fertilized. She does not detect the smell at her house but only when in the vicinity of a field that has been sprayed. Mrs. Grugin testified she is not affected by any alleged odor from the spray irrigation system at her home but only when she is traveling in the vicinity of the speedway on foot or horseback. Neither Mr. Barnett nor Mrs. Seymour testified that an odor is produced by the operation of the spray field. Nor did the Appellants' expert testify that any flaw in the design or operation of the system would produce an objectionable odor. Nor was there any testimony by Mrs. Grugin linking the alleged odor to Lake Erie Promotion's operation of the spray irrigation facility.

The Department and Lake Erie Promotions argue that Mrs. Grugin's testimony, by itself, is insufficient to confer standing on the Appellants. The Department further argues that her testimony lacks credibility because the waste treated by the spray irrigation system is primarily of a liquid as opposed to solid content and has undergone primary and secondary treatment before being sprayed on the field.

It is the job of the Board to act as a fact finder based on the evidence presented to us. *Birdsboro v. Department of Environmental Protection*, 795 A.2d 444 (Pa. Cmwlth. 2002). This includes resolving questions of witness credibility and weight to be assigned to the evidence. *Id.* at 447; *Pennsylvania Game Commn. v. Department of Environmental Resources*, 509 A.2d 877, 880 (Pa. Cmwlth. 1986) ("Questions of resolving conflicts in the evidence, witness credibility,

and evidentiary weight are properly within the exclusive discretion of the fact finding agency, and are not usually matters for a reviewing court.")

Here, we find Mrs. Grugin's testimony not credible regarding the allegedly offensive odor of the spray irrigation system. Simply stated, we do not believe her. When asked how she was affected by the spray irrigation system, Mrs. Grugin's answer centered primarily on how the racetrack affected her. The only complaint she had that related at all to the spray irrigation system was the alleged odor emanating from it while it is in operation or immediately thereafter and how it affects her when she walks or rides her horse past the facility. When asked to describe the alleged smell, Mrs. Grugin had a very difficult time articulating it. On one occasion she described it as smelling like "human feces." We find this description not to be credible based on both our observation of her testimony together with the expert testimony regarding the treatment and content of the waste stream at the facility. Substantial testimony was presented regarding treatment of the waste prior to spraying. In addition, the evidence indicates that the content of the waste stream is likely to consist primarily of liquids as opposed to solids. Based on this evidence, we simply do not believe Mrs. Grugin's testimony that the spray system gives off an odor of human feces.

Even if we were to accept Mrs. Grugin's testimony as being credible, which we do not, we do not think her testimony credibly supports that such smell emanated from the treatment field. Moreover, her testimony indicates only that the alleged odor results from the existence of the spray irrigation system and not due to any defect in its operation. As set forth below, any issues regarding the siting of the spray irrigation system are administratively final.

Administrative Finality

Both Lake Erie Promotions and the Department argue that, even if the Appellants were

found to have standing, this appeal is barred by the doctrine of administrative finality. The doctrine of administrative finality precludes a collateral attack where a party could have appealed an earlier administrative action but chose not to do so. *Department of Environmental Protection v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). The Department and Lake Erie Promotions assert that because the Appellants did not appeal the prior approval of the Planning Module for the spray irrigation system, all issues decided at that level – namely, siting of the facility, soils evaluation and design capacity – are administratively final and may not be challenged in this appeal of the water quality management permit.

This issue was closely analyzed in *Perkasie Borough Authority v. DEP*, 2002 EHB 764, which involved the construction of a new sewage treatment plant. Like the present action, that case also involved an appeal of a Part II/Water Quality Management permit. Also like the present action, no appeals were filed from earlier Department approvals – in that case, the Department's approval of the Sewage Facilities Act 537 Plan and the Part I/NPDES permit. Writing for the Board, Chief Judge Krancer explained the three-step process involved in the permitting of a new sewage treatment facility:

> To describe the process mechanically, when a project, as here, involves the construction of a new sewage treatment plant three things have to happen. First, the new facility is presented as part of a Sewage Facilities Act 537 Plan. Second, the proponent of the facility applies for and secures a National Pollutant Discharge Elimination System (Part I/NPDES) permit under § 202 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001 (Clean Streams Law or CSL), 35 P.S. § 691.202. The focal point of the NPDES or Part I permit is that it establishes the location(s) of the discharge point(s) and sets effluent limitations for the discharge into the receiving waters. Finally, in step three, the facility proponent applies for and secures a water quality management (WQM/Part II) permit, which authorizes construction and operation of the sewage facility

> pursuant to construction plans which are submitted for review by the Department.

Id. at 8-9. In *Perkasie Borough*, each side cited a number of prior Board decisions addressing the question of what is administratively final and what is not administratively final where the permitting process consists of several stages. Some cases discussed a continuum of overlapping, interrelated steps that are part of one larger process; others viewed the process as compartmentalized and consisting of discrete steps. In analyzing each of these decisions, Judge Krancer wrote:

> Our review of these cases tells us that there are no categorical or mechanically applicable answers to the question of what particulars are or are not included in any of the respective steps along the continuum and, thus, what is administratively final upon completion of a certain step. The result of each of the cases cited is heavily dependent upon its procedural posture, its specific factual and legal background and the nature of the arguments made by the parties. This case, likewise, will not involve, nor could it, our setting forth a universally applicable prescription of the subjects which are included in and excluded from each of the three steps of the process. We will, however, attempt to parse out, in the context of the factual, legal and procedural background of this case, in light of the arguments made by the parties and with the guidance of the cases cited before, which matters are included in this Part II permit appeal and which are not.

Id. at 10.

Likewise, in the present case we must determine what issues, if any, are administratively final based on the factual, legal and procedural background of this case. The factual background is as follows: In February 2001, a Sewage Facilities Planning Module (planning module) for the Lake Erie Speedway spray irrigation system was submitted to the Department for review. The Department approved the planning module on June 22, 2001 (Ex. C-45) and notice was published in the Pennsylvania Bulletin. (Ex. C- 27) The approval letter stated as follows:

> The Department of Environmental Protection (Department) has

> reviewed the proposed Official Plan revision consisting of a racetrack development to be served by a spray irrigation sewage disposal system. The proposed development is located on PA Route 89. The plan revision is approved.
>
> Approval of this planning module is only approval of the preliminary concept of the proposed sewage facilities and does not assure that the required Clean Streams Law (CSL) permit will be issued by the Department.

(Ex. C-45)

Although the planning module was referenced during the hearing, it was not moved into evidence. According to the very limited testimony of the Department's sewage planning specialist, Eric Kicher, on this subject, he considered the following information in recommending approval of the planning module: the suitability of slopes, flows and soils; downgradient water uses; and spray application rate. (T. 671-675)

In the case of *Munoz v. DEP*, 1995 EHB 284, the Board examined the types of issues that are considered and decided upon by the Department in the planning module stage of a sewage construction project. That case involved the appeal of a water quality management permit authorizing construction of an on-site sewage treatment plant, storage lagoons and a spray irrigation system for an elementary school. As here, the appellants in *Munoz* did not appeal the sewage facilities planning module. They appealed only the water quality management permit, in which they raised a number of issues related to the siting of the treatment plant and spray irrigation field.

The Board in *Munoz* held that "issues related to the siting of sewage treatment facilities must be raised at the planning stage and cannot be raised at the construction stage." *Id.* at 286 (citing *Fuller v. DEP*, 1990 EHB 1726). The Board noted that the planning module had contained the size and location of each component of the sewage disposal system and that soil

and hydrogeologic data gathered from the proposed spray field had been considered in approving the planning module. The Board determined that the siting of the sewage facilities and their impact on neighboring properties should have been challenged in an appeal of the planning module.

Based on the holdings in *Perkasie Borough*, *Munoz* and *Fuller*, as well as the limited testimony presented on this subject at the hearing, we find that any challenge to the siting of Lake Erie Speedway spray irrigation field should have been raised in an appeal of the Department's approval of the planning module for the spray irrigation field. Thus, even if we found Mrs. Gurgin's testimony credible, which we do not, her testimony cannot provide standing because her complaints go only to siting, and any appeal by the Appellants on this ground would be barred by administrative finality.

For the reasons set forth above, we find that this appeal should be dismissed due to a lack of standing and administrative finality.

CONCLUSIONS OF LAW

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

2. The Appellants have the burden of proving by a preponderance of the evidence that they have standing to pursue this appeal. *Giordano, supra.*

3. The Appellants have failed to meet their burden of demonstrating by a preponderance of the evidence that they have standing to pursue this appeal.

4. It is the job of the Board to act as a fact finder based on the evidence presented to us. *Birdsboro v. Department of Environmental Protection*, 795 A.2d 444 (Pa. Cmwlth. 2002). This includes resolving questions of witness credibility and weight to be assigned to the evidence. *Id.* at 447; *Pennsylvania Game Commn. v. Department of Environmental Resources*, 509 A.2d 877,

880 (Pa. Cmwlth. 1986)

5. Challenges to the siting of the Lake Erie Speedway spray irrigation system are precluded on the basis of administrative finality. *Perkasie Borough, supra.*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREENFIELD GOOD NEIGHBORS GROUP, INC. and COLLEEN and DARRELL BARNETT	:	
v.	:	**EHB Docket No. 2002-006-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LAKE ERIE PROMOTIONS, INC.	:	

ORDER

AND NOW, this 20th day of August, 2003, the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **August 20, 2003**

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

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For Permittee:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EARTHMOVERS UNLIMITED, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-108-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 27, 2003**
	:	

OPINION AND ORDER ON PETITION FOR RECONSIDERATION EN BANC

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

Synopsis:

The Board denies a petition for reconsideration from an interlocutory order. The order in question denied the Department's motion to dismiss an appeal from the Department's determination that the appellant was ineligible to work on a grant-funded, waste-tire-remediation project. The Department has failed to provide compelling and persuasive reasons for reconsideration or point to any extraordinary circumstances that warrant interlocutory reconsideration.

OPINION

The Department of Environmental Protection (the "Department") has petitioned this Board to reconsider *en banc* the Board's interlocutory opinion and order dated July 31, 2003. The ruling in question rejected the Department's prior motion to dismiss this appeal.

The Standard for Reconsideration

Section 1021.151 of the Board's rules, 25 Pa. Code § 1021.151, governs reconsideration of interlocutory orders. That rule states that a petition for reconsideration of an interlocutory order "must demonstrate that extraordinary circumstances justify consideration of the matter by the Board." 25 Pa. Code § 1021.151(a). A *Comment* to the rule provides as follows:

> There is no need to file a petition for reconsideration of an interlocutory order in order to preserve an issue for later argument. Reconsideration is an extraordinary remedy and is inappropriate for the vast majority of the rulings issued by the Board.

Although the rules do not define what circumstances are "extraordinary," we have held that a party seeking reconsideration of an *interlocutory* order must first show that it meets the criteria for reconsideration of a *final* order. *Harriman Coal Corporation v. DEP,* 2001 EHB 1, 3; *Miller v. DEP*, 1997 EHB 335, 339. Those criteria for reconsideration are set forth at 25 Pa. Code § 1021.152 as follows:

> (a)...Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. These reasons may include the following:
>
> (1) The final order rests on a legal ground or a factual finding which has not been proposed by any party.
>
> The crucial facts set forth in the petition:
>
> (i) Are inconsistent with the findings of the Board.
> (ii) Are such as would justify a reversal of the Board's decision.
> (iii) Could not have been presented earlier to the Board with the exercise of due diligence.

Thus, the petition for reconsideration of an interlocutory order must not only be based upon "compelling and persuasive reasons," it must also be clear that "extraordinary circumstances" require the Board to reconsider the matter immediately, despite the fact that it is

merely an interlocutory ruling. In other words, the matter cannot wait until the full Board has the opportunity to issue a final order disposing of the appeal following the development of an administrative record. We can envision, for example, situations where an interlocutory ruling might have an immediate, practical impact on the parties apart from the obligation to prosecute the litigation itself. Or it may be that the question presented is such that, if review is postponed until a final order is issued, the claim will be irreparably lost. *Cf.* Pa.R.A.P. 313 (appeal from collateral orders).

Regarding the "compelling and persuasive reasons" that must support *all* petitions for reconsideration, it is important to keep in mind that the recipient of an adverse ruling will rarely be overflowing with delight to see that ruling. The party will usually disagree with the adverse ruling, or it presumably would not have made the claim in the first place. *See* 25 Pa. Code § 1021.31(b) (signature certifies good faith and proper purpose). We have now held on many occasions that mere disagreement is *not* a basis for reconsideration, even of final orders. *See, e.g., Starr v. DEP*, 2002 EHB 799, 808 ("Appellants have done little more than contend that the Board mistakenly applied the law. If reconsideration were available whenever a party disagreed with the Board's application of the law, reconsideration would cease to be an extraordinary remedy and would be granted as a matter of course. That is clearly not the intent of the rule."). In *Harriman,* 2001 EHB 1, we stated as follows:

> [] Appellants would have us hold that the Board should reconsider interlocutory orders whenever one of the parties feels that the Board has made a mistake. This would require that we go far beyond the standards set forth in *Miller [v. DEP*, 1997 EHB 335] or any of our other reconsideration decisions. Indeed, we would have to abandon the current standard entirely. As noted above, reconsideration of final orders "will be granted only for compelling and persuasive reasons," 25 Pa. Code § 1021.124(a), and the standard for reconsidering interlocutory orders requires "extraordinary circumstances" as well. 25 Pa. Code § 1021.123. It is by design an "extraordinary" remedy. Yet, if reconsideration

> were available whenever a party disagreed with the Board's application of the law, virtually every decision the Board issues would be ripe for reconsideration. In the overwhelming majority of decisions the Board issues, the parties differ on how the law should be applied, and the Board disagrees with at least one of them. Presumably, many of these frustrated parties continue to believe that their interpretation of the law was correct, even after the Board issues its decision. If reconsideration were available whenever a party disagreed with the Board's application of the law, reconsideration would cease to be an extraordinary remedy and would instead become available as a matter of course.

2001 EHB at 5.

The Department has added a further wrinkle in this case by requesting *en banc* reconsideration of the assigned Board Member's interlocutory opinion and order. The Board's rules do not expressly provide for *en banc* reconsideration of interlocutory orders. *Compare* 25 Pa. Code § 1021.132(a) ("A party may, within 5 days after the last post-hearing briefing and prior to adjudication, request oral argument before the entire Board.") Obviously, if the Board's rules do not provide for any *en banc* review, they also do not specify when *en banc* reconsideration of an interlocutory order is appropriate. We have not addressed this issue in the past. We certainly do not believe that such review of interlocutory rulings should be automatic, or that it should be granted simply because it is requested. To the contrary, it must be remembered that the Board is a somewhat unusual institution in that it has five Members and yet it performs functions that are similar to those of a trial court. In order to manage this arrangement, appeals are handled by one Board Member until there is a final disposition of a claim or of the appeal itself. Until that final disposition, the parties remain free to present their position on an issue to the full Board when it is in the process of preparing an adjudication, even where a single Board Member has already addressed it. As a practical matter, involving the entire Board in interlocutory questions must be the rare exception rather than the rule. Furthermore, we believe that it is inappropriate for the recipient of an adverse interlocutory order

to seek reconsideration *en banc* with nothing more than a hope that a majority of the Board will ultimately disagree with the single Board Member's interpretation of the facts or the law. This Board will be wary of any attempt at forum shopping.

In summary, a successful petition for reconsideration *en banc* of an interlocutory order will be based on compelling and persuasive reasons, it will point to extraordinary circumstances above and beyond those compelling and persuasive reasons that require the Board's urgent attention, and it will set forth some reasoned explanation of why *en banc* review of an interim ruling by the assigned Board Member is appropriate.

The Opinion and Order At Issue

The Department's petition for reconsideration does not assert that we made a crucial factual error. (*See* 25 Pa. Code § 1021.152(a).) Therefore, we continue to assume as a factual matter that the Department made a determination "that Earthmovers Unlimited was not eligible to enter into a contract with the Township of Antis, Blair County to perform a waste tire remediation project pursuant to a tire remediation grant." (Amended Notice of Appeal ¶ 2.) As set forth in a letter from the Department's Office of Chief Counsel to the Appellant's attorney, which is attached to the notice of appeal, that "*determination* about the contracting issue was made by Tom Woy in the Department's central office (emphasis added)." When the Department advised Antis Township of Earthmovers' ineligibility due to outstanding compliance problems, the Township rejected Earthmovers' low bid and awarded the grant-funded work to another company. Earthmovers then filed this appeal--not from the award of the grant or the rejection of the bid or the award of the contract to another party--but from the Department's ineligibility determination. Because Earthmovers correctly argued that all of the Department's arguments in its motion to dismiss failed to acknowledge this fundamental, dispositive distinction, we denied the Department's motion to dismiss on July 31, 2003.

The Petition For Reconsideration

The Department's petition for reconsideration does not provide any compelling or persuasive reason to reconsider our July 31 opinion and order. As previously mentioned, there is no claim of a crucial factual error. The Department does not allege that the order rests upon a legal ground or a factual finding which has not been proposed by any party. The Department does acknowledge that extraordinary circumstances must be present, but as explained above, those extraordinary circumstances for reconsideration of an interlocutory order must be over and above the standard criteria for reconsideration of any order. *Starr*, 2002 EHB at 808. The extraordinary circumstances cited by the Department amount to criticism of the Board's ruling, and provide no explanation why this matter required the immediate attention of the Board. Finally, the Department gives no explanation why *en banc* consideration is warranted.

Notwithstanding the deficiencies in the Department's petition, we have carefully considered its arguments to ensure that we did not miss something. The "extraordinary circumstances" that the Department relies upon are as follows. First, the Department repeatedly criticizes not so much the result of the July 31 opinion as the opinion itself. It suggests that the opinion "did not address argument and contrary precedent" raised in the Department's extensive filings. We did not "set forth clearly the grounds for [our] decision" or "demonstrate that [we] responded to the arguments presented to [us]." We have an obligation to "render consistent opinions and should either follow, distinguish or overrule [our] own precedent." We failed to adequately distinguish the cases cited by the Department in its memoranda in the opinion.

The Department's second basis for reconsideration is that we misinterpreted the Department's memoranda by saying that the Department "conceded that the alleged 'determination' at issue in this appeal was an appealable 'determination' within the meaning of"

the law. Finally, the Department argues that we erred by concluding that Antis Township and the successful bidder were not indispensable parties.

Earthmovers filed a response in opposition to the petition, which, by way of summary, argues that "the Department merely alleges 'error' and fails to provide any extraordinary circumstance requiring reconsideration. How many times must Appellant and the Board inform the Department that a ruling from the Board has no impact on the rights of Antis Township and the successful bidder?" Earthmovers adds that the Department's petition is not substantially justified.

Reconsideration Is Denied

Although the Department is disappointed with the length of our original opinion, it does not require erudite explication to expose the fundamental flaw permeating the Department's arguments. The key point in this appeal is, as we set forth in the opinion, that Earthmovers is *not* appealing from the award of the grant or the contract or the rejection of its bid; it is appealing from the Department's ineligibility determination as a separate and distinct act.

All of the Department's arguments were and continue to be premised upon the mistaken characterization of this appeal as "essentially a bid challenge." (Motion ¶ 11.) It mischaracterized Earthmovers' appeal as having asserted that Earthmovers was "entitled to the Antis contract as the lowest responsible bidder." (Memorandum p. 3.) Earthmovers makes no such claim, at least not in this appeal. The Department stated incorrectly that this "appeal is grounded in Antis' decision to reject [Earthmovers'] bid." It discussed inapplicable case law regarding disappointed bidders and indispensable parties. It inaccurately stated that Earthmovers "challenge[s] Antis entering into the remediation contract with another bidder." (Memorandum 9.) Based on its misunderstanding of Earthmover's claim, the Department went on to argue that this Board may not for various reasons get involved in what is "essentially a bid challenge." The

Department rehashes these arguments in its petition for reconsideration, refusing to accept or even acknowledge an understanding of the distinction we have drawn and the implications thereof.

Upon reconsideration, we continue to agree with Earthmovers that it is not doing what the Department thinks that it is doing. It seeks no relief from this Board regarding the contract award. It does not here challenge that award. It has no beef here with Antis Township or the successful bidder. It has not asserted that it is "entitled" to the contract, or that it is owed any damages in lieu thereof. Rather, it challenges the Department's act of determining that Earthmovers cannot work on grant-funded, tire-remediation projects. Among other things, it disputes that it is in fact out of compliance and that pertinent statutes authorize or allow the Department to take such an action. The Board's role is limited to a review of that independent act.

With regard to whether the Department conceded the "determination" issue, the Department, through Office of Chief Counsel, sent a letter to Earthmovers explaining and memorializing its self-styled "determination." The Department sent another letter, also attached to the notice of appeal, in which it stated that a Departmental employee "advised the Township that the Department could not enter into an agreement with the Township...that allowed [Earthmovers] to perform the work." The Department in its papers in this appeal has acknowledged that we must take the facts as they are alleged at this point. The Department has referred us to authorities which by their very terms give us jurisdiction over "determinations." (Motion ¶ ¶ 17 (citing 25 Pa. Code § 1021.2) and 19 (citing 2 Pa.C.S. § 101).) It did not "concede" the conclusion of the syllogism, but its concessions regarding the premises inescapably leads to that result based on the existing record. Earthmovers notes that it is incredible that the Office of Chief Counsel (as opposed to, say, program personnel) would send a

letter to Earthmovers characterizing the Department's action as a "determination," and then argue to this Board that the Department did not make a "determination," and we tend to agree.

More to the point, the Department has not added anything new in its petition to explain why an official communication to a potential grant recipient that a particular party is ineligible to work on waste-tire grant-funded projects is *not* an appealable action. Regardless of what concessions the Department has or has not made, the important point is that the Department's publicly announced ineligibility determination, decision, ruling, finding, or whatever we chose to call it had an immediate, adverse effect on Earthmovers' rights. The harm to Earthmovers flowed from the determination itself, not Antis Township's rejection of Earthmovers' bid. *Cf.* 35 P.S. § 4007.1(d) ("A permittee or applicant [under the Air Pollution Control Act] may appeal any violation arising under this act which the department places on the compliance docket.") The rejection of the bid is the first secondary impact of the Department's placement of a contract bar, and there may be others. There is no question in our minds that Earthmovers is entitled to due process review before this Board of the Department's, as opposed to Antis Township's, action.[1]

The Department manifests particular offense at our failure to discuss *Popple v. DEP*, 1997 EHB 152, which "was decided by all of the Board's Administrative Law Judges, including a majority of those currently sitting on the Board." (Petition p. 6.) The Department's heavy reliance on *Popple* further illustrates its continuing and basic misunderstanding of the nature of this appeal.

Popple is not on point. The appellant's notice of appeal in *Popple* "raise[d] only those questions pertaining to contractual bids which he submitted to the Department and the Department's rejection of those bids." 1997 EHB at 155. Earthmovers is not appealing from the

[1] It is particularly unfortunate that the Department would seek interlocutory reconsideration of this fact-specific issue at this point in the proceedings. Exactly what happened here remains in dispute. As we alluded in our original opinion, the Department is attempting to force the premature resolution of an issue sorely in need of an administrative record.

award (or lack thereof) of a grant or a contract. The Departmental action in question in that case was the rejection of the bids. As we have now stated repeatedly, the Department did not reject bids here. It did not refuse to issue a grant. It made an ineligibility determination. Independent, separate, and apart from the Antis Township grant and contract, the Department has found that Earthmovers is in ongoing violation of the law, which apparently puts it on a compliance docket, which, according to the Department, precludes any recipient of a tire remediation grant from dealing with Earthmovers. The Department has embodied its determination in a communication to at least one third party in a manner that had immediate, severe, real-world consequences. *Compare Felix Dam Preservation Association v. DEP*, 2000 EHB 409, 425-26 ("A decision which is not manifested in any way or not carried out in any way is not appealable.") The determination was made in the context of and arose because of the Antis project, but as we said in the opinion, we have no reason to assume that the determination is limited to the Antis situation.

The essence of the *Popple* decision is that we have limited our rulings "to those orders, permits, licenses or decisions of the Department on matters directly concerning the environment." *Popple*, 1997 EHB at 154 (emphasis original). We also held that the Department's rejection of a contract bid is not an action or decision that affected Mr. Popple. Here, unlike the appellant in *Popple*, Earthmovers has not raised any "questions pertaining to contractual bids." *Id.* Earthmovers' issues are directly related to the environment, such as the Department's right to institute a contract bar against Earthmovers pursuant to the Waste Tire Recycling Act. (Amended Notice of Appeal ¶ 5.j.) And, again for current purposes only, the Department's action here may be continuing to affect Earthmovers' ability to enter into grant-funded projects. This goes beyond the loss of a potential contract that a party may have had no right to in the first place.

Finally, we continue to reject the Department's argument that our ruling in this appeal will "necessarily" "impact the rights of Antis and the successful bidder under the Antis contract," thereby rendering those parties indispensable. First, this is merely a repetition of an argument previously made and rejected, so there is no call for reconsideration. Secondly, the Department continues in its failure to explain why our ruling would "necessarily" have any impact whatsoever on the Township or the company that got the work. We are unable to fill in this fatal gap in the Department's reasoning with speculation. We have no difficulty imagining that our relief in this case will have no consequences whatsoever for Antis Township or the successful bidder. Our review of whether *the Department* acted lawfully has no bearing that is obvious to us on whether the Township and/or the successful bidder acted lawfully in light of the Department's actions. It is not necessary to delve into the nuances of the law regarding indispensability where the Department has failed to explain the factual and logical underpinnings that are pertinent to its argument.

In short, the Department has done nothing more than critique the opinion and repeat the very same arguments that we considered and rejected therein. We continue to reject them. The Department has failed to present any persuasive or compelling reasons for reconsideration. It has failed to explain why there are extraordinary circumstances that compel us to decide these issues now. Finally, although the Department has not explained any basis for *en banc* review other than its disagreement with the ruling of the assigned Board Member, we nevertheless and out of an abundance of consideration have provided that level of review given the current lack of a standard for granting such review, in the hopes that such review will not be understood to be automatic in the future.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EARTHMOVERS UNLIMITED, INC.	:	
	:	
v.	:	EHB Docket No. 2003-108-L
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 27th day of August, 2003, the Department's Petition for Reconsideration *En Banc* is DENIED.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Chairman Michael L. Krancer is recused in this matter.

DATED: August 27, 2003

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

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SECRETARY TO THE BOARD

PENNSYLVANIA TROUT, TROUT UNLIMITED—PENNS WOODS WEST CHAPTER and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2002-251-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ORIX-WOODMONT DEER CREEK VENTURE, Permittee	:	**Issued: August 27, 2003**

OPINION AND ORDER ON PETITION TO INTERVENE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A petition to intervene is denied where the hearing is scheduled to begin in one month. To allow the School District to intervene in an Appeal that it could have petitioned to intervene in months ago would be unfair and prejudicial to the Appellants. It is the Board's duty to make sure that all parties' rights to a fair hearing are protected. Part and parcel to a right to a fair hearing is the right to conduct adequate discovery. There is not sufficient time before the hearing to ensure that adequate discovery could be conducted. Likewise, if we allowed intervention and postponed the hearing it would be unfair to the Permittee who has sought an expedited hearing and the hearing has already been postponed once.

OPINION

This appeal is from a water obstruction and encroachment permit issued by the Department of Environmental Protection (Department) to Orix-Woodmont Deer Creek Joint Venture (Orix-Woodmont) for the construction of a commercial development, consisting of a shopping center and office complex, in Harmar Township. Several environmental groups, consisting of Pennsylvania Trout, Trout Unlimited-Penns Woods West Chapter, and Citizens for Pennsylvania's Future (Appellants) have appealed the issuance of the permit. Appellants are requesting that we revoke the permit.

The Pennsylvania Environmental Hearing Board (Board) has issued three opinions in this Appeal to date.[1] Currently before us is a petition for intervention filed on August 11, 2003 by the Allegheny Valley School District (School District). The petition states the School District seeks to intervene on the following grounds:

> a. As the School District within which the subject property is situate, Petitioner has a great interest in the positive community development which it anticipates from Permittee's proposed land development project, both economically and communally.
>
> b. The School District will benefit from Permittee's proposal which includes the transfer to the School District of title to a portion of the subject property which contains wetlands, which will be used for educational purposes.

---

1 *See Pennsylvania Trout v. DEP and Orix-Woodmont*, 2002 EHB 968 (Opinion issued November 13, 2002 on Motion for Expedited Disposition and For a More Specific Pleading); *Pennsylvania Trout v. DEP and Orix-Woodmont*, EHB Docket No. 2002-251-R (Opinion issued February 20, 2003 on Motion to Compel Corporate Designee, Motion for Sanctions, and Motion to Compel More Specific Answers to Interrogatories); and *Pennsylvania Trout v. DEP and Orix-Woodmont*, EHB Docket No. 2002-251-R (Opinion issued April 30, 2003 on Motion for Reconsideration).

Section 4(e) of the Environmental Hearing Board Act, provides that "any interested party may intervene in any matter pending before the Board."[2] The Commonwealth Court has explained that, in the context of intervention, the phrase "any interested party" actually means "any person or entity interested, i.e., concerned, in the proceedings before the Board."[3] The interest required must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will gain or lose by direct operation of the Board's ultimate determination.[4]

As noted in *TJS Mining, Inc. v. DEP,*[5] "The Board's proceedings, however, are different in nature from a town hall meeting or other public fora where virtually everyone who cares to speak his or her mind may do so. Board proceedings constitute adversarial litigation, which means that a party-participant must have an actual stake in the outcome of the appeal at hand." While we certainly believe that the School District is an interested party with an actual stake in the outcome of the Appeal at hand in the context of our Rule and the relevant cases our analysis does not end there.

This appeal was filed on October 15, 2002, and has been rapidly proceeding to a hearing. Shortly after the appeal was filed, Orix-Woodmont moved for an expedited hearing, seeking to schedule a hearing only 4 ½ months after the filing of the appeal. In order to protect the due process rights of the Appellants while still balancing the need of Orix-Woodmont for a speedy disposition of

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2 35 P.S. § 7513(e).
3 *Browning Ferris, Inc. v. DER*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991) ("*BFI*").
4 *Jefferson County v. DEP*, 703 A.2d 1063 n.2 (Pa.Cmwlth. 1997); *Wheelabrator Pottstown, Inc. v. DER*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *BFI*, 598 A.2d at 1060-61; *Wurth v. DEP*, 1998 EHB 1319, 1322-23.

5 EHB Docket No. 2002-136-L (Opinion issued July 2, 2003).

this matter, the Board scheduled the case for hearing in April and May of 2003, with the consent of the parties and the assurance they would be ready for trial at that time. After a myriad of discovery disputes which the parties were unable to resolve amicably, it became clear that this case was not ready for trial at the time scheduled. Therefore, the Board postponed the hearing. A multi-week hearing is now scheduled to begin on September 30, 2003.

The School District was aware or certainly should have been aware of this appeal from the time it was filed. It provides no explanation for waiting until now to seek to intervene. Such intervention at this late date, although permissible under our Rules, would further complicate and lengthen a hearing which is already quite lengthy and complex. However, this is not reason alone to deny intervention.

The Appellants, although not formally opposing intervention, believe it is inappropriate. They have indicated that if intervention is granted they will move for an extension of discovery and a continuance of the hearing. In *Giordano v. DEP and BFI*,[6] Judge Labuskes, although allowing intervention, reopened discovery and severely limited the intervenor's right to participate at the hearing. However, the petition to intervene in that case was filed approximately four months before the hearing. Here, the petition was filed only 1½ months before the hearing. As stated in *Giordano*, "it would be unfair to the existing parties who would be adverse to the [intervenor's] position ...to allow the intervenor to participate in the hearing without having first provided the adverse parties

6 2000 EHB 1154.

with the opportunity to conduct discovery."[7]

Since the hearing, which has already been postponed once, is only one month away, the parties simply do not have adequate time to reopen discovery. As we stated in our earlier opinions, it is this Board's duty to ensure that all parties' rights to a fair hearing are protected. Part and parcel to the right to a fair hearing is the right to conduct adequate discovery. "The Board is the forum for protecting the due process rights of the parties. As such, it is imperative that the process is fair to all parties."[8]

We are loathe to postpone the hearing again. This would not be fair to Orix-Woodmont. Likewise, it would not be fair to Appellants to allow intervention of a party adverse to them without consequently insuring that they could conduct discovery which would fully allow them to explore their opponent's legal and factual positions. To rule otherwise, would allow parties to avoid the rigors of prehearing procedures yet still participate in the hearing. This we will not do.

We are confident, however, that the School District's voice will certainly be heard at the hearing. If the School District's proposed witnesses have been properly identified by Orix-Woodmont and/or the Department, they may still be able to testify on behalf of those parties. Therefore, by denying the School District's petition to intervene, we are not necessarily preventing their witnesses from testifying at the hearing if called by the Department or Orix-Woodmont.

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7 2000 EHB at 1159.

8 *Pennsylvania Trout v. DEP and Orix-Woodmont*, 2002 EHB 968, 972.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA TROUT, TROUT UNLIMITED—PENNS WOODS WEST CHAPTER and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2002-251-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ORIX-WOODMONT DEER CREEK VENTURE, Permittee	:	

ORDER

AND NOW, this 27th day of August, 2003, the petition to intervene is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: August 27, 2003

See following page for service list

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COMMONWEALTH OF PENNSYLVANIA
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EAGLE RESOURCES COPORATION	:	
	:	
v.	:	**EHB Docket No. 2002-030-R**
	:	**(Consolidated with 2002-318-R)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 28, 2003**

OPINION AND ORDER ON REQUEST FOR EXTENSION OF TIME TO OBTAIN COUNSEL

By Thomas W. Renwand Administrative Law Judge

Synopsis:

Corporations must be represented by counsel in appeals before the Pennsylvania Environmental Hearing Board. The Board refuses to dismiss a consolidated Appeal where Appellant corporation has not yet obtained counsel to represent it despite being ordered twice to do so. The Board considers Appellant's request for a further extension to obtain counsel even though it is embodied in a letter instead of a motion. The Board grants Appellant an additional 14 days rather than 30 days to obtain counsel because Appellant never explained why an additional 30 days was needed.

OPINION

This consolidated appeal arose after the Pennsylvania Department of Environmental Protection (Department) ordered Eagle Resources Corporation (Eagle) to plug wells and reclaim

well sites pursuant to the Pennsylvania Oil and Gas Act.[1] The original appeal was filed on February 7, 2002 while the second appeal was filed on December 18, 2002. The appeals were consolidated pursuant to Eagle's Motion by our Order of January 28, 2003. On July 15, 2003 we issued an Order allowing Eagle's attorney to withdraw from the case because they were not being paid.

The Board's Rules of Practice and Procedure require corporations to be represented by counsel in proceedings before the Board.[2]

Section 1021.21. Representation

> b) Corporations shall be represented by an attorney of record admitted to practice before the Supreme Court of Pennsylvania.[3]

Although we allowed Eagle's attorneys to withdraw, we ordered Eagle on July 15, 2003 to obtain new counsel on or before August 15, 2003 "if it wishes to continue its Appeal." When no attorney entered an appearance on Eagle's behalf we issued a second Order on August 19, 2003. The relevant part of this Order directed Eagle to obtain counsel to represent it on or before August 26, 2003 or pursuant to 25 Pa. Code Section 1021.61 we would dismiss Eagle's Appeal as a sanction for its failure to abide by a Board Order.

On August 26, 2003 Eagle's President filed a letter with the Board "requesting a 30 day extension to this date to be able to obtaining [sic] the necessary funding to retain counsel." On August 27, 2003, the Department filed its Response in Opposition to Appellant's Request for An Extension of Time (Response).

The Department first points out that Eagle simply ignored the Board's Order of July 15,

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[1] 58 P.S. Section 601.101 *et. seq.*
[2] 25 Pa. Code Section 1021.21.

2003 requiring Eagle to obtain a new lawyer by August 15, 2003. The Department further objects because 1) Eagle's request is required to be filed in the form of a motion pursuant to our Rules;[4] and 2) Eagle has already had sufficient time in which to obtain counsel. The Department urges us to dismiss Eagle's appeal.

We agree with the Department that simply because Eagle does not have counsel does not excuse it from complying with the Board's Rules of Practice and Procedure. Indeed, in *Van Tassel v. DEP*[5] we warned that "laypersons proceeding *pro se* assume the risk that their lack of legal expertise may prove their undoing."[6] Further, we also agree with the Department that Eagle has had sufficient time to obtain a new attorney.

Our Rules do require that requests for extension of time should be made by motion[7] unless all parties consent. If all parties consent, then the "request may be embodied in a letter, provided the letter indicates the consent of the other parties."[8] Our Rules also require that the motion for extension conform to the provisions of Section 1021.92 relating to procedural motions.[9]

We are also mindful that our Rules should be liberally construed to secure the just, speedy and inexpensive determination of every appeal. "The Board at every stage of an appeal... may disregard any error or defect of procedure which does not affect the substantial rights of the parties."[10] Thus, in the interests of justice, we will overlook the fact that Eagle's request for a further extension of time to obtain counsel was made by letter rather than motion.

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[3] 25 Pa. Code Section 1021.21(b).
[4] 25 Pa. Code Section 1021.92.
[5] 2002 EHB 625.
[6] 2002 EHB at 628.
[7] 25 Pa. Code Section 1021.12(a).
[8] 25 Pa. Code Section 1021.92(d).
[9] 25 Pa. Code Section 1021.92(b).

Turning to the merits of the request for an additional thirty day extension of time, we note that the letter provides no information as to why this is a "magic" number. It does not indicate that a loan has been requested, or that property will be sold, or give any reason why we should simply wait another thirty days for Appellant to obtain counsel which our Rules require at all times. We are hesitant, however, at this juncture to simply dismiss Eagle's appeal. Nevertheless, since we are not given any concrete reasons as to why an additional thirty days is necessary we decline to extend the deadline to obtain counsel for another thirty days. Instead, we will grant Eagle two additional weeks from the date of this Order to obtain an attorney. If it does not obtain an attorney during this time period, we will dismiss its Appeal.

[10] 25 Pa. Code Section 1021.4.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EAGLE RESOURCES COPORATION	:	
	:	
	:	
v.	:	**EHB Docket No. 2002-030-R**
	:	**(Consolidated with 2002-318-R)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 28th day of August, 2003, after review of Appellant Eagle Resources Corporation's request for an additional thirty days to obtain an attorney and the Department's Response in Opposition, it is ordered as follows:

1) The request is ***granted in part.***
2) An attorney shall enter his or her appearance on Eagle's behalf in this Appeal on or before **Thursday, September 11, 2003**.
3) Pursuant to 25 Pa. Code Section 1021.61 if Eagle does not obtain counsel to represent it on or before Thursday, September 11, 2003, the Board will ***dismiss*** Eagle's consolidated Appeal.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2002-030-R
(Consolidated with 2002-318-R)

DATED: August 28, 2003

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

For the Commonwealth, DEP:
Stephanie K. Gallogly, Esq.
Northwest Regional Counsel

For Appellant:
Eagle Resources Corporation
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DELAWARE RIVERKEEPER, DELAWARE RIVERKEEPER NETWORK AND AMERICAN LITTORAL SOCIETY	:	
v.	:	**EHB Docket No. 2003-083-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PORTLAND BOROUGH, Permittee	:	**Issued: September 12, 2003**

OPINION AND ORDER ON MOTION TO AMEND APPEAL

By George J. Miller, Administrative Law Judge

Synopsis

The Board grants in part and denies in part a motion to amend a notice of appeal. The Board grants those objections which are fairly encompassed within the general objections already raised in the appellants' notice of appeal or are purely legal contentions. The Board denies the appellants' motion to the extent they seek to add objections that are clearly beyond the scope of the appeal or could have been added at a much earlier date. Permitting the addition of these objections would significantly prejudice the municipality which is under a time constraint to implement its sewage facilities plan under the terms of a grant.

OPINION

Before the Board is the motion by the Delaware Riverkeeper, Delaware Riverkeeper Network and the American Littoral Society (collectively, Appellants) to

amend their notice of appeal. Their appeal objected to the Department of Environmental Protection's approval of an Act 537 Plan Update Revision for Portland Borough, Northampton County. Both the Department and the Borough object to the proposed amendments. As we explain below, we grant in part and deny in part the Appellants' motion.

The Department approved an Act 537 plan revision for the Borough in March 2003. The revision approved, among other things, the construction of a wastewater treatment plant. The construction of this plant is dependent, at least in part, by the use of grant funds which need to be expended by the end of December 2004. On April 3, 2003, the Appellants filed their appeal which objected to the Department's approval of the Borough's plan revision on the basis that it failed to consider alternatives to the single stream discharge into the Delaware River, and did not adequately evaluate alternatives and require proof that the treatment facility proposed in the plan revision was the best environmentally acceptable alternative. After some discovery, the Appellants have filed a motion to amend this appeal which would change the regulatory citation to one objection and add seven new objections.[1] The Board held an oral argument with all the parties on this motion via teleconference on September 11, 2003.

As we have explained many times before, the Board allows the filing of broadly worded notices of appeal, which may be amended without leave of the Board within

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[1] Pursuant to the current pre-hearing order, discovery is scheduled for completion by October 10, 2003.

twenty days of filing.[2] Otherwise an appellant must seek leave of the Board pursuant to Rule 53(b), which dictates the circumstances under which such leave may be granted:

> (1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Departmental employees.
>
> (2) It is based upon facts, identified in the motion, that were discovered during the preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.
>
> (3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor.[3]

The Board is generally liberal in allowing the addition of legal objections to an action of the Department by amendment.[4] It is also liberal in permitting parties to pursue objections that are fairly contained in the notice of appeal.[5] Yet we must carefully scrutinize amendments which will require significant additional discovery and prejudice the other parties to the appeal.

The Appellants first seek to amend "Objection B" of their notice of appeal, which deals with the Department's consideration of alternatives, by changing the citation of the regulation from 25 Pa. Code § 71.65(a)(1) to the more general citation, 25 Pa. Code § 71.61(a). Further, the Appellants also wish to add an objection (Objection H) to the effect that the plan revision fails to comply with the policy of protecting the environment as articulated in the Clean Streams Law. We believe both of these amendments are in the nature of legal objections and do not change or expand the substance of the Appellants'

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[2] 25 Pa. Code § 1021.53(a).
[3] 25 Pa. Code § 1021.53(b).
[4] *Global Eco-Logical Services, Inc. v. DEP*, 2001 EHB 74.
[5] *Ainjar Trust v. DEP*, 2001 EHB 59.

claims from their initial notice of appeal. Therefore we will grant the Appellants' motion to amend Objection B of their notice of appeal and to add Objection H.[6]

Additionally, the Appellants wish to add Objection D to the notice of appeal which contends that the plan revision calls for significantly more capacity than is necessary to meet the needs of the Borough and fails to adequately consider alternatives to the resulting stream discharge. The Appellants contend that this is a more specific objection which fairly falls under the purview of the objection in their original notice of appeal concerning the failure of the Department to consider alternatives. The Borough objects to the addition of this contention based on its position that it lacks merit and expresses concern that additional delay in this litigation will result.

We believe that this objection is closely related to the Appellants' original claim that the plan revision fails to adequately consider alternatives and is therefore harmful to the environment. During oral argument the Appellants represented that the nature and scale of their concern did not come to light until it received certain discovery documents from the Borough and the Department.[7] Moreover, at least some discovery related to this subject-matter has already taken place, thereby reducing the hardship which may be visited upon the Borough. We recognize that the addition of this objection may necessitate some extension of discovery deadlines, but the parties have been diligent in completing this process to date. We are confident that any extension requests will not be significant.

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[6] Objection H is simply a restatement of the Appellants' original objection and arguably the Appellants do not even require an amendment to their appeal in order to make this argument. *Ainjar Trust v. DEP*, 2001 EHB 59.

[7] 25 Pa. Code § 1021.53(b)(1)(allowing amendment based on discovery from hostile witnesses or department employees).

The remaining objections which the Appellants seek to add to their notice of appeal are either clearly beyond the scope of the subject-matter of the original notice of appeal or involve issues that were evident on the face of the Act 537 Plan Revision and therefore could have been added much earlier in the proceedings. To allow their addition at this late date would prejudice the Borough which is under a time constraint to begin construction of the treatment facility proposed in its revision. We will first deal with the objections which relate to matters beyond the scope of this appeal.

Proposed Objections E and J[8] relate to the Appellants' allegation that the Borough's plan revision was improperly granted because of the negotiations between the Borough and a neighboring municipality, Upper Mount Bethel Township, concerning sewage facilities. Although, as the Borough admits, the plan revision contemplates a possible agreement with Upper Mount Bethel Township to provide sewage disposal capacity at some point in the future, the plan does not explicitly provide for any capacity

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[8] Specifically, these objections are:

> Objection E. DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the 537 Plan because the plan provides sewage service for the neighboring municipality, Upper Mount Bethel Township (UMBT), without requiring adoption of the plan by the governing body of UMBT. 25 Pa. Code § 71.12(b) and 25 Pa. Code § 71.13(c). DEP further committed an error of law and acted arbitrarily, capriciously and/or unreasonably because the department did not require alternatives analysis on the potential land application available to UMBT in violation of 25 Pa. Code § 71.13(a) and § 71.61.
>
> Objection J. DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the 537 Plan because the plan includes proposed sewage facilities affecting sewage facilities of UMBT without UMBT submitting revisions to their 537 plan for approval in conjunction with the Portland Borough 537 Plan in violation of 25 Pa. Code § 71.32(d)(7).

to be allocated to it. First, the exploration of this issue will clearly require significant additional discovery and delay the progress of this litigation. Second, it is obvious that such an agreement would require additional plan revisions and those revisions could be challenged at that time. Further, Upper Mount Bethel Township would also be required to make changes to its sewage facilities planning which could also be challenged in the future. Accordingly, objections based on these sorts of possible future events, not explicitly provided for in the plan revision, are beyond the scope of the current appeal, and we will not allow the addition of these objections.

Objection F alleges that the Department's approval of the plan revision was inappropriate because "the plan provides an alternative that was not adopted by the governing body of Portland Borough." At oral argument, the Appellants contend that they do not seek to argue that the political process of the Borough was improper, but contends that there is a technical discrepancy between what the Borough government approved and what the Department approved in the plan revision. First, the Appellants clearly could have added this objection earlier in this proceeding since the "discrepancy" was evident from the plan documents themselves. Moreover, this objection is more than merely an additional legal contention which expands upon the Appellants' original allegation. Its addition will create the need for additional discovery, slowing down the pace of this litigation thereby prejudicing the Borough's ability to implement the plan revisions. Accordingly, the Appellants' motion to add Objection F is denied.

Objections G and I contend that the plan failed to properly identify endangered species and failed to adequately consider funding for the proposed sewage treatment facility. Both of these contentions would involve significantly more discovery as they are

clearly factual issues. The consideration of any endangered species which may be impacted by the plan revision would involve expert evaluation. Moreover, since both were topics explicitly discussed in the plan revision, we can see no reason why they could not have been added to the Appellants' appeal earlier than a month before the close of discovery in this matter. Accordingly, we deny the Appellants' motion to add Objections G and I.[9]

In conclusion, as explained above, we are granting the addition of objections which are purely legal in nature or are so closely linked to the Appellants' original general objection, that significant prejudice to the other parties will not result. However, we are denying the motion inasmuch as it seeks to add objections which would necessitate additional discovery and prejudice the Borough and which could have been raised much earlier in this litigation. Accordingly, we enter the following order:

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[9] *Township of Paradise v. DEP*, 2001 EHB 920 (denying a motion to amend an appeal near the close of discovery which sought to add an objection based on a claim that was clear on the face of the challenged permit and therefore could have been added earlier).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER, DELAWARE RIVERKEEPER NETWORK AND AMERICAN LITTORAL SOCIETY	:	
v.	:	**EHB Docket No. 2003-083-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PORTLAND BOROUGH, Permittee	:	

ORDER

AND NOW, this 12th day of September, 2003, upon consideration of the Appellants' motion to amend their appeal in the above-captioned matter, it is HEREBY ORDERED as follows:

1. The motion to amend Objection B of the notice of appeal is GRANTED. The objection now reads:

> DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the 537 Plan because the plan does not adequately evaluate alternatives available to provide sewage facilities and proof that the proposed sewage facility is the best short- and long-term environmentally acceptable alternative. 25 Pa. Code § 71.61(a).

2. The motion to amend the notice of appeal by adding Proposed Objection D is hereby GRANTED. The appeal is hereby amended to include the following:

> DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the 537 Plan because the plan provides for more than two times the capacity needed by Portland Borough to meet its current and/or future needs, the plan doesn't include the development and evaluation of alternatives to a stream discharge for the excess capacity in violation of 25 Pa. Code § 71.21(a), § 71.21(a)(6) and § 71.31(a).

3. The motion to amend the notice of appeal by adding Proposed Objection H is hereby GRANTED. The appeal is hereby amended to include the following:

> DEP committed an error of law and acted arbitrarily, capriciously and/or unreasonably in the approval of the 537 Plan because the plan fails to further the policies under section 3 of the act (35 P.S. § 750.3) and sections 4 and 5 of the Clean Streams Law (35 P.S. §§ 691.4 and 691.5). 25 Pa. Code § 71.32(d)(3).

4. The motion to amend is DENIED in all other respects.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Member

DATED: September 12, 2003

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

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WILLIAM T. PHILLIPY IV
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DAUPHIN MEADOWS, INC.	:	
	:	
v.	:	**EHB Docket No. 99-190-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and UPPER DAUPHIN AREA CITIZENS ACTION COMMITTEE, et al., Intervenors	:	**Issued: September 17, 2003**

OPINION AND ORDER ON MOTIONS FOR SANCTIONS

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

Synopsis:

A motion for discovery sanctions for an allegedly untimely supplementation of an interrogatory is denied. The movant failed to show that the respondent's continuing objection to the interrogatory was inappropriate. It failed to support its claim that the supplementation was not seasonable. It also failed to explain why a sanction or remedy short of evidence preclusion would have been inadequate to redress the alleged discovery grievance.

A cross-motion for sanctions is also denied. Supplementation of discovery several weeks before a hearing is not *ipso facto* unreasonable. There is also no basis for imposing sanctions because of the changed employment status of an individual designated as a corporate representative for discovery purposes.

OPINION

Dauphin Meadows' Motion

Dauphin Meadows has filed a motion for sanctions. It asks that sanctions be imposed against the Upper Dauphin Area Citizens Action Committee ("UDACAC") because UDACAC only recently supplemented its answer to an interrogatory by identifying three additional individuals who have knowledge related to harms and benefits associated with the proposed expansion of the Dauphin Meadows Landfill. Dauphin Meadows argues that these people should have been identified a long time ago, not on the verge of the hearing, which is scheduled to begin on October 6, 2003. The only sanction requested by Dauphin Meadows is an order from the Board precluding the three individuals from testifying at the upcoming hearing. UDACAC has filed a response in opposition to the motion. The Department, by letter, noted its agreement with UDACAC's opposition.

Dauphin Meadows has not convinced us that UDACAC committed a discovery violation. The interrogatory at issue reads as follows:

> 1. Identify all persons, other than current employees of the Department, who UDACAC has reason to believe have knowledge of facts related to known and potential harms or benefits associated with the proposed expansion of the Dauphin Meadows landfill.

UDACAC objected to the interrogatory as being overly broad and unduly burdensome. It observed that there are "hundreds, if not thousands, of persons that may have knowledge of facts related to known and potential harms or benefits associated with" the landfill expansion. Without waiving its objection, UDACAC identified 25 individuals with knowledge.

Dauphin Meadows did not petition the Board to dismiss UDACAC's objection pursuant to Pa.R.C.P. 4006(a)(2). It did not file a motion to compel or for a more specific response. Pointedly, Dauphin Meadows has not challenged UDACAC's objection even now in its motion

for sanctions. The interrogatory in question is quite broad, and UDACAC's objection does not independently appear to us to have been obviously inappropriate. Therefore, if it has not been established that UDACAC had an obligation to answer the interrogatory in the first place, there is a serious question on our minds as to whether it can now be sanctioned for providing allegedly untimely supplementation of that interrogatory. In its response to the motion to compel, UDACAC points out that "Dauphin Meadows chose not to challenge UDACAC's objections to Interrogatory No. 1 [and] not to compel a further response to Interrogatory No. 1 [and] Dauphin Meadows should not be allowed to bootstrap itself into a sanctions remedy...." UDACAC's point is well taken.

Although UDACAC provided the names of 25 people in response to Dauphin Meadows' interrogatory and recently added three names, it was careful on both occasions to preserve its objection. To repeat, Dauphin Meadows has never challenged that objection. It is clear that UDACAC's initial list was not intended to be an exclusive list or to suggest that there were no other persons with relevant knowledge. We do not believe that the fact that UDACAC provided some names in its initial response bolsters Dauphin Meadows' contention that a discovery violation has occurred.

The essence of Dauphin Meadows' complaint, of course, is not so much that UDACAC's list of names was incomplete. Rather, its primary concern is that UDACAC's supplementation was untimely. Putting aside the fact that UDACAC may have had no duty to supplement in the first place, Dauphin Meadows has failed to explain why the supplementation was untimely. It is true that this appeal has a lengthy history and we are now on the verge of the hearing on the merits. Those facts alone, however, do not *ipso facto* demonstrate that UDACAC failed to comply with its obligation to "seasonably" supplement its responses as required by Pa.R.C.P.

4007.4(1). There is no proof or even a well-supported allegation here that UDACAC failed to act with appropriate dispatch given the specific circumstances associated with the three individuals in question. Dauphin Meadows' motion fails to make out its case of a discovery violation in this key respect.

In short, we remain unconvinced that a discovery violation occurred. Even if we assume, however, that a violation occurred, the only sanction requested by Dauphin Meadows--exclusion of testimony--is too extreme. First, in a point that overlaps the above discussion, insufficient groundwork has been laid for Dauphin Meadows' motion for sanctions. While Dauphin Meadows could not have filed a motion to compel regarding the allegedly untimely nature of the supplementation, it could have filed such a motion if it wished to challenge UDACAC's original and continuing objection. Its failure to do so not only suggests that there was no discovery violation at all, it also weakens Dauphin Meadows' request that severe sanctions be imposed. *Cf. Township of Paradise v. DEP*, 2001 EHB 1005, 1008. (sanction of preclusion not imposed where no prior motion to compel or violation of Board order).

Perhaps more fundamentally, one simple rule guides our resolution of discovery disputes: The purpose of discovery is to prevent surprise and unfairness and to allow a fair hearing on the merits. *ERSI v. DEP*, 2001 EHB 824, 830. A corollary to this principle is that we will be intensely circumspect of any request to preclude factual evidence that might otherwise assist the Board in reaching the correct result *on the merits. Kleissler v. DEP*, 2002 EHB 617, 621; *Township of Paradise*, 2001 EHB at 1008. In the absence of contumacious disregard of Board orders, a party who would have us exclude evidence as a discovery sanction must show that less severe mechanisms are not adequate to redress a discovery problem. *Kleissler*, 2002 EHB at 621.

Here, Dauphin Meadows has not asked for any sanction short of complete preclusion of all testimony of all three witnesses. It has not asked to conduct any additional discovery. To the contrary, it lists a parade of undesirable horribles, including additional discovery, that will befall it if the entire testimony is not precluded.[1] After examining the three individuals' identities and their areas of knowledge as described in the materials, we do not accept either Dauphin Meadows' dire predictions or its claim that only complete preclusion would have sufficed. Although we suspect that depositions of the new people would have gone a long way toward alleviating Dauphin Meadows' concerns, we are hesitant to fashion a different remedy or impose a different sanction where Dauphin Meadows has not requested it and may not even want it.[2] In short, even if we assume that there was a discovery violation here, we have not been shown that the sanction of complete preclusion of all of the individuals' testimony is necessary or appropriate.

UDACAC'S Motion

Largely in what appears to be a counteroffensive designed to quell Dauphin Meadows' motion for sanctions,[3] the UDACAC has filed its own cross-motion for sanctions. UDACAC asks us to preclude Dauphin Meadows from calling eight individuals as witnesses. UDACAC complains that Dauphin Meadows also only recently identified several new potential witnesses.

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[1] "[I]n this case, short of multiple additional depositions and document reviews, followed by inevitable motions designed to preclude disguised expert testimony which, in turn, will be followed by further supplementation of expert reports by Dauphin Meadows and revised Pre-Hearing Memorandum (all of which will result in significant time and expense), there is no practical cure for the extraordinary prejudice Dauphin Meadows will suffer as a result of UDACAC's willful failure to comply with its discovery obligations." (Motion ¶ 15.)

[2] We do not suppose that Dauphin Meadows simply overlooked the possibility of additional discovery. Given the nature of the individuals' knowledge as outlined in the materials, it is not inconceivable that Dauphin Meadows decided that the cost of three more depositions in this heavily litigated appeal would not be justified.

[3] UDACAC is wrong in contending that Dauphin Meadows' own alleged discovery violations would have justified any discovery violations on UDACAC's part.

Dauphin Meadows, of course, contests the cross-motion. The Department has interposed a "response" to UDACAC's cross-motion wherein it "admits" UDACAC's averments, adds additional points (e.g. a relevancy argument), supports UDACAC's request for relief, and proposes alternative relief in the event the cross-motion is denied.[4]

UDACAC's cross-motion does not adequately explain why we should impose the severe sanction of evidence preclusion with respect to seven of the eight individuals involved. As we stated with respect to Dauphin Meadows' motion for sanctions, the mere fact that potential witnesses are identified late in the proceedings is only one factor in deciding whether discovery has been "seasonably" supplemented. It is obviously a major factor, but it is not dispositive. The unfortunate truth of the matter is that new individuals tend to be identified as a hearing draws near in more cases than not. It is simply the nature of litigation. Discovery is never perfectly complete. A party who would preclude testimony of fact witnesses must provide specific, compelling grounds why the Board should turn a blind eye to what might otherwise help us reach the best possible result on the merits. Other than stating that Dauphin Meadows has identified individuals late in the game, UDACAC provides no basis for a conclusion that Dauphin Meadows committed a discovery violation, and it has fallen far short of making a case for the imposition of any sanctions with respect to seven of the eight individuals in question.[5]

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[4] Although we have considered the Department's position, we have done so with some hesitation. We are not sure that it is appropriate for a third party to interpose a response in a discovery dispute between two other parties concerning discovery between those two parties. The Department is not adverse to UDACAC either in general or with respect to the particular discovery dispute at hand. Among other difficulties, the Department's "response," which is, in reality, a joinder, was filed at the same time as Dauphin Meadows' response, thereby effectively depriving Dauphin Meadows of an opportunity to address the Department's points, at least without permission of the Board and further delay. If the Department believed that its own discovery rights were violated, it could have filed its own motion. This opinion and order should not be viewed as endorsement of the tactic employed by the Department in future cases.

[5] We would add that UDACAC's cross-motion suffers from some of the same defects as Dauphin Meadows' motion; namely, UDACAC's failure to move to dismiss Dauphin Meadows' continuing objection to the interrogatory that provides the foundation for the cross-motion. Further, as we held with

UDACAC's argument with respect to the eighth individual is difficult to follow. UDACAC's position appears to be that Dauphin Meadows should not be permitted to call David Conrad as a witness because Mark Harlacker was previously identified as Dauphin Meadows' designee for purposes of responding to a notice of deposition of the corporation that was served pursuant to Pa.R.C.P. 4007.1(e). UDACAC argues that Mr. Conrad should not be allowed to act as Dauphin Meadows' "new spokesperson for the company" at the hearing. UDACAC adds that it had grounds for impeaching Mr. Harlacker that it will now be prevented from using.

First, the concepts regarding corporate designees for purposes of discovery have no direct application to the hearing on the merits. The corporation does not have an official "spokesperson" at the hearing. Witnesses at the hearing do not testify as representatives or agents per se; they testify as to facts based upon their personal knowledge. Pa.R.E. 602. Dauphin Meadows cannot be said to be "attempting to substitute a new spokesperson for the company."

Furthermore, UDACAC does not explain exactly what discovery violation Dauphin Meadows supposedly committed. It cites no rule or precedent. It does not allege that Dauphin Meadows acted improperly by designating Harlacker at the time of the deposition. It does not refer us to any source or authority that imposed an obligation on Dauphin Meadows to advise UDACAC of Harlacker's alleged change in employment status. UDACAC does not explain why it did not conduct follow-up discovery to fill any gaps in its own knowledge. It does not provide a reasoned basis for sanctions. Having discounted UDACAC's "spokesperson" argument, it is not immediately apparent why it would otherwise be necessary or appropriate to exclude

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regard to Dauphin Meadows' motion, it is not immediately apparent to us that Dauphin Meadows' objection to UDACAC's interrogatory was invalid. Still further, not only are we not convinced that Dauphin Meadows had an obligation to answer the interrogatory, it is not apparent that Dauphin Meadows had a duty to supplement the interrogatory, even if we assume there was a duty to answer it in the first place. *See* Pa.R.C.P. 4007.1 (general rule is that there is no duty to supplement).

Conrad's testimony even if we assume that there was a discovery violation regarding *Harlacker*. Dauphin Meadows presumably remains bound by Harlacker's deposition testimony. UDACAC does not contend that it was impeded from deposing Conrad. It has asked for no sanction or remedy short of complete preclusion.[6] We must reject UDACAC's request for sanctions regarding Conrad.

Accordingly, we issue the order that follows.

[6] The Department in its prayer for relief does ask to depose Conrad and one other newly identified witness in the event UDACAC's cross-motion is denied. To the extent that the cross-motion is denied because no violation was shown to have occurred, however, *no* sanction or relief is appropriate. The Department has not sought additional discovery independent of any violations, and it has not otherwise explained why additional depositions at this extremely late date would be appropriate or even particularly helpful. We also question whether it was appropriate to include the request in a "response" to UDACAC's motion. *See* footnote 4, *supra*.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAUPHIN MEADOWS, INC.	:	
	:	
v.	:	**EHB Docket No. 99-190-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and UPPER DAUPHIN AREA CITIZENS ACTION COMMITTEE, et al., Intervenors	:	

ORDER

AND NOW, this 17th day of September, 2003, the parties' motions for sanctions are **DENIED.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: September 17, 2003

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PENNSYLVANIA TROUT, TROUT UNLIMITED—PENNS WOODS WEST CHAPTER and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2002-251-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ORIX-WOODMONT DEER CREEK VENTURE, Permittee	:	**Issued: September 24, 2003**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Permittee's motion for summary judgment claiming Appellants' lack of standing is denied. In ruling on motions for summary judgment we are required to view the record in the light most favorable to the non-moving party and to resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Appellants' argument that their use of the area of the permit and surrounding areas through hiking, walking, fishing and wildlife observation are recreational uses sufficient to confer standing to challenge the Department's action raises genuine issues of material fact that must be decided at the hearing on the merits.

OPINION

Background

This appeal is from a water obstruction and encroachment permit issued by the Department of Environmental Protection (Department) to Orix-Woodmont Deer Creek Venture (Orix-Woodmont) for the construction and development of a mixed use commercial center, consisting of a shopping center and office complex, in Harmar Township, Allegheny County. The Appellants are Pennsylvania Trout, Trout Unlimited – Penns Woods Chapter and Citizens for Pennsylvania's Future (Appellants or Penn Future). The Appellants seek to have the permit revoked on the basis that it does not comply with the requirements of 25 Pa. Code Chapter 105.

Penn Future contends that Orix-Woodmont failed to affirmatively demonstrate there was no practicable alternative to the project. They further contend that Orix-Woodmont's definition of "basic purpose" of the project is improperly narrow and specific and that the Department's approval of the permit did not comply with the applicable regulations.

Summary Judgment

Orix-Woodmont has filed a motion for summary judgment alleging that the Appellants have not demonstrated they have standing to bring this appeal. Summary judgment is appropriate where the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Stern v. DEP*, 2001 EHB 628. When evaluating a motion for summary judgment, the Board views the record in the light most favorable to the non-moving party; all doubt as

to the existence of a genuine issue of material fact must be resolved against the moving party. *Id.*

Standing

An essential element of the Appellants' case is that they must have standing to bring this appeal. In other words, they must be aggrieved by the action under appeal, i.e. the issuance of the water obstruction and encroachment permit. *Township of Florence*, 1997 EHB at 773-74. An organization can have standing either in its own right or as a representative of its members. *Barshinger v. DEP*, 1996 EHB 849. Where an organization is acting as a representative for its members, it has standing if at least one of those individuals has been aggrieved by an action of the Department. *Chestnut Ridge Conservancy v. DEP,* 1997 EHB 45; *RESCUE Wyoming v. DER*, 1993 EHB 839.

The concept of standing was explained in *Wurth v. DEP*, 2000 EHB 155, 170-71, as follows:

> The purpose of the standing doctrine in the context of proceedings before the Board is to determine whether an appellant is the appropriate party to seek relief from an action of the Department. *Valley Creek Coalition v. DEP,* EHB Docket No. 98-228-MG (Opinion issued December 15, 1999). In order to have standing to challenge a Department action, an appellant must be "aggrieved." *Florence Township v. DEP,* 1996 EHB 282. Accordingly, an appellant must show that he has a "substantial" interest in the subject matter of the particular litigation which surpasses the common interest of all citizens in seeking compliance with the law; a "direct" interest that was harmed by the challenged action; and an "immediate" interest that establishes a causal connection between the action complained of and the injury they suffered. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975).

In other words, we must ask whether the Appellants have a special right that rises above the general interest of all citizens to challenge the Department action in question, based on what they have alleged. *Greenfield Good Neighbors Group v. DEP*, EHB Docket No. 2002-006-R (Adjudication issued August 20, 2003).

The test for determining standing was set forth in *Giordano v. DEP*, 2000 EHB 1184, 1187:

> In order to establish standing, the appellants must prove that (1) the action being appealed has had – or there is an objectively reasonable threat that it will have – adverse effects, and (2) the appellants are among those who have been – or are likely to be – adversely affected in a substantial, direct, and immediate way [citations omitted]. . . .The second question cannot be answered affirmatively unless the harm suffered by the appellants is greater than the population at large (i.e. "substantial") and there is a direct and immediate connection between the action under appeal and the appellants' harm (i.e. causation in fact and proximate cause). . . .

2000 EHB at 1185.

In the summary judgment context, the requirement of a direct, immediate and substantial interest in the subject matter of an appeal must be met by specific examples once standing has been challenged. In other words, once a challenge to standing has been raised, the appellant must set forth sufficient facts or law in support of its conclusion that it has standing. If it fails to do so, it runs the risk of its appeal being dismissed for lack of standing. *Pennsylvania Game Commn. v. DER*, 555 A.2d 812, 818 (1989) (concurring opinion of J. Zappala). As the United States Supreme Court has

held with regard to the issue of standing, "pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial." *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

In *Tessitor v. Department of Environmental Protection*, 682 A.2d 434 (Pa. Cmwlth. 1996), the Commonwealth Court examined the question of whether an appellant's interest rose to the level necessary to convey standing. As in this case, in *Tessitor* the petitioner had appealed the Department's grant of a water obstruction and encroachment permit. The permit authorized the Port Authority of Allegheny County (PAT) to construct and maintain new bridges across a creek and river and to construct interchange ramps in a floodplain. The petitioner had appealed the Department's action, arguing that the granting of the permit would increase transit emissions resulting in a decline in the environmental quality of his community. In response to a motion to dismiss for lack of standing filed by the Department, the petitioner argued that he used the stream and property affected by the permit as a hiker, bird watcher, fisherman and outdoorsman. The Board dismissed the appeal on the basis of standing, and the Commonwealth Court affirmed.

The Commonwealth Court began its analysis of the standing question by reiterating the basic standard for standing as follows:

> To have standing to initiate a legal action, a party must have a direct

> and immediate interest in the subject matter of the litigation. The interest must have substance beyond the abstract interest of all citizens in having others comply with the law. An interest is immediate rather than remote only where a party proves a sufficiently close causal connection between the challenged action and the asserted injury.

Id. at 437 (citations omitted). Then applying the test to find that Appellant did not pass muster the Court stated as follows:

> In the present matter, the Board determined that Tessitor failed to *allege facts to support his assertion that he will suffer direct harm as a result of the issuance of the permit.* Tessitor's sole allegation that there is a causal connection between the permit and his potential injury is that the construction authorized by the permit will result in an increase in transit emissions and an ensuing decline in the air quality surrounding the community. To accept that Tessitor has standing means that an individual need only generally allege that an increase in transit emissions will cause a decline in the air quality in the surrounding community. Tessitor has not alleged any specific harm or causal relation between the issuance of the permit and any air quality degradation. To accept Tessitor's syllogism means that he has standing to challenge the issuance of any permit if it involves an emission in his community. According to Tessitor's own allegation, the permit causes no direct harm to his interest; the connection between his concerns and the issuance of the water encroachment permit is too remote and speculative. He has not alleged the necessary close causal connection between the water encroachment permit and the harm to his interest.
>
> Additionally, Tessitor has not specified which streams and property he deems environmentally endangered nor has he precisely defined the area where he conducts his activities or the area that he maintains is his community. His stake as an outdoorsman does not rise to a level beyond the abstract interest of all citizens in having the Department comply with environmental regulations.

Id. at 437-38.

With this case law as a basis we turn to the issue of whether Appellants have alleged sufficient facts at this stage of the litigation to allow them to proceed to a hearing. In other words, have they sufficiently alleged facts if proven that would entitle them to challenge the Department's action?

Deer Creek

The Appellants assert they have an interest in Deer Creek, which flows through and in the vicinity of the proposed development. Pennsylvania Trout has alleged that its members "regularly fish in the segment of Deer Creek that will be surrounded by the proposed development." Trout Unlimited has alleged that some of its members regularly fish in Deer Creek at the site of the proposed development and that "[a]ppreciation of the surrounding natural environmental and wildlife is essential to that experience." Its members "intend to visit and use the site in the future." Penn Future has alleged it has members who "live in the vicinity of the proposed Deer Creek development, drive on the roads near the site, fish in Deer Creek, hike and generally enjoy the aesthetic qualities of this natural area including the stream, the wetlands, and the wildlife. They intend to continue doing so in the future." (Orix-Woodmont Motion, Ex. A, Appellants' Answers to Interrogatories)

Orix-Woodmont points to the deposition testimony of the Appellants' own representatives, and argues that of the approximately 3,000 local members of the Appellant organizations, only two people have utilized the property at one point for hiking or fishing and that no member of the

organizations has used the property in the past several years since no trespassing signs were posted.

In the face of this, Appellants assert that the deposition testimony of their own designees was speculative and incomplete on this point and submitted subsequently secured affidavits of three of their members attesting to the fact that they have fished or spent time on the property in question. This requires us to take a slight diversion from our discussion because Orix-Woodmont has argued that, as a procedural matter, we should ignore those affidavits for purposes of analyzing its summary judgment motion on standing.

Affidavits

The first affidavit, that of Paul Brown, states, "In the spring of 2001 and after the property had become posted, I walked along the edge of this property at dusk and could hear the courtship of American woodcocks (a migratory game bird) and the chorusing of what had to be very large numbers of spring peepers (a tree frog)." (Appellants' Response, Exhibit) The second affidavit, that of Joseph Mercurio, states that on three occasions in 2002 he fished Deer Creek in the vicinity of the proposed development and on one occasion fished the actual site where the development is to be located. (Appellants' Response, Exhibit) The third affidavit, that of Donald Orlowski, states that Mr. Orlowski is a member of Tri-County Trout Club which is a member of Penn Future. Tri-County Trout Club is responsible for stocking Deer Creek with trout, and prior to the posting of the property stocked the creek in the area of the proposed development. The group now stocks it above the proposed site. Mr. Orlowski states that he has fished the stretch of Deer Creek on the property where

the proposed development will be located approximately six times each year until 2002 when the property was posted, and since then has continued to fish the stretches adjacent to the property. (Appellants' Response, Exhibit)

Orix-Woodmont says that we should disregard these late affidavits. It argues that the three individuals were never identified by the Appellants' designees when the latter were deposed. Orix-Woodmont further asserts that the Appellants are bound by the testimony of their organizational designees and refers us to Pennsylvania Rule of Civil Procedure 4007.1(e).

Pennsylvania Rule of Civil Procedure 4007.1(e) states in relevant part that when an organization is named as a deponent it "shall serve a designation of one or more officers, directors, or managing agents, or other persons who consent to testify on behalf, and may set forth, for each person designated the matters on which each person will testify...The person or persons so designated shall testify as to matters known or reasonably available to the organization..." The comment to this rule states that it is adopted almost verbatim from Federal Rule of Civil Procedure 30(b)(6).

Orix-Woodmont directs us to several cases interpreting Federal Rule of Civil Procedure 30(b)(6), holding that a corporation has an affirmative duty to make available such number of persons as will be able to give complete and binding answers on its behalf.

We are not convinced in reviewing the record before us that Appellants had any duty to produce corporate designees to specifically testify regarding standing. Evidently, Permittee asked for

designees having "knowledge of the basis for all of the allegations contained in the amended notice of appeal before the Environmental Hearing Board." (Notices of Depositions) The Amended Notice of Appeal does not allege standing. As set forth in the comment to Pennsylvania Rule of Civil Procedure 4007.1(e) "the notice [of deposition] must describe with reasonable particularity the matters to be inquired into." Therefore, it is certainly not clear that the Permittee requested Appellants to produce designees for oral deposition who could specifically testify regarding Appellants' standing.

The rule in this jurisdiction is that a party cannot avoid summary judgment by submitting an affidavit that contradicts prior sworn testimony by that party. *Hackman v. Valley Fair*, 932 F.2d 239 (3d Cir. 1991); *Martin v. Merrill Dow Pharmaceuticals, Inc.*, 851 F.2d 703 (3d Cir. 1988). However, not every discrepancy between an affidavit and earlier deposition testimony authorizes us to disregard the affidavit. "[A]n affidavit should only be disregarded where it 'contradicts, without explanation, previously given clear testimony....'" *In re Tire Worker Asbestos Litigation,* 1991 U.S. Dist. Lexis 10977 (E.D. Pa.).

The Appellants' explanation for the apparent conflict between the deposition testimony of its designees, Joe Pugach and Joan Miles, and the affidavits provided in support of its response to the motion for summary judgment is set forth in footnote 1 of their brief:

> Mr. Pugach's testimony, at most, evidenced his uncertainty as to the activities of other members. Ms. Miles provided examples from her personal knowledge, but clearly could not speak to the activities of all of Penn Future's members. Mr. Pugach's testimony is clearly speculative and Ms. Miles' clearly incomplete for purposes of

> supporting Permittee's conclusion. Permittee could have simply propounded an Interrogatory seeking the identities of members who have used the site. This would have allowed Appellant litigants to respond with the knowledge of all members with whom they could communicate.

We will not disregard the affidavits. First, it is not clear that the law allows us to strike their affidavits. The case law is clear that we may do so only where the affidavits clearly contradict the deposition testimony without explanation. Here, the affidavits do not appear to contradict the deposition testimony but, rather, they supplement testimony that was clearly incomplete. Also, this motion for summary judgment filed by Orix-Woodmont must be viewed in the light most favorable to Appellants. Based on the convergence of these two points, we will consider what the late affidavits have to say.

Looking at the facts raised in the affidavits in the light most favorable to the Appellants they claim that their use of the area of the permit and surrounding areas through hiking, walking, fishing and wildlife observation are recreational uses granting them standing to challenge the Department's action. *O'Reily v. DEP*, 2000 EHB 723, 723-725; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944; *Belitskus v. DEP*, 1997 EHB 939, 951. Whether these interests are adequate to confer standing on the Appellants will be determined at the hearing. At that time they will have full opportunity to sufficiently prove that they have been personally and directly harmed by the Department's action in issuing the permit. Here, in considering Permittee's Motion for Summary Judgment, we must view the record in the light most favorable to the non-moving party and resolve all doubts as to the

existence of a genuine issue of material fact against the moving party. *Stern v. DEP*, 2001 EHB 628. Based on this standard, the Motion for Summary Judgment must be denied. We will issue an appropriate Order.

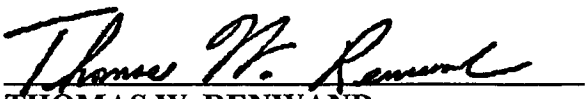
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA TROUT, TROUT UNLIMITED—PENNS WOODS WEST CHAPTER and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2002-251-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ORIX-WOODMONT DEER CREEK VENTURE, Permittee	:	

ORDER

AND NOW, this 24th day of September, 2003, the Permittee's Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: September 24, 2003

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WALTER J. ZLOMSOWITCH, Appellant; EAST PENN CONCERNED CITIZENS, Intervenor	:	
v.	:	**EHB Docket No. 2002-131-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LEHIGH ASPHALT PAVING & CONSTRUCTION COMPANY, Permittee	:	**Issued: September 24, 2003**

OPINION AND ORDER DENYING INTERVENOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

A Motion for Partial Summary Judgment filed by Intervenor is denied and the matter scheduled for a hearing on the merits. Intervenor's motion asserted that the Department unlawfully issued the Noncoal Surface Mining Permit at issue in this appeal by allegedly failing to assure Permittee's compliance with certain regulatory requirements applicable to exceptional value waters. The existence of genuine issues of material fact preclude summary judgment.

OPINION

This appeal concerns a third-party challenge by Appellant Walter J. Zlomsowitch to Noncoal Surface Mining Permit No. 13990301 (the Mining Permit), issued by the Department of Environmental Protection (DEP) to Lehigh Asphalt Paving & Construction Company (LPACC) on May 10, 2002 pursuant, *inter alia*, to the Noncoal Surface Mining and Reclamation Act[1] and

[1] Act of December 19, 1984, P.L. 1093, No. 219, as amended, 52 P.S. § 3301 *et seq.*

the Clean Streams Law.[2] The Mining Permit authorizes LPACC to conduct a siltstone/sandstone mining operation in East Penn Township, Carbon County (the Site). Mr. Zlomsowitch's appeal raises objections based primarily on DEP's alleged failure to assure adequate protection of the environment from the impact of LPACC's permitted mining operation, as required by applicable mining and water quality regulations.

East Penn Concerned Citizens (East Penn), filed a petition to intervene on August 30, 2002. The Mining Permit incorporates National Pollution Discharge Elimination System Permit No. PA0224014 (the NPDES Permit); in its petition, East Penn alleged that the NPDES Permit authorizes LPACC to discharge from facilities at the Site into an unnamed tributary to Lizard Creek (UNT Lizard Creek). East Penn asserted that UNT Lizard Creek has been designated by DEP as an "Exceptional Value Water," see 25 Pa. Code §§ 93.3; 93.4b(b), and the substance of its challenge in this appeal concerns an alleged failure by DEP and LPACC to comply with regulatory requirements specifically applicable to such exceptional value waters.[3] East Penn's petition to intervene was granted on September 18, 2002.

Following the close of discovery, East Penn filed the Motion for Partial Summary Judgment presently before me. DEP and LPACC timely filed opposition to the motion, and East Penn filed a timely reply; Mr. Zlomsowitch filed no response to the motion. East Penn seeks summary judgment with respect to two challenges raised in its petition to intervene: first, when reviewing LPACC's application for the Mining Permit, DEP allegedly failed to require LPACC

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[2] Act of June 22, 1937, P.L. 1987 No. 394, as amended, 35 P.S. § 691.1 *et seq.*

[3] According to its Petition to Intervene, East Penn is an *ad hoc* not-for-profit coalition that seeks to protect the environmental quality of East Penn Township; its members either own property adjacent to, or immediately downstream of, UNT Lizard Creek, or they reside within East Penn Township within relatively close proximity to the Site and recreate in and along UNT Lizard Creek. East Penn members are concerned that any discharges from the Site will degrade the water quality in UNT Lizard Creek and downstream, thereby diminishing their enjoyment and recreational use of the UNT Lizard Creek area and reducing the value of their property. *See* East Penn Petition for Intervention, at ¶¶ 1-8.

to evaluate and implement nondischarge alternatives to a proposed discharge from the Site into UNT Lizard Creek—violating 25 Pa. Code § 93.4c(b)(1)(i)(A); second, adequate public notice of any proposed discharge to UNT Lizard Creek was allegedly not given by LPACC in violation of 25 Pa. Code § 92.61(a) and/or § 93.4c(b)(1)(ii)(B). Arguing that these alleged violations render the Mining Permit unlawful, East Penn requests the Board to revoke the permit and direct DEP to review LPACC's permit application anew, this time in compliance with all regulations pertinent to exceptional value waters. After careful review, I have determined that there exist genuine issues of material fact relevant to the evaluation and implementation of nondischarge alternatives at the Site, and to the adequacy of public notice under the circumstances presented. Consequently, I will deny East Penn's Motion and schedule this matter for hearing.

I. Factual Background

Based on the record presented by the motion papers, a basic framework of undisputed facts is discernable. On July 12, 1999, LPACC submitted to DEP a Noncoal Surface Mining permit application for its proposed siltstone/sandstone mining operation at the Site. LPACC's original permit application proposed a sporadic point source discharge into UNT Lizard Creek from two sumps to be constructed at the Site. *See* LPACC Brief, Exh. 1 (Noncoal Surface Mine Permit Application Form). At the time that LPACC's permit application was submitted to DEP in mid-1999, the designated water use of UNT Lizard Creek was a Trout Stocking Fishery—not an exceptional value water. *See* 25 Pa. Code § 93.9d (1999).[4] There is also no indication in the record that when LPACC submitted its permit application the parties were aware of any data indicating that the existing use of UNT Lizard Creek was different from its designated use.

[4] *See also* DEP Response to Motion, at ¶ 3; East Penn Brief, at Exh. 1; LPACC Brief, at Exh. 3. In fact, UNT Lizard Creek continues to be formally designated in the Pennsylvania Code as a Trout Stocking Fishery, see 25 Pa. Code § 93.9d (2003), although, as we will discuss, in the interim DEP has determined that the existing use of UNT Lizard Creek is Exceptional Value.

Public notice of DEP's receipt of the LPACC permit application was published by DEP in the Pennsylvania Bulletin in late July 1999. *See* 29 Pa. Bull. 4096 (July 31, 1999).[5] Public notice concerning LPACC's application was also given in the Lehighton Times News on July 14, 1999, July 21, 1999, July 28, 1999 and August 4, 1999.[6] A public hearing on the LPACC permit application was held on October 21, 1999 after notice of the hearing was advertised in the Allentown Morning Call and Lehighton Times News on October 7, 1999 and October 14, 1999.[7]

In response to the submission of LPACC's permit application, several field surveys of the Site were conducted by DEP and the Pennsylvania Fish and Boat Commission (PFBC). On January 5, 2000, PFBC performed a stream survey on UNT Lizard Creek; the survey results indicated a naturally reproducing trout population. Based on the data collected during field and stream surveys at the Site, a PFBC fisheries biologist concluded in January 2000 that the wetlands associated with the stream system at the Site "would be classified as exceptional value and need to be protected accordingly." *See* East Penn Brief, Exh. 3 (1/11/00 memo from Steven Kepler, PFBC Fisheries Biologist to Keith Laslow, DEP District Mining Manager). DEP personnel conducted an existing use survey in April 2001 during which they collected and

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[5] The notice in the Pennsylvania Bulletin reads as follows: "133990301. Lehigh Asphalt Paving & Construction Co. (P.O. Box 549, Tamaqua, PA 18252), commencement, operation and restoration of a quarry operation in East Penn Township, Carbon County affecting 104.4 acres. Receiving stream-unnamed tributary to Lizard Creek. Application received July 12, 1999." 29 Pa. Bull 4096 (July 31, 1999).

[6] *See* LPACC Brief, at Exh. 2 (Proof of Publication). The newspaper notice states, in part, that the permit "application includes a variance request to conduct support activities within 100 feet of an unnamed tributary to Lizard Creek. There are two proposed erosion and sediment control discharges from the new [surface mining permit] area." *Id.*

[7] *See* East Penn Brief, at Exh. 2; LPACC Brief, at Exh. 6 (12/15/99 DEP Report on LPACC Public Hearing). According to the DEP Report, purportedly prepared by the hearing moderator Gerald Wascavage: "approximately 50 individuals were in attendance. Attendees consisted of concerned citizens, municipal officials, an aide to Representative Keith R. McCall, and the news media." *Id.* at p. 2. In addition: "Of the approximately 50 attendees, 14 individuals registered to give oral testimony regarding the Lehigh permit application. Concerns frequently expressed during the comment period of the hearing included . . . degradation of Lizard Creek by sediment . . . ." *Id.* at p. 3; *see also id.* at p. 4 ("Concern has been expressed that mining activity by Lehigh will have a detrimental effect on the existing quality of Lizard Creek, and its respective tributaries, as a result of surface water runoff water following precipitation events.").

evaluated data relative to the existing water quality of UNT Lizard Creek. Based on the findings from DEP's existing use survey, DEP's Division of Waster Quality Assessment and Standards reached a conclusion that the existing use of UNT Lizard Creek is Exceptional Value. Recognizing that the Chapter 93 designated use of UNT Lizard Creek was different from its conclusion on existing use, the Division formally recommended that its existing use classification for UNT Lizard Creek be adopted by the Bureau of Water Supply and Waste Management. The Bureau Director concurred in the recommendation on May 16, 2001.[8]

Prior to issuing the Mining Permit, DEP held several pre-issuance meetings with interested stakeholders to discuss the permit, the conditions being imposed by DEP on the mining operation, and the discharge characteristics of the permit. One such meeting held on March 7, 2002 specifically included Appellant Mr. Zlomsowitch and members of East Penn. During that meeting, the entire permit was reviewed and specific information was explained to the individuals in attendance, including the conditions relating to any discharges from the Site. *See* Affidavit of Michael Hill, at ¶¶ 8-10; LPACC Brief, Exh. 7.

DEP issued the Mining Permit to LPACC on May 10, 2002. The NPDES Permit is incorporated as Part A of the Mining Permit and provides for two discharge facilities—Outfall Nos. 001 and 002—both of which are described as "Erosion and Sediment Control/Other Discharge" facilities. In lieu of a detailed prescription of discharge limitations for each of the two described outfalls, the NPDES Permit includes the following provision:

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[8] *See* East Penn Brief, Exh. 1; LPACC Brief, Exh. 3 (5/16/01 Memo from Richard Shertzer, Chief, Water Quality Monitoring and Assessment Section, Division of Water Quality Assessment and Standards, to Fred Marocco, Director, Bureau of Water Supply and Wastewater Management). *See also* DEP list of "Statewide Existing Use Classifications" at http://www.dep.state.pa.us/dep/deputate/watermgt/wqp/wqstandards/existuse/co13.htm (includes listing for UNT Lizard Creek showing designated use as TSF and existing use as EV). According to the Bureau's recommendation document: "Concurrence [in the recommended existing use classification] by the Director of the Bureau of Water Supply and Wastewater Management means that the recommended existing use will be considered in official actions by the Department of Environmental Protection and County Conservation Districts as appropriate." East Penn Brief, Exh. 1, p. 5.

> There shall be no pumped discharge from Outfall Nos. 001 or 002 until this permit has been upgraded by the Department to address in-stream criteria. Furthermore, there shall be no direct discharge from the above outfalls, except in response to precipitation events and only occurring during and up to 24 hours after the precipitation event.

East Penn Brief, Exh. 5 (Mining Permit, Part A, at p. 1).

II. Discussion

The Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94(b); Pa. R. Civ. P. 1035.2; *County of Adams v. DEP*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Holbert v. DEP*, 2000 EHB 796, 807-08. When deciding summary judgment motions, the Board views the record in the light most favorable to the nonmoving party. *Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162, 1164.

A. Evaluation of Nondischarge Alternatives

East Penn first argues that the Mining Permit should be vacated and remanded because LPACC's permit application materials never considered, and DEP failed to require LPACC to consider and implement, nondischarge alternatives to a proposed point source discharge from the Site into UNT Lizard Creek. East Penn notes that when LPACC first submitted its permit application in July 1999, UNT Lizard Creek was designated as a Trout Stocking Fishery. However, as of May 2001 DEP determined that the existing use of UNT Lizard Creek was Exceptional Value, thereby immediately placing the tributary within the compass of special regulatory protections afforded waters so classified. *See* 25 Pa. Code § 92.8a(a).[9]

[9] Section 92.8a(a) states in relevant part that whenever the Department "makes a determination which would change existing or impose additional water quality criteria or treatment requirements, it shall be the duty of the permittee of facilities affected thereby, upon notice from the Department, to promptly take steps necessary to plan, obtain a permit or other approval and construct facilities that are required to comply with the new water quality standards or treatment requirements." 25 Pa. Code § 92.8a(a).

One such protection is preference for nondischarge alternatives over point source discharges. Pursuant to DEP water quality regulations:

> (1) *Point source discharges*. The following applies to point source discharges to High Quality or Exceptional Value Waters.
>
> (i) *Nondischarge alternatives/use of best technologies.*
>
> (A) A person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge. If a nondischarge alternative is not environmentally sound and cost-effective, a new, additional or increased discharge shall use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies.

25 Pa. Code § 93.4c(b)(1)(i)(A). Pointing to this regulatory requirement, East Penn asserts that LPACC was fully aware of the upgraded classification of UNT Lizard Creek but that during the nearly three-year application process the permittee never considered nondischarge alternatives to the point source discharges proposed in the original application materials. East Penn argues that LPACC's alleged failure to do so violated the mandate in 25 Pa. Code § 93.4c(b)(1)(i)(A).

East Penn further asserts that DEP failed to require LPACC's compliance with § 93.4c(b)(1)(i)(A) when reviewing the permit application. DEP's mining regulations state:

> A permit, permit renewal or revised permit application will not be approved, unless the application affirmatively demonstrates and the Department finds in writing, on the basis of the information in the application or from information otherwise available, that . . . (1) The permit application is accurate and complete and that the requirements of the act, the environmental acts and this chapter have been complied with.

25 Pa. Code § 77.126(a)(1). By allegedly failing to apply § 93.4c(b)(1)(i)(A), East Penn argues that DEP violated § 77.126(a)(1), acted contrary to law, and thereby rendered the Mining Permit unlawful. *See, e.g., Teledyne Columbia-Summerhill Carnegie v. Unemployment Compensation Board of Review*, 634 A.2d 665, 668 (Pa. Cmwlth. 1993) ("A duly promulgated regulation has

the force and effect of law and it is improper for the [agency] to ignore or fail to apply its own regulation."); *see also Oley Township v. DEP*, 1996 EHB 1098, 1119 (where DEP "does not review an application as required by the statutes and regulations, it abuses its discretion").

Neither DEP nor LPACC contest that, by operation of § 92.8a(a), § 93.4c(b)(1)(i)(A) became applicable to LPACC's permit application upon DEP's determination in May 2001 that the existing use of UNT Lizard should be classified as Exceptional Value. They also do not contest that the regulations required consideration of nondischarge alternatives to any proposed point source discharges to UNT Lizard Creek as part of the permit application and review process. Instead, they focus on the factual assertions underpinning East Penn's argument. DEP flatly denies that the agency did not consider nondischarge alternatives, and asserts that the agency not only required evaluation of non-discharge alternatives by LPACC but "in fact issued a non-discharge surface mining permit." DEP Brief, at p. 6. LPACC similarly asserts that it not only considered nondischarge alternatives to direct point source discharges to UNT Lizard Creek, but that the mining operation, as structured by the limitations and conditions imposed in the Mining Permit, will actually implement an environmentally sound nondischarge alternative.

In my view, this aspect of the dispute cannot be resolved by summary judgment. A key factual question is whether DEP and LPACC undertook the nondischarge alternative analysis required by § 93.4c(b)(1)(i)(A) during the permit application and review process. A related, fact-dependent, legal issue is whether the water quality protection measures required by the Mining Permit constitute an "environmentally sound and cost-effective nondischarge alternative." *Id.* Although East Penn asserts that LPACC and DEP failed to undertake the required nondischarge alternatives analysis, the evidence East Penn submitted to support this critical factual assertion is limited and contradictory. East Penn did not submit any of LPACC's permit application

materials as exhibits; submitted no deposition testimony from LPACC or DEP witnesses; and, offered no testimony from East Penn expert witnesses analyzing the permit application or the water quality protection measures in the Mining Permit. Although East Penn included portions of the Mining Permit as an exhibit, it does not provide any explanatory analysis of that document by persons with appropriate knowledge and expertise. Without evidence of such kind it is not possible to ascertain what nondischarge analysis was performed during the permit application process, or what protection measures are actually being required by the Mining Permit.[10]

On the other side, DEP submitted two affidavits to support its position—one by Michael Hill, DEP Geologic Specialist and lead reviewer for the Mining Permit; and one by Joseph Blyler, a DEP Mining Engineer who reviewed the permit's NPDES component. Mr. Hill states that because of DEP's existing-use determination the LPACC permit "was both reviewed and issued as if the stream had already been designated E[xceptional] V[alue]." Hill Affidavit, at ¶ 7.[11] After describing control measures required at the Site, Mr. Blyler states that DEP "not only required [LPACC] to consider a nondischarge alternative, but specifically required them to implement a non-discharge alternative for infiltration through sumps as described in the permit and Appendix D of the anti-degradation guidance." Blyler Affidavit, at ¶ 14.

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[10] Based on my examination of the details of the Mining Permit documents submitted by East Penn and LPACC as exhibits, the various water quality protection measures prescribed—*e.g.*, retention of water in on-site sumps, use of infiltration basins, construction of a berm surrounding the quarry disturbance area—*appear* to conform to the types of nondischarge alternatives described in DEP's Draft Water Quality Anti-Degradation Implementation Guidance Policy which East Penn relies upon as an authoritative interpretive source. *See* LPACC Brief, Exh. 2, Part B (conditions 3, 5, 8,17-19 and exhibits 7, 11 and 12); *cf.* East Penn Brief, Exh. 6, at pp. 37-46, Appendix D). Expert testimony will probably be necessary to resolve the issue. Of course, if the Mining Permit allows only for nondischarge alternatives, then East Penn's contention that such measures were not considered would be vacuous. However, there would still remain the question whether the Mining Permit complies with the requirement to "use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge." 25 Pa. Code § 93.4c(b)(1)(i)(A). Consequently, a *precise* understanding of the nature of the water quality measures required to be implemented at the Site by the Mining Permit is critical to resolution of this dispute.

[11] Mr. Hill further averred: "The Department, at all times after the identification of the existing use of UNT to Lizard Creek as Exceptional Value required permittee to structure its permit, and finally issued a permit, which took into account the status of the creek and the Department's antidegradation regulations." Hill Affidavit, at ¶ 12.

In addition, a memorandum from a professional wetland scientist employed by LPACC, (which East Penn submitted to evidence LPACC's awareness of the existing-use determination), contains information which tends to support LPACC's contention that it considered nondischarge alternatives—at least, as the nonmovant, LPACC is entitled to have such an inference drawn in its favor. *Allegro Oil & Gas, Inc.,* 1998 EHB at 1164. LPACC also submitted a copy of a report from its expert witness, Phillip S. Getty, P.G., Environmental Hydrogeologist, which explains that the design of control measures at the Site was improved so that there will be no direct discharge of surface waters, and he describes purportedly nondischarge alternatives which will be implemented. *See* LPACC Brief, Exh. 4, at pp. 2-3.[12] Mr. Getty concludes in his report that the "proposed quarry plan will employ an environmentally sound nondischarge alternative which should result in no adverse impact" to UNT Lizard Creek. *Id.* at p. 5.

In the face of this contrary evidence, East Penn relies heavily on a single sentence in the NPDES Permit: "there shall be no direct discharge from the above outfalls, *except in response to precipitation events and only occurring during and up to 24 hours after the precipitation event.*" *See* Mining Permit, Part A, at p. 1. In the absence of any supporting testimony, and in the face of the contrary testimony from DEP and LPACC witnesses, this is a slim reed on which to base a summary judgment. East Penn nevertheless argues that because the NPDES Permit, on its face, allows for a direct discharge to UNT Lizard Creek in response to precipitation events, that is sufficient evidence that the NPDES Permit violates the restrictions of § 93.4c(b)(1)(i)(A).

DEP and LPACC correctly counter, however, that § 93.4c(b)(1)(i)(A) does not absolutely prohibit all discharges to exceptional value waters. *Id.*; *see also Birdsboro and Birdsboro Municipal Authority v. DEP*, 2001 EHB 377, 398-403, *aff'd*, 795 A.2d 444 (Pa. Cmwlth. 2002)

[12] Although LPACC did not submit any supporting affidavit from Mr. Getty, East Penn did not object to LPACC's inclusion of Mr. Getty's expert report as an exhibit attached to LPACC's opposition brief, and I have consequently considered it as part of the record for purposes of deciding this motion.

(rejecting argument that DEP must deny a noncoal mining permit application unless applicant proves there is no potential whatsoever for pollution of an exceptional value stream resulting from proposed mining operation). Rather, the regulation requires the permittee to "use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge." 25 Pa. Code § 93.4c(b)(1)(i)(A). There are clearly genuine issues of fact relevant to whether the Mining Permit provides for the use of such an alternative, particularly in light of the Blyler Affidavit and Mr. Getty's expert report. Moreover, as DEP points out, the regulations do not define "nondischarge alternative." It is thus partly a matter of regulatory interpretation whether the Mining Permit, as it is currently structured to include an exception for unspecified "precipitation events," actually requires the use of an environmentally sound and cost-effective nondischarge alternative. This legal question cannot be justly answered until the factual issues described above are resolved through a hearing on the merits.

B. Adequate Public Notice

East Penn's second challenge concerns the nature of the public notice given by LPACC and an alleged failure of such notice to comply with applicable regulations. East Penn does not argue that DEP's July 1999 notice in the Pennsylvania Bulletin regarding receipt of LPACC's Noncoal Surface Mining permit application was defective. Rather, East Penn argues that a separate public notice requirement was imposed on LPACC subsequent to, and by virtue of, DEP's May 2001 existing-use determination for UNT Lizard Creek. Relying on § 92.61(a), in combination with § 93.4c(b)(1)(ii)(B) and § 92.8.a(a), as the source for this alleged additional notice requirement, East Penn insists that a subsequent notice in the Pennsylvania Bulletin containing a statement that LPACC was proposing to discharge into an Exceptional Value water was the only proper means of satisfying this separate requirement. DEP and LPACC contest both the legal and factual bases for this second challenge.

The legal ground offered by East Penn to support this contention is not particularly solid. The foundation for East Penn's argument—§ 92.61(a)—contains a regulatory requirement for *DEP* to publish notice of its receipt of *NPDES permit applications* in the Pennsylvania Bulletin: "Public notice of every complete application for an NPDES permit will be published by the Department in the *Pennsylvania Bulletin*." 25 Pa. Code § 92.61(a). East Penn does not explain why § 92.61(a)—which relates to DEP receipt of NPDES permit applications—should apply to LPACC's Noncoal Surface Mining permit application, nor how that regulation, in and of itself, creates an obligation for LPACC to publish a notice in the Pennsylvania Bulletin following DEP's existing-use determination in May 2001.

Section 92.61(a) contains a description of the minimum contents which DEP's notices of NPDES permit applications must include; these contents are itemized in a series of subsections. *See* 25 Pa. Code §§ 92.61(a)(1)-(9). To support its expansive reading of § 92.61(a), East Penn points to § 92.61(a)(9), which states that DEP's notice must include the "antidegradation classification of the receiving surface water under § 93.4c(b)(1)(ii)(B) . . . ." 25 Pa. Code § 92.61(a)(9). Examination of the reference to § 93.4c(b)(1)(ii)(B) does not clarify the underlying question, however, because it is not clear how these two sections can work in tandem to create the requirement that East Penn seeks to impose on LPACC.[13] Section 92.61(a) applies to public notice of DEP's receipt of complete NPDES permit applications. Subsection (a)(9) merely refers

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[13] Section 93.4c(b)(1)(ii)(B) states:

> *Public participation requirements for discharges to High Quality or Exceptional Value Waters.* The following requirements apply to discharges to High Quality or Exceptional Value Waters, as applicable: . . . .
>
> (B) For new or increased point source discharges, in addition to the public participation requirements in §§ 92.61, 92.63 and 92.65 (relating to public notice of permit application and public hearing; public access to information; and notice to other government agencies), the applicant shall identify the antidegradation classification of the receiving water in the notice of complete application in § 92.61(a).

25 Pa. Code 93.4c(b)(1)(ii)(B).

to § 93.4c(b)(1)(ii)(B) as a form of shorthand; it does not alter the basic structure of the overall regulation. Thus, it is unclear from the arguments presented thus far how § 92.61(a)(9) supports East Penn's argument that the applicant for a Noncoal Surface Mining permit must publish a particular type of public notice concerning its proposed discharge into an exceptional value water, or how these regulations apply to the particular circumstances of this case.[14]

Finally, East Penn relies on 25 Pa. Code § 92.8a(a) as the source for creating a second notice requirement on LPACC after DEP's existing-use determination. Even assuming one can locate in § 92.61(a) the particular type of notice requirement East Penn seeks for noncoal surface mining permit applicants, it is not clear that § 92.8a(a) would operate to compel LPACC to publish a new notice in the Pennsylvania Bulletin. According to § 92.8a(a):

> whenever the Department . . . makes a determination which would change existing or impose additional water quality criteria or treatment requirements, it shall be the duty of the permittee of facilities affected thereby, upon notice from the Department, to promptly take steps necessary to plan, obtain a permit or other approval and construct facilities that are required to comply with the new water quality standards or treatment requirements.

25 Pa. Code § 92.8a(a). This regulation compels facilities to physically upgrade their water quality control measures to meet upgraded water quality standards or treatment requirements. The intent of the notice rules is to provide interested stakeholders with adequate information regarding the proposed conduct of a permit applicant so those stakeholders have an opportunity to protect their own interests through comment, objection or appeal. East Penn does not explain how § 92.8a(a) provides for, or relates to the policies expressed in, notice requirements.

Resolution of the legal questions concerning adequate public notice of LPACC's mining permit application will be assisted by the development at a hearing of a precise and complete

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[14] East Penn does not argue that § 93.4c(b)(1)(ii)(B) alone provides sufficient legal ground on which to base the public notice obligation it seeks to impose, so the question need not be resolved in this context. It is sufficient to observe here that the function of § 93.4c(b)(1)(ii)(B) is not crystal clear on the face of the regulation.

factual record. The factual basis for East Penn's notice argument is rather tenuous based on the record presented by the motion papers. East Penn asserts that LPACC did not provide adequate public notice of its intent to discharge into an exceptional value water, presumably to the detriment or prejudice of East Penn's members. But East Penn's moving papers include little evidence relevant to the notice issue. I cannot determine from movant's papers the nature and sequence of public notice, public hearings, or individual meetings held with parties to this appeal. In addition, there is no testimony of East Penn members stating that they were unaware of LPACC's permit application or the proposed water quality control measures planned for the Site, whether before or after the existing-use determination. There is also no testimony from any witness that she was not given an opportunity to comment on or object to those aspects of the Mining Permit which relate to environmental protections or UNT Lizard Creek in particular.

In contrast, DEP and LPACC submitted documentary exhibits and affidavits which tend to support their claim that adequate public notice was given regarding LPACC's permit application, the potential effects of the mining operation on UNT Lizard Creek, and the water quality control measures being discussed for implementation at the Site. For example, Mr. Hill's affidavit describes various meetings, including individual meetings with East Penn members apparently held after the UNT Lizard Creek existing-use determination, at which the specifics of the permit application were discussed in detail and the attendees had an opportunity to voice their concerns and objections. Hill Affidavit, at ¶¶ 8-11. He also testifies that DEP made specific changes to the Mining Permit in response to concerns expressed by East Penn. *Id.* at ¶ 8. It is clear from my review of the record that there are genuine issues of material fact relevant to the question of adequate notice which preclude the grant of summary judgment on this point as well. Accordingly, I will enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WALTER J. ZLOMSOWITCH, Appellant;	:	
EAST PENN CONCERNED CITIZENS,	:	
Intervenor	:	
v.	:	**EHB Docket No. 2002-131-C**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and	:	
LEHIGH ASPHALT PAVING &	:	
CONSTRUCTION COMPANY, Permittee	:	

ORDER

AND NOW, this 24th day of September, 2003, it is hereby ORDERED as follows:

1. The Motion for Partial Summary Judgment filed by Intervenor East Penn Concerned Citizens is DENIED.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: September 24, 2003

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

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EHB Docket No. 2002-131-C

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PENNSYLVANIA TROUT, TROUT UNLIMITED—PENNS WOODS WEST CHAPTER and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2002-251-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ORIX-WOODMONT DEER CREEK VENTURE, Permittee	:	**Issued: October 1, 2003**

OPINION AND ORDER ON MOTIONS IN LIMINE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Responses to motions "shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion." Permittee's response is in contravention to the Board's Rules where it generally sets forth its opposition to the relief requested by Appellants in their three Motions in Limine. We deem the specific allegations of Appellants' Motions in Limine to be admitted by Permittee's nonconformance to our Rules. The Board should not have to guess as to whether something set forth by Appellants is accurate or not.

Appellants' Motions to Exclude witnesses are denied in part and granted in part. The Board has wide discretion to fashion an appropriate sanction for discovery violations based on the magnitude of the violations. The appropriateness of the sanction is assessed in light of four

factors: (1) the prejudice caused to the opposing party and whether the prejudice can be cured; (2) the defaulting party's willfulness or bad faith; (3) the number of discovery violations; and (4) the importance of the precluded evidence. The purpose of discovery is to prevent surprise and unfairness and to allow a fair hearing on the merits. A necessary corollary to this principle is that we will be intensely circumspect of any request to preclude factual evidence that might otherwise assist the Board in reaching the correct result on the merits.

Five of the witnesses, although identified late in the discovery process or at the time of the filing of Permitee's Pre-Hearing Memorandum, will be allowed to testify as Appellants will suffer no prejudice. One of the witnesses should have been identified during discovery and his testimony will be excluded. Appellants will be allowed to present rebuttal witnesses to counter the testimony of the school superintendent and the township supervisor. Although the Department allegedly did not consider any testimony of such sort the hearing before the Board is *de novo*. Since there is a regulation on this issue of benefits the testimony of these individuals may be relevant.

The issue of the quality of the wetlands to be impacted is relevant based in part on an argument advanced by Appellants. Therefore, since Appellants themselves have raised this as an issue in the case their motion on this issue is denied.

Permittee's Motion in Limine to exclude standing witnesses is denied. Permittee's Motion in Limine to preclude reference to any specific off-site alternative is denied. Finally, we reserve ruling until the hearing on Permittee's Motion in Limine to preclude Appellants' experts from testifying outside the scope of their expert reports. Appellants claim that Permitee filed late discovery responses following the submission of its expert reports which will result in necessary modifications of Appellants' experts' testimony.

Background

This appeal is from a water obstruction and encroachment permit issued by the Department of Environmental Protection (Department) to Orix-Woodmont Deer Creek Venture (Orix-Woodmont) for the construction and development of a mixed use commercial center, consisting of a shopping center and office complex, in Harmar Township, Allegheny County. The Appellants are Pennsylvania Trout, Trout Unlimited – Penns Woods West Chapter and Citizens for Pennsylvania's Future (Appellants or Penn Future). The Appellants seek to have the permit revoked on the basis that it does not comply with the requirements of 25 Pa. Code Chapter 105.

Penn Future contends that Orix-Woodmont failed to affirmatively demonstrate there was no practicable alternative to the project. They further contend that Orix-Woodmont's definition of "basic purpose" of the project is improperly narrow and specific and that the Department's approval of the permit did not comply with the applicable regulations.

Motions in Limine

Presently before the Board are three separate Motions in Limine filed by Appellants and three Motions in Limine filed by Permittee. Appellant's First Motion in Limine seeks to preclude Permittee from presenting witnesses, and other proof, argument or support not timely identified. Appellants' Second Motion in Limine seeks to preclude Permittee from offering the testimony of Mr. Robert Seibert and Dr. Charles Territo at the hearing. Appellants' Third Motion in Limine requests the Board to limit evidence on the quality of the wetlands that would be impacted by the proposed project.

Orix-Woodmont's First Motion in Limine seeks to preclude the Appellants from making reference to any specific off-site alternative to the permitted project. Its second Motion in

Limine seeks to bar testimony at the hearing from what it calls supplemental standing witnesses. Finally, Permittee's Third Motion in Limine seeks to preclude Appellants' experts from testifying beyond the scope of their expert reports.

Penn Future's First Motion In Limine To Preclude Permittee From Presenting Witnesses, And Other Proof, Argument Or Support Not Timely Identified.

Penn Future's First Motion in Limine contends that Orix-Woodmont did not properly answer Penn Future's discovery requests centering around whether Orix-Woodmont had information concerning practicable alternatives to its project location that did not involve wetlands and that were "not included in your submission to the Department of Environmental Protection." Appellants sought not only documentary evidence but any proof, argument and other support that the Permittee had not supplied to the Department. Its Motion in Limine sets forth its factually intensive position and argument as to why it is entitled to the relief requested.

In response to this Motion and Appellants' two other motions, Orix-Woodmont filed what it entitled "Permittee's Consolidated Opposition to Appellants' Motion in Limine." In this document, Permittee set forth in narrative form its opposition to Appellants' Motions in Limine. By doing so it avoided responding directly to the individual paragraphs of Appellants' Motions.

The Environmental Hearing Board's Rules of Practice and Procedure require that "a motion shall set forth in numbered paragraphs the facts in support of the motion and the relief requested." 25 Pa. Code Section 1021.91(d). Appellants fully complied with this requirement in cogently setting forth the facts supporting their Motions in Limine. Our Rules further require that "a response to a motion shall set forth in correspondingly numbered paragraphs all factual disputes and the reason the opposing party objects to the motion." 25 Pa. Code Section 1021.91(e). Orix-Woodmont ignored this requirement allegedly "for ease of presentation, and to

avoid unnecessary and cumbersome responses ...." (Permittee' Consolidated Opposition to Appellants' Motions in Limine, page 1). This response does not comply with our Rules.

By framing its response in the manner it did Orix-Woodmont made our job much more difficult. Appellants' first motion is very specific and it would have been extremely helpful to see Orix-Woodmont's specific response to each paragraph. Instead, we were left to guess as to whether something set forth by Appellants was accurate or not. Our Rules set forth the penalty for non-compliance. "Material facts set forth in a motion that are not denied may be deemed admitted for the purposes of deciding the motion." Although we have the power to ignore this violation in the interests of justice[1] to do so here would be an injustice to Penn Future. Therefore, we deem the specific allegations of Penn Future's Motions in Limine to be admitted by Permittee's response in violation of our Rules. Of course, these admissions are limited to these Motions in Limine.

Orix-Woodmont, before generally addressing the Appellants' Motions in Limine, further contends that its case and the Department's case are "rebuttal" and only the Appellants have a "case-in-chief." It seems that Permittee is advancing this novel interpretation to cloak any "new information" it may come up with now as "rebuttal" to allow it to skirt the disclosure requirements required by our prehearing rules. Taken to its logical conclusion, Orix-Woodmont's view of rebuttal would seem to excuse it and the Department from even having to file prehearing memoranda or listing their witnesses and exhibits until after the Appellants

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[1] 25 Pa. Code Section 1021.4 Construction and Application of Rules provides as follows:

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

present their case. (We note the Department has not filed any specific responses to any of the Motions in Limine.)

Orix-Woodmont's interpretation of rebuttal is far broader than any court in Pennsylvania has set forth. We agree with Penn Future that if Permittee is allowed to flaunt our prehearing rules it will be subjected to "nothing short of trial by ambush." Neither the Board's Rules of Practice and Procedure nor the Pennsylvania Rules of Civil Procedure condone such a practice. Nor do we.

Discovery in Board proceedings is governed by our Rules of Practice and Procedure in conjunction with the Pennsylvania Rules of Civil Procedure. See 25 Pa. Code Section 1021.102(a). Full disclosure of a party's case underlies the discovery process. The "integrity of the adjudication process requires that all parties promptly and with thoroughness respond to discovery requests." *Hein v. Hein*, 717 A.2d 1053, 1056 (Pa. Super. 1998).

Penn Future, in its first Motion in Limine, contends that Orix-Woodmont did not fully answer its discovery requests seeking the identity of witnesses, proof, and documents. It seeks to exclude any witnesses who it claims were not purposely identified earlier. It has identified four individuals in this Motion in Limine who it claims should have been identified much sooner. Three of these gentlemen were not identified until they were listed in Orix-Woodmont's pre-hearing memorandum which was filed on September 5, 2003. The other individual, Mr. Starman, was identified on July 25, 2003.[2]

Rule 4019(a) of the Pennsylvania Rules of Civil Procedure authorizes the imposition of sanctions for the failure to comply with the rules of discovery. Rule 4019(i) specifically

[2] At the time he was identified, this was the last day that discovery was permitted. The Board later extended discovery until August 20, 2003.

provides as follows:

> A witness whose identify has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party the court may grant a continuance or other appropriate relief.

Likewise, Rule 4019(c) of the Pennsylvania Rules of Civil Procedure specifically authorizes the Board to enter an order prohibiting the offending party from introducing in evidence designated documents where a party has failed to permit inspection as requested under Rule 4009.

As Judge Coleman stated in *Environmental & Recycling Services, Inc. v. DEP*, 2001 EHB 824, 834, the Board has wide discretion to fashion an appropriate sanction for discovery violations based on the magnitude of the violation.

> The appropriateness of the sanction is assessed in light of four factors: (1) the prejudice caused to the opposing party and whether the prejudice can be cured; (2) the defaulting party's willfulness or bad faith; (3) the number of discovery violations; and (4) the importance of the precluded evidence. *See Hein*, 717 A.2d at 1056. 2001 EHB at 834.

Discovery in this case has not gone smoothly. The parties have battled fiercely over interrogatories and requests for production. Both the Appellants and Permittee have advanced novel interpretations of the attorney-client privilege, attorney-work product doctrine, and even the deliberation process in an attempt to shield information from their opponents. The Board has been forced to intervene several times in order to insure the integrity of the discovery process. Nevertheless, although the process has been rocky we are convinced after extensively reviewing various discovery responses and deposition transcripts that the parties have been much more forthcoming in recent weeks in their answers and responses. Very detailed responses have been

made and voluminous numbers of documents have been produced.

Turning specifically to the four witnesses who are the subject of Appellants' First Motion in Limine we find that three of the witnesses should not be prohibited from testifying at trial based on the four-factor test enunciated by Judge Coleman. First, none of these witnesses are experts. Second, Mr. Aaron Savin is a real estate broker and according to Permittee he can testify as to what activities he undertook on behalf of his clients in the Route 28 corridor. Arguably, Permittee should have identified him earlier than July 25, 2003. However, Permittee's counsel offered to arrange his deposition for Appellants. Moreover, there was still approximately one month left of discovery and Appellants took no steps to depose him. Therefore, we do not believe that Appellants are prejudiced by his late identification. Mr. Kevin Dougherty, who was not identified until Permittee filed his pre-hearing memorandum, would testify evidently on the same subject as Mr. Savin. Permittee gives no valid reason as to why he was not identified earlier and our review of the record failed to find such a justification. Therefore, we find that Penn Future should not have to guess about what Mr. Dougherty would testify to at the hearing. Moreover, Orix-Woodmont should have surely realized based on the relative narrowness of the Appellants' Amended Notice of Appeal that Mr. Dougherty was a relevant witness who should have been identified much earlier. *North Pocono Taxpayers' Association v. DER and North Pocono School District*, 1994 EHB 409, 470-473. To argue that Mr. Dougherty is a mere rebuttal witness who did not have to be identified would gut our Rules and strike at the very foundation of fairness underlying our pre-hearing procedures.

The other two witnesses, Mr. Richard Hirschhorn and Mr. James Starman, were also not identified by Orix-Woodmont until they were listed as witnesses in its Pre-Hearing Memorandum. Permittee contends that they were identified in direct response to two statements

set forth in Appellants' Pre-Hearing Memorandum concerning an alternate site and whether potential tenants of Orix-Woodmont would not go to another location. After reviewing the record we find that Orix-Woodmont did not act willfully in not identifying these two witnesses. In any event, Penn Future has not set forth how they would be prejudiced if we allow these two witnesses to testify.

Penn Future's Motion in Limine regarding documents and proof is less specific than its contentions regarding the four identified witnesses. We will thus defer ruling on individual documents or evidence until offered in evidence at the hearing. At that time the facts underlying the factors set forth in our balancing test will be most able to be viewed in a more concrete light. We will enter an Order at this time, however, denying Penn Future's First Motion in Limine to preclude the testimony of Mr. Savin, Mr. Hirschhorn, and Mr. Starman and granting its Motion to preclude the testimony of Mr. Dougherty.

Appellants' Second Motion in Limine To Preclude Permittee From Presenting The Testimony Of Robert Seibert and Charles Territo

Appellants, in their Second Motion in Limine, seek to preclude the testimony of Mr. Robert Seibert, Chairman of the Harmar Township Board of Supervisors, and Dr. Charles Territo, Superintendent of the Allegheny Valley School District. They seek to exclude them because (1) they were not identified as witnesses until July 25, 2003; and (2) the areas they allegedly would testify about concerning provisions for social and economic balancing against adverse environmental impacts were not applied by the Department in granting this permit and are not implicated in the current appeal. Orix-Woodmont indicates that they will testify as to expected tax revenues from the project and the favorable impacts the project will have on their communities.

Hearings before the Board are subject to the Board's *de novo* review of the Department's actions. *De novo* review, as recognized by Penn Future as set forth in its First Motion in Limine, means the Board is empowered to consider all relevant and admissible evidence presented to us at the time of the hearing even if the evidence was not presented to the Department or considered previously by the Department. This applies to all parties before the Board. *Warren Sand & Gravel Co. v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *Pequea Township v. Herr*, 716 A.2d 678, 685-87 (Pa. Cmwlth. 1998); *Smedley v. DEP and International Paper Co.*, 2001 EHB 131, 155-160.

Although arguably Permittee could have identified these witnesses far sooner than it did, we note that Penn Future took no steps to depose these witnesses or propound any discovery to Orix-Woodmont regarding them. We, therefore will deny Penn Future's Second Motion in Limine. We do note that Penn Future indicates in their Second Motion in Limine that if we deny their motion then they "have considerable evidence...showing that the project will have a negative economic impact on the taxing municipalities and school district and would need to put such evidence on to rebut any contrary testimony introduced by Permittee." (Appellants' Second Motion in Limine, page 3). Appellants will be permitted to do so.

Appellants Third Motion In Limine To Limit Evidence On The Quality Of The Wetlands To Be Impacted

The Appellants Third Motion in Limine argues that the quality of the wetlands on the site is irrelevant. Therefore, no mention of their quality should be permitted. At first glance we tend to agree with Appellant. However, a review of Appellants' Pre-Hearing Memorandum leads us to deny Appellants' third Motion. Appellants themselves strongly argue that the replacement wetlands that Orix-Woodmont is mandated by the permit to construct will be vastly inferior to

the original wetlands on the property. Therefore, Appellants themselves have raised this as an issue in the case.

Orix-Woodmont's First Motion to Preclude Reference to Any Specific Off-Site Alternative

Orix-Woodmont argues that Penn Future has not clearly specified what specific off-site alternatives it intends to argue at the hearing were "practicable alternatives" to the proposed site. However, after extensively reviewing Penn Future's discovery answers, responses, and expert reports we find no support for Orix-Woodmont's argument. We will therefore deny its First Motion in Limine.

Orix-Woodmont's Second Motion to Exclude Standing Witnesses

In response to Orix-Woodmont's Motion for Summary Judgment, Penn Future filed three affidavits of members of Appellants' organizations alleging activities that Penn Future contends would provide the Appellants standing to contest the Department's issuance of the permit to Orix-Woodmont. Orix-Woodmont's Second Motion in Limine centers on its contention that the testimony of these witnesses contradicts the testimony of the corporate designees produced by Penn Future in response to Orix-Woodmont's notices of deposition of corporate designees. In denying Orix-Woodmont's Motion for Summary Judgment we indicated our disagreement with Orix-Woodmont's premise that the testimony was in conflict. Instead, we indicated that the notices of deposition clearly did not request any witnesses to testify on the subject of standing. Moreover, Penn Future provided an extensive and detailed answer to an interrogatory propounded by Orix-Woodmont specifically on the subject of standing. This answer is also consistent with the affidavits of the three standing witnesses.

We therefore do not even find a discovery violation let alone any prejudice to Orix-Woodmont. Finally, we note that although these affidavits were provided to Orix-Woodmont in

March, 2003 it took no steps to depose these witnesses. We find no prejudice. We will deny Orix-Woodmont's Second Motion in Limine.

Orix-Woodmont's Motion to Preclude Experts From Exceeding The Scope of Their Expert Reports

Orix-Woodmont's Third Motion in Limine seeks to preclude Appellants' experts from testifying outside the scope of their expert reports. Normally, experts may only testify within the "four corners of their filed expert reports." Appellants contend that "a virtual wave of disclosures, as well as documents, suddenly sprung from Permittee in the last weeks of the (extended) discovery period. It would have been not just unduly burdensome, but impossible for Appellants' experts to supplement their reports, prior to the August 25th filing of Appellants' Pre-Hearing Memorandum." (Appellants' Answer to Orix-Woodmont's Third Motion in Limine, page 11.)

We certainly do not condone expert testimony exceeding what is set forth in their reports. However, we will reserve our ruling until Appellants' experts actually testify at the hearing. If Permittee objects to specific testimony as exceeding the scope of the expert reports we will evaluate the objection at that time taking into consideration whether it is a result of late information received from Permittee. As Judge Labuskes recently stated: "The purpose of discovery is to prevent surprise and unfairness and to allow a fair hearing on the merits... A corollary to this principle is that we will be intensely circumspect of any request to preclude factual evidence that might otherwise assist the Board in reaching the correct result on the merits." *Dauphin Meadows, Inc. v. DEP*, EHB Docket No. 99-190-L (Opinion & Order issued September 17, 2003), *slip op.* at p.4.

We will therefore reserve ruling on Permittee's Third Motion in Limine until testimony if

offered and objected to at the hearing.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA TROUT, TROUT UNLIMITED—PENNS WOODS WEST CHAPTER and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2002-251-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ORIX-WOODMONT DEER CREEK VENTURE, Permittee	:	

ORDER

AND NOW, this 1st day of October, 2003, following review of Appellants' Three Motions in Limine and Permittee's Three Motions in Limine, it is ordered as follows:

1) Appellants' First Motion in Limine is ***granted in part*** and ***denied in part.***
   a) It is ***granted*** and **Mr. Kevin Dougherty** will not be permitted to testify at the hearing because he was identified too late to testify.
   b) It is ***denied*** as to the exclusion of the other three witnesses.
   c) We will defer ruling on individual documents or evidence until offered in evidence at the hearing.
2) Appellants' Second Motion in Limine is ***denied.*** Appellants may present rebuttal testimony.
3) Appellants' Third Motion in Limine is ***denied.***
4) Permittee's First Motion in Limine is ***denied.***
5) Permittee's Second Motion in Limine is ***denied.***
6) We will defer ruling on Permittee's Third Motion in Limine until expert testimony is actually offered at the hearing and we will then rule on any specific objections made at that time.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: October 1, 2003

c: **DEP Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-134-CP-C**
RICHARD AND VERA BAREFOOT, R.W. BAREFOOT, INC., and BAREFOOT'S SANITARY SERVICE	:	**Issued: October 6, 2003**

OPINION AND ORDER DENYING IN PART AND GRANTING IN PART A MOTION TO DEEM FACTS ADMITTED, STRIKE DENIALS, AND STRIKE NEW MATTER IN THE DEFENDANTS' ANSWER AND GRANTING A MOTION TO AMEND THE COMPLAINT

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department filed a motion which requested the Board to sanction Defendants for failing to file their answer to the complaint for civil penalties within the 30-day time period prescribed by Board rules, and to strike the "new matter" set forth in Defendants' answer. As a sanction, the Department asked the Board to deem all relevant facts in the complaint admitted and to strike all denials of the complaint's allegations. The request for sanctions is denied as inappropriate under the circumstances, but the motion is granted with respect to the new matter—which Board rules prohibit. The Department's unopposed motion to amend its complaint to set forth an additional cause of action is granted.

OPINION

This matter was commenced by the filing of a Complaint for Assessment of Civil Penalty

by the Department of Environmental Protection (DEP) against Richard and Vera Barefoot, R.W. Barefoot, Inc, and Barefoot's Sanitary Service pursuant to Section 605 of the Clean Streams Law (CSL)[1] and Board Rule 1021.71, 25 Pa. Code § 1021.71. DEP's complaint requests the Board to calculate and assess a civil penalty for violations of, *inter alia*, the CSL and the Solid Waste Management Act (SWMA)[2] allegedly committed in connection with Defendants' operation of a sanitary service which collects, transports and disposes of municipal waste. More specifically, the complaint alleges that Defendants transported municipal waste to unpermitted facilities in violation of 25 Pa. Code § 285.215(b); failed to maintain daily operational records for the collection, transportation and disposal of municipal waste in violation of 25 Pa. Code §§ 285.201 and 285.217(a); and, failed to provide the daily operational records required by § 285.217(a) upon request by DEP, in violation of 25 Pa. Code § 285.217(b). DEP's complaint requests the Board to assess civil penalties in the amount of $309,000 for the alleged violations.

I. Background

The complaint was filed with the Board on June 13, 2003, and it includes the notice to defend required by Board Rule 1021.71(d). The requisite notice to defend informs the recipient that he must take action within thirty days of service by filing an answer to the complaint with the Board. *See* 25 Pa. Code § 1021.71(d). It is undisputed that copies of the complaint and attached notice to defend were served on the Defendants by certified mail on June 13, 2003 and by personal service via hand delivery to Vera Barefoot on June 16, 2003.

Defendants filed an answer to the complaint on August 14, 2003 and served their answer by regular mail on DEP counsel that same day. The answer admitted certain factual allegations, denied some, and pleaded lack of sufficient knowledge or information for the remainder; the

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[1] Act of 1937, P.L. 1987, as amended, 35 P.S. § 691.605.

[2] Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. §§ 6018.101 *et seq.*

answer also included five paragraphs of "New Matter" and requested judgment be entered in Defendants' favor.

On August 19, 2003, after the pleadings had closed, the Board issued Pre-Hearing Order No. 2-CP, establishing the schedule for pre-hearing discovery procedures and the filing of dispositive motions. Two weeks later, on September 2, 2003, DEP filed the Motion to Deem Facts Admitted, to Strike Denials in Defendants' Answer and to Strike New Matter (the Sanctions Motion) presently before me. In this motion, DEP points out that Defendants' answer was not filed within thirty days of service as prescribed by Board Rules, and DEP asks the Board to sanction Defendants for their untimely filing by deeming all relevant facts in the complaint admitted and striking any denials in the answer. DEP also requests the Board to strike the "New Matter" contained in the answer because Board Rules do not permit the inclusion of new matter in an answer to a complaint. Defendants' filed a timely response opposing the Sanctions Motion.

A week after filing the Sanctions Motion, DEP filed a Motion to Amend seeking leave to amend its complaint; DEP wants to add a third cause of action pertaining to Defendants' alleged failure to comply with an Order issued by DEP to Defendants on June 13, 2003. That Order required Defendants to submit within ten days certain recent operational records, and to submit within fifteen days a list of all sources of municipal waste transported and all disposal locations utilized over the past five years. Defendants did not appeal the June 13, 2003 Order to the Board. Although Defendants' counsel produced some few records to DEP in mid-August and early September, DEP's proposed amendment alleges that Defendants have failed to comply with the Order in violation of the CSL, the SWMA, and 25 Pa. Code § 285.217, and asks the Board to assess a civil penalty of $1,000 per day of non-compliance with the Order beginning from June 27, 2003 until Defendants fully comply. Defendants filed a timely response to the Motion to

Amend which, while reserving the right to respond to DEP's amended complaint after it is filed, does not oppose DEP's request for leave to add the third cause of action.

II. Discussion

I first address the Sanctions Motion. Pursuant to the Board rules of practice and procedure: "Answers to complaints shall be filed with the Board within 30 days after the date of service of the complaint, unless for cause the Board, with or without motion, prescribes a different time." 25 Pa. Code § 1021.74(a). Having been properly served with the complaint by certified mail on June 13, 2003, see 25 Pa. Code § 1021.71(b), Defendants' answer was due to be filed with the Board thirty days thereafter, or by July 14, 2003. The answer was not filed until August 14, 2003, or 61 days after service of the complaint. Defendants did not request the Board, by motion or otherwise, to extend the prescribed 30-day time period for filing answers. *See* 25 Pa. Code §§ 1021.74(a); 1021.12(a). There is thus no question that Defendants failed to comply with the requirements of 25 Pa. Code § 1021.74(a).

Relying on Board Rule 1021.74(d), DEP asks the Board to impose a sanction on Defendants for the untimely filing of their answer. According to Rule 1021.74(d):

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

25 Pa. Code § 1021.74(d) (emphasis added).[3] The specific sanction requested by DEP is that all relevant facts in the original complaint be deemed admitted and all denials of factual allegations

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[3] Rule 1021.161, relating to sanctions, provides that:

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

25 Pa. Code § 1021.161.

be concomitantly stricken. Practically speaking, given the nature of the complaint, DEP's request that all facts be deemed admitted and denials stricken is tantamount to seeking a partial adjudication as to liability. I do not believe that such a harsh sanction is appropriate under the circumstances for several reasons.

Defendants filed an untimely answer by approximately 30 days; they did not fail entirely to defend against this action by not responding in any way to the complaint or the motion. While the Board has granted a partial default adjudication, (as to liability only), as a sanction where a defendant has failed to file an answer to a complaint, *see DER v. Allegro Oil and Gas Company*, 1991 EHB 34; *DER v. Marileno Corporation*, 1989 EHB 206; *DER v. Canada-PA, Ltd.*, 1987 EHB, 177, in each of those cases the defendants failed to file any answer and filed no response to the motions seeking default adjudication.[4] On the other hand, where the defendant has filed an answer to the complaint, even if untimely by a relatively short period, Board members have hesitated to impose the severe sanction of a partial default adjudication as to liability. *See DEP v. Tessa, Ltd.*, 2000 EHB 280, 289-96.

In this case, notably Defendants filed their answer more than two weeks before the Sanctions Motion was filed. Although Defendants did not seek an extension of time from the Board as they should have, they point out that their former counsel sent a letter to DEP counsel on July 1, 2003 indicating that Defendants planned to retain environmental counsel and requesting time to obtain such appropriate counsel. DEP has not explained how it has been prejudiced by the untimely filing of Defendants' answer, and under the circumstances I can

[4] Moreover, either a lengthy amount of time passed without any response whatsoever from the defendant, or a communication was received from defendant indicating it had no intention of defending the action, before the Board was willing to enter a partial default adjudication. In *Canada-PA* for example, over a year passed without any communication from the defendant before the Board determined that a default adjudication was appropriate. *See Canada-PA*, 1987 EHB at 183 ("Flagrant disregard for the administrative law process cannot be permitted to serve as the means for hindering or halting the process.").

discern no appreciable prejudice.

In addition, it is not clear DEP will actually profit considerably from the harsh sanction being sought. Defendants have already admitted some of the complaint's allegations; other allegations concerning DEP investigative activity are not likely to be contested at a hearing. Moreover, a hearing on the amount of the civil penalty would have to be held even if I deemed all relevant facts in the complaint admitted. *See, e.g., Marileno Corporation*, 1989 EHB at 212. Many of the factual allegations in the complaint—such as the precise nature of the violations allegedly committed and the Defendants' compliance history—will also be relevant to, and will have to be carefully examined in connection with, the Board's determination as to the appropriate amount of any civil penalty assessed in this matter. Thus, it appears that the sanction sought by DEP will ultimately save it little time and effort in its prosecution of this matter.

Finally, DEP's Motion to Amend strikes me as inconsistent with its Sanctions Motion. By asking for leave to amend its complaint to include an additional cause of action, DEP has effectively indicated that it considers its original complaint filed in mid-June to have been incomplete when filed. Moreover, DEP has not explained the effect of the filing of an amended complaint on its assertion that the answer was untimely filed; in other words, the filing of the amended complaint would start the clock for filing an answer anew and so would seem to cure the defect for which DEP seeks a sanction. Consequently, it does not seem just to grant DEP leave to amend its complaint after Defendants' answer was filed, while simultaneously punishing Defendants' for an untimely answer.

For these reasons, I will deny the Sanctions Motion to the extent it seeks to have all relevant facts admitted and denials stricken in Defendants' Answer. I will, however, grant that part of the Sanctions Motion which asks me to strike the "New Matter" from Defendants'

Answer. The Board's rules state that "[a]nswers to complaints shall set forth any legal objections as well as any denial of facts, in a single pleading." 25 Pa. Code § 1021.74(b). Those rules also explicitly state: "No new matter or preliminary objections shall be filed." 25 Pa. Code § 1021.74(e). Defendants admit in their response to the Sanctions Motion that their answer contains five paragraphs of "new matter" and Defendants do not offer any opposition to DEP's request to have the new matter stricken. Consequently, I will enter an Order striking the five paragraphs of new matter from Defendants' original answer.

Turning to the Motion to Amend, Defendants' similarly do not oppose DEP's request for leave to amend its complaint. Moreover, Defendants claim no prejudice from amendment of the complaint and I can discern none at this early stage of the proceedings. Given that Defendants have not opposed DEP's request to amend its complaint, I will grant the Motion to Amend on that basis.[5] I will also extend the time periods established for pre-hearing discovery procedures to accommodate the parties' need to undertake discovery relevant to the issues raised by the amended complaint and answer. Accordingly, I enter the following order.

[5] Notably, the Board's rules do not provide specifically for the amending of complaints. However, the rule concerning amendment of an appeal does offer some tangential support for granting the Motion to Amend. Pursuant to Rule 1021.53(b), leave to amend an appeal may be granted if the appellant establishes that the requested amendment includes alternate or supplemental legal issues the addition of which will cause no prejudice to any other party. 25 Pa. Code § 1021.53(b). DEP proposes to include a third cause of action for Defendants' alleged failure to comply with the June 13, 2003 Order, which requires Defendants to provide DEP with the types of records at issue in DEP's original complaint. Thus, the amendment merely contemplates addition of a supplemental set of legal issues directly related to those raised by the original complaint.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-134-CP-C**
RICHARD AND VERA BAREFOOT, R.W. BAREFOOT, INC., and BAREFOOT'S SANITARY SERVICE	:	

ORDER

AND NOW, this 6th day of October, 2003, it is hereby ORDERED as follows:

1. DEP's Motion to Deem Facts Admitted, Strike Denials in Defendants' Answer and Strike New Matter (Sanctions Motion) is denied in part and granted in part;

2. The Sanctions Motion is denied with respect to DEP's request to deem all relevant facts admitted and striking all denials in Defendants' answer to the complaint;

3. The Sanctions Motion is granted with respect to DEP's request to strike new matter contained in the answer, and the "New Matter" set forth in Defendants' answer to the complaint is hereby stricken;

4. DEP's Motion to Amend is granted and DEP shall file and serve the amended complaint as described in its Motion to Amend within fifteen days of the date of this Order;

5. Defendants shall file and serve their answer to the amended complaint within fifteen (15) days of service of the amended complaint;

6. The dates established for pre-hearing procedures by Pre-Hearing Order No. 2-CP, dated August 19, 2003, are amended as follows:

A. All discovery in this matter shall be completed by **January 16, 2004**;

B. DEP shall serve its expert reports and answers to all expert interrogatories by **February 13, 2004**. Defendants shall serve their expert reports and answers to all expert interrogatories within 30 days after the receipt of the expert reports and interrogatories from DEP.

C. All dispositive motions in this matter shall be filed by **April 4, 2004**;

D. All other provisions of Pre-Hearing Order No. 2-CP, dated August 19, 2003, shall remain in effect.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: October 6, 2003

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

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COLUMBIA GAS TRANSMISSION CORPORATION	:	
v.	:	
	:	**EHB Docket No. 2002-176-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY FOUR MINING COMPANY, Permittee	:	**Issued: October 14, 2003**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

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

Synopsis:

An owner of gas transmission lines appeals from the Department's issuance of a permit revision to a deep mine operator. The gas company's motion for summary judgment is denied due to insufficiently developed issues of law and disputed issues of fact.

The Department's three-step approach to ensuring the protection of gas lines was to (1) accept the mine operator's subsidence control plan, the two key components of which were a promise to notify the gas company of approaching mining and a generic list of measures that can be taken to protect lines, (2) require more detail in 6-month maps, and (3) insert a special condition in the permit. A list of mitigation measures in the subsidence control plan that theoretically can be taken to minimize disruption of utility services is not responsive to regulatory requirements. A deep mine operator's commitment to provide advance notice to the

utility of forthcoming undermining of the utility's facilities is neither insufficient nor sufficient as a matter of law. Whether the Department's approach was lawful and reasonable is a mixed question of fact and law. The Board will need to consider numerous potentially relevant factors, such as whether the Department's approach adequately protects public safety and allows for meaningful public participation in the permitting process.

It is not clear that the Department has a duty to determine whether a deep mine operator has the legal right pursuant to property law concepts to cause subsidence under a utility's facilities. Assuming that such a duty exists, whether the Department's approach, which essentially involved a deferral of the determination until after the permit had been issued, was lawful and reasonable is a mixed question of genuinely disputed fact and law.

OPINION

Columbia Gas Transmission Corporation ("Columbia") filed this appeal from the Department of Environmental Protection's (the "Department's") issuance of a revision (the "permit revision") adding 7,204 acres to Eighty Four Mining Company's ("Eighty Four's") permitted area for its deep mine in Somerset Township, Washington County. Eighty Four intends to mine beneath Columbia's gas transmission lines. Columbia is worried about the effect that mine subsidence will have on those pipelines. It does not believe that the Department has fulfilled its legal responsibility to ensure that those lines will be protected. Columbia has filed a motion for summary judgment because it believes that it is entitled to judgment in its favor as a matter of law based upon undisputed facts.[1] In our view, there are too many issues of disputed fact and inadequately developed issues of law to allow for the entry of summary judgment.

[1] The standard for evaluating a motion for summary judgment is set forth at Pa.R.C.P. 1035.1 and in numerous opinions of the Board. *See, e.g., Philadelphia Waste Services v. DEP*, 2002 EHB 456, 457-58.

Columbia's Pipelines

Columbia's primary complaint[2] is that the Department failed to ensure as part of the application review process that Eighty Four's mining will not damage, destroy, or disrupt the utility service provided by Columbia's pipelines, and that the Department failed to ensure as part of the application review process that undermining those pipelines will not cause an imminent hazard.

The operative regulations are found at 25 Pa. Code §§ 89.141(d)(11) and 89.142a. Section 89.141(d)(11) requires a permit applicant to include in its application "a description of the measures to be taken to minimize damage, destruction or disruption in utility service in accordance with 25 Pa. Code § 89.142a(g)." Section 89.142a reads in the pertinent part as follows:

> (g) Protection of Utilities
>
> > (1) Underground mining shall be planned and conducted in a manner which minimizes damage, destruction or disruption in [utility] services....
> > (2) The measures an operator may take to minimize damage, destruction or disruption in services protected by this subsection may include, but are not limited to, one or more of the following:
> > > (i) A program for detecting subsidence damage and minimizing disruption in services.
> > > (ii) A notification to the owner of the facility which specifies when underground mining beneath or adjacent to the utility will occur.
> > > (iii) Providing support in accordance with the utility owner's support rights.
> > > (iv) Providing temporary or alternative service to customers.
> > > (v) Demonstrating to the Department that subsidence will not materially damage the utility.

[2] Columbia presents three separate claims in support of its motion, but, as explained more fully below, the first two claims are so closely interrelated that we have decided to address them together.

> (4) The Department will suspend or restrict underground mining if it determines that mining beneath or adjacent to a utility will present an imminent hazard to human safety.
>
> (i) Prevention of Hazards to Human Safety
>
> (2) If the Department determines and so notifies the operator that a mining technique or extraction ratio will result in subsidence which creates an imminent hazard to human safety, the operator may not use the technique or extraction ratio unless the operator, prior to mining, takes measures approved by the Department to eliminate the imminent hazard to human safety.

See also 52 P.S. § 1406.9(a) (prevention of hazards). Columbia also directs our attention to 25 Pa. Code § 89.155, which requires an operator to send notice of mining to each utility "at least 6 months, but no more than 5 years, prior to mining beneath" the property.

Eighty Four responded to the regulatory requirements by providing the following information and commitments in Module 18 of its permit application:

> Eighty Four Mining Company will adopt measures to minimize damage, destruction or disruption of utility services, including utilizing longwall mining, which is a full extraction mining technique. Longwall mining assures that unplanned subsidence does not occur and that the overlying strata are stable after completion of the coal extraction. Longwall mining causes subsidence to occur at a predictable time and in a relatively uniform manner, consequently, it is an underground mining method used to control subsidence.
>
> Controlling subsidence by causing it to occur at a predictable time and in a predictable manner minimizes damage and destruction of utility facilities by affording the responsible party an opportunity to monitor and to take measures to address any likely impacts. This, in turn, assures that the utility services are not disrupted. Mining to cause planned and controlled subsidence is a measure that prevents, avoids, and/or minimizes damage, destruction, and disruption of services to utility facilities, which pass under, over or through the underground permit area.
>
> As required by applicable law, Eighty Four Mining Company will notify all utility owners at least six (6) months, but not more than five (5) years, prior to mining under their utilities. Copies of all

utility notification letters will be filed with the Department after they are sent to the utilities. In addition, Eighty Four Mining Company will maintain communication with the utility owners in the active mining areas as to allow sufficient notice for the utility owners to perform appropriate mitigation measures, as necessary.

* * *

Mitigation methods which can be used to minimize disruption of service will depend upon the specific circumstances of each case, but may include one or more of the following techniques: ongoing inspections and monitoring of the structure, trenching around structures, installation of effective venting areas to atmosphere for natural gas pipelines, trenching of sections of pipelines, installation of a slip sleeve protection in areas of predicted higher tension or compression, installation of additional shut-off valves to isolate sections of pipelines, maintenance of vertical or horizontal alignment with mechanical supports, reinforcement of sensitive structures, and temporary or permanent relocation of pipelines and/or associated features. Other measures may be developed or required by specific conditions or circumstances.

* * *

[T]he previous descriptions of measures which may be taken to minimize damage, destruction or disruption of utility services is not intended as a commitment on the part of Eighty Four Mining Company to implement any or all of such measures (unless required by applicable law or regulation) or as a waiver of any rights under applicable law, including the right to mine and remove all of the coal underlying utility facilities, including pipelines, without obligation to protect such facilities and without liability for damage to such facilities, or as a representation by Eighty Four Mining Company of the right to implement such measures.

The undermining of utilities requires careful management. The main issue is who should be obligated to undertake those management practices. Eighty Four Mining Company believes that the obligation is a function of whose property rights are superior for the case at hand. By describing methods that can be used to minimize damage, destruction, or disruption of services provided by utility facilities, Eighty Four Mining Company is not waiving or diminishing any of its common law property rights.

Eighty Four Mining Company does not have the right to perform work on utility facilities that are owned by others. Where full

> extraction mining is planned and Eighty Four Mining Company has superior property rights to those property rights of the owners of utility facilities, Eighty Four Mining Company will not perform the mitigation measures, but will expect the owners of the utility facilities to identify and perform the appropriate mitigation measures, as required.
>
> Longwall mining causes subsidence to occur at a predictable time and in a predictable manner thus affording the responsible party the opportunity to effectively implement the appropriate mitigation measures that will prevent and/or minimize damage, destruction, and disruption of services to utility facilities. The effective implementation of mitigation measures will also serve to minimize and eliminate the potential of an imminent hazard to human safety.

The Department did not consider the disruption-in-service and imminent-hazard questions as separate issues. Columbia has presented the two issues separately in its motion, but it does not allege that the Department erred by dealing with them as one. We suppose that it is conceivable that the pipelines could be damaged or destroyed without creating an imminent hazard, and it might even be possible to create a threat of an imminent hazard without damaging or destroying the lines or disrupting service, but we do not see how it is possible or practical to plan for and guard against the two contingencies separately. Columbia retains the right to show us that two separate plans and investigations were in order, but for our current purposes, we will follow the Department's practice of treating the minimization of damage and prevention of hazards as essentially one problem.

The Department was generally satisfied with the commitments provided by Eighty Four in its application. The Department does not appear to have conducted any investigation. The Department did not analyze the actual potential for disruption in service or imminent hazards at the Eighty Four mine. It did not consider any site-specific facts or circumstances.

Instead, the Department did three things. First, it approved Eighty Four's subsidence control plan as presented, with its two key components being advance notice to Columbia and a

list of generic measures that can be taken to protect lines.[3] Second, the Department will require more detail from Eighty Four when Eighty Four identifies a pipeline in its six-month mining maps. Third, the Department included Special Condition 4 in Eighty Four's permit, which reads as follows:

> Prior to undermining any gas line which poses a risk of human safety, Eighty Four Mining Company will provide the Department with written notification that: 1) the appropriate mitigation measures have been performed, 2) an agreement has been reached whereby the measures will be performed before the undermining occurs, or 3) a demonstration is provided that an imminent hazard will not occur. If the Department has not been informed two weeks prior to the proposed undermining that one of the above conditions has been met, then the Department may suspend Eighty Four Mining Company's authorization to mine beneath the gas line.

Columbia's first point is that, when reviewing Eighty Four's subsidence control plan, the Department should have disregarded (and this Board should now disregard) Eighty Four's list of generic measures that can be taken to protect lines. Columbia argues that Eighty Four's listing of mitigation measures that can be used to minimize disruption and prevent hazards, particularly when coupled with Eighty Four's statements to the effect that the utility owner is solely responsible for implementing those measures, is legally meaningless and an illusory response to the regulatory requirements.

We agree that the list of available mitigation measures adds nothing of substance to the analysis. Section 89.142a(g) calls for information concerning how the underground mining shall be planned and conducted and a description of the measures that the operator will take. Listing measures that are available to prevent disruption does little more than state the obvious. There is no question that mitigation measures exist. The regulation asks what will be done at a site, not

[3] To remove any doubt about the absence of any plan or commitment on Eighty Four's part, Eighty Four states that it does not plan to do anything (beyond notification).

what theoretically can be done. As previously noted, the Department did not go so far as to consider whether the generic measures could beneficially be applied to specific facilities at Eighty Four's mine.

Although it is not directly on point, the instant situation is reminiscent of the facts in *Stoystown Borough Water Authority v. DEP*, 729 A.2d 170 (Pa. Cmwlth. 1999.) That case dealt with the Department's statutory obligation to require a deep mine operator to describe in its permit application how water supplies would be replaced if mining activity diminished or degraded them. In response to that requirement, the mine operator stated that it would either (1) supply a temporary water supply, (2) inform the water supplier that it has not been able to gain access to the water supply to perform a survey, or (3) inform the water supplier that the contamination was not its fault. The Department accepted those promises and we upheld the Department. The Commonwealth Court reversed. It held that

> one does not describe how a water supply will be replaced by stating that it will temporarily replace it, **or**, that it will inform the public authority which relies upon the water supply that the reason the water supply has become polluted is not its fault.

729 A.2d at 174. The Court added that the operator's acknowledgement that it would comply with the law simply stated an obvious truism: that it would do what the law required it to do. *Compare PUSH v. DEP*, 789 A.2d 319, 331 (Pa. Cmwlth. 2001) (no error where DEP approved operator's step-by-step procedure detailing how it would replace water supplies).

It is true that *Stoystown* can easily be distinguished, and yet its message seems to resonate here. Eighty Four has addressed how it will minimize disruption of utility service in part by providing a list of things that can be done to a pipeline. Eighty Four does not say that it will do them, or even that a third party will do them, or that they make sense at this site. There is no specific reference to this site or the pipelines at this site. The list of theoretical possibilities in

Eighty Four's application does little more than give the appearance of compliance with a regulatory requirement. As with the truism at issue in *Stoystown*, it does not address in a meaningful or binding way the crucial concern established in the regulations; namely, in *Stoystown* that water supplies be replaced, and here, that interference with utility service be minimized and hazards be prevented. Stating that utilities *can* be protected is no different than saying there are numerous ways to assure the safety of miners, or that there are numerous methods for operating a mine without undue environmental damage. Such representations are simply not helpful one way or the other in deciding whether a particular permit with a particular mining plan should be allowed.

Thus, we accept Columbia's suggestion that we disregard the listing of generic measures that Columbia can theoretically take to protect its own lines because that listing provides no incrementally valuable information or commitments that are responsive to the regulatory requirement. All that leaves in the subsidence plan, according to Columbia, is Eighty Four's commitment to notify Columbia of encroaching mining. Columbia's next argument is that such notice is by itself inadequate as a matter of law to satisfy 25 Pa. Code § 89.142a's requirement for a meaningful subsidence control plan.

This is not a new issue. In *PUSH v. DEP*, 1996 EHB 1422 (November 27, 1996), this Board found that an operator's notice to utility companies of future mining beneath pipelines was inadequate by itself to comply with a prior version of the requirements now set forth in Section 89.142a.[4] That regulation (25 Pa. Code § 89.143 at the time) read as follows:

[4] The Board rejected requests to vacate its November 17, 1996 orders regarding utilities in the final adjudication in that appeal. *PUSH v. DEP*, 1999 EHB 457, 573-76, *aff'd*, 789 A.2d 319 (Pa. Cmwth. 2001).

(c) *Protection of utilities.*

(1) Underground mining activities shall be planned and conducted in a manner which minimizes damage, destruction or disruption in services....

(2) The measures adopted to minimize damage, destruction or disruption of services protected by this subsection may include, in addition to those measures discussed in § 89.141(d), a program for detecting subsidence damage and avoiding disruption in services, and a notification to the owner of the facility which specifies when the mining activity beneath or adjacent to the structure will occur.

Although the permit application at issue referred to mitigation measures that were available in theory, the only action that Eighty Four was required to take under its permit was to notify the water company in question that it would be mining under that company's lines. It was then up to the water company to take preventative measures to ensure that the water line remained in operation. The permit, therefore, allowed mining to proceed even if it caused the complete destruction of the line. We also took note of an "issue paper" prepared by the Department, which recognized that to "continue past practice by only requiring notification of the utility...does not address imminent hazard situation, or public perception."

We found that "the Department completely ignore[d] the language of its own regulations by only requiring notification to the water company. If the Department is correct, then most of the [regulatory] language cited above is surplusage. The regulations could be distilled to only one sentence merely requiring the mining company to notify utilities of its mining operations. There would be no need for any subsidence plans requiring coal companies to adopt measures to minimize mine subsidence...." 1996 EHB at 1422. We concluded: "Notice is not sufficient to safeguard the lives and property of thousands of citizens." 1996 EHB at 1423.

Later that year, we rejected a petition to reconsider our order. In *PUSH v. DEP*, 1996 EHB 1623, we stated that "[t]he Department's own regulations require Eighty Four Mining Company to set forth in its subsidence plans exactly what mitigation measures it will employ *in the mine*." 1996 EHB at 1624 (emphasis original).

This italicized language was evidently particularly worrisome to the Department. It was concerned that the Board's decisions might "have significant detrimental effects on this Commonwealth's underground bituminous coal mining industry." 27 Pa. Bulletin 2379 (May 10, 1997). It initiated rulemaking to revise the regulation to make it clear that the regulation is not to be read to "unduly restrict[] utility protection to in-mine measures." *Id.* The Environmental Quality Board initially agreed with "the EHB's opinion that a mine operator must do more than merely notify a utility operator that its lines are about to be undermined." *Id.* But when the Environmental Quality Board promulgated the final regulation, it opined that the rule in its final form would "allow notification to suffice for meeting the requirement to minimize damage, destruction, or disruption in service provided to utilities." 28 Pa. Bulletin 2761, quoted in *Wheeling & Lake Erie Railway v. DEP*, 1999 EHB 293, 307.

If we cut to the final scene, we see that the regulation (quoted above) was ultimately revised to read that the measures that an operator may take "may include, but are not limited to, *one* or more of the following: (ii) A notification to the owner of the facility...." 25 Pa. Code § 89.142a(g)(2)(ii)(emphasis added). The earlier version of the regulation did not include the phrase "one or more of the following." This regulatory language, particularly as viewed against the backdrop of the *PUSH* decisions and the Environmental Quality Board's reaction, is sufficient to defeat Columbia's contention that mere notice is insufficient *as a matter of law* to satisfy the requirements of 25 Pa. Code § 89.142a(g). The regulation in its current form leaves

open the possibility that notice without more may very well be sufficient under some circumstances. Accordingly, Columbia's motion for summary judgment must be denied on this claim.

We wish to emphasize for purposes of going forward, however, that, just as we cannot say that mere notice is *insufficient* as a matter of law, neither can we say that it is *sufficient* as a matter of law. The adequacy of a subsidence control and hazard prevention plan with respect to utilities should not be viewed in a vacuum. The operator's plan should be evaluated in the context of a particular site. The inquiry is dependent upon the facts presented in the case at hand. Although notice without more might be enough, it is not *necessarily* enough.

On that note, the Department is quick to point out that more was required of Eighty Four than mere notice. There is the need to provide more detail in the six-month maps. And there is Special Condition 4.

Columbia contends that these steps are simply not good enough. One of the more serious criticisms raised by the Columbia is that the Department's approach is designed to, or at least has the effect of, denying the public the opportunity to provide meaningful comment. The public has the right to comment during a permit review, but the Department has not conducted any meaningful, fact-specific review at that stage, so there is little of substance about which to comment. At the much later point in time when specific measures are proposed and/or required regarding particular facilities, it is not clear that the public has any practical way of knowing what is happening. We would also add that deciding whether a permit should be issued at all is different from deciding whether active, previously permitted mining must be stopped. *See PUSH v. DEP*, 1996 EHB 1468, 1474 (December 2, 1996) (DEP approval of permit that allows operator to chose other methods of subsidence control down the road raises concerns regarding

"whether the alternative proposal would be subject to the same degree of scrutiny as the original subsidence control plan or whether the public would be afforded an opportunity to comment on the alternative proposal.").

Columbia points out that Special Condition 4 imposes no obligation on Eighty Four to notify Columbia of anything. The condition does not require that any information be sent to Columbia or that Columbia be notified of how the condition has been satisfied. Special Condition 4 does not require the DEP to verify independently any information provided by the operator. Columbia is concerned that Special Condition 4 allows Eighty Four to make its showing as late as two weeks prior to the proposed mining. Regardless of when the information is provided to the Department, the role of this Board is marginalized because there is no procedure whereby Columbia could appeal any determination made by the Department. In other words, if the Department makes an erroneous determination that mitigation measures have been performed, that an agreement has been reached, or that an imminent hazard will not occur, Columbia might not have a meaningful way to challenge that determination. Further, Columbia notes in its reply brief:

> The danger that Eighty Four may make a unilateral representation on Special Condition 4 with which Columbia disagrees is not merely hypothetical; earlier this year, Consolidation Coal Company, Eighty Four's parent company, made a representation to the DEP that it had an agreement to undermine Columbia's lines at the Bailey Mine when no such agreement existed. In fact, the DEP's "informal policy" of requiring Eighty Four to provide notice to Columbia under Special Condition 4 was implemented as a result of the Bailey situation.

(Reply Brief at 10 n.4.) Although there is no citation to record evidence, the point, if true, is worth exploring.

We note that Columbia has raised several potential problems, but it has not pointed to any evidence of an actual threat. To that extent, Columbia may be somewhat guilty of taking the same defective approach that it attributes to the Department; namely, trying to address this issue in a way that is divorced from the reality of the mine at issue. Nevertheless, we acknowledge that Columbia has raised some legitimate concerns.

The Department's answer to some of Columbia's concerns is that a Departmental employee has implemented an "informal policy" that ensures that Columbia receives notice. Along the same lines, Eighty Four cites Departmental testimony that, even if the permit does not expressly require that any measures be taken, the Department in fact makes sure some measures are taken by somebody to minimize potential hazards. Although it is not necessarily required, Eighty Four has, in fact, kept Columbia informed in the past. No imminent hazards have been created so far.

These responses are obviously less than completely satisfying. The fact that a particular approach has worked in practice might very well be relevant in analyzing whether the Department has acted lawfully and reasonably, but it is certainly not dispositive. It may be that the parties have simply been lucky so far. In any event, we have held that such practical considerations do not give the Department authority to disregard regulatory requirements. *PUSH v. DEP*, 1996 EHB 1623, 1627. Permits are like contracts in the sense that they are designed to create specific, enforceable rights and obligations. Parties (and in this case, the public) should not be required to rely on a handshake, a hope, or a prayer that things will probably work out in the end.[5]

[5] The Department also asserts that Columbia could always seek a supersedeas or court injunction from any adverse determination, but it is not entirely clear to us what Columbia would seek a supersedeas from.

Many of Columbia's complaints boil down to an assertion that the Department should be making the tough calls *before* issuing the permit. It should not be deferring these questions by using the device of "special conditions." There is some precedent to support Columbia's view that the timing of the Department review can be a critical factor in assessing whether the Department acted reasonably and in accordance with the law.[6] In *Blose v. DEP*, 2000 EHB 189, the appellant argued that the Department should not issue a surface mining permit if the permit application includes future proposed mining activities inside dwelling barriers if at the time the permit was issued the permittee had not obtained dwelling-barrier waivers. The Department interpreted the relevant regulations to allow it to issue a surface mining permit which included proposed mining activities within barrier areas, so long as it required the operator to obtain an authorization to mine during the second permitting step after the initial permit was issued.

We observed that the Department's regulations explicitly provide that a permit application cannot be approved unless the application affirmatively demonstrates and the Department finds, in writing, that the proposed permit area is not within 300 feet from any occupied dwelling unless a waiver has been obtained. 25 Pa. Code § 86.37(a)(5)(v). We added that the Department is required to find that mining activities can be feasibly accomplished in that proposed mining activities are not permitted within 300 feet of any occupied dwelling, except where variances have been obtained. 25 Pa. Code §§ 86.37(a)(2) and 86(a)(5)(v). Despite the language of the regulations, the Department proposed in *Blose* that the appropriate time to

[6] One of Columbia's arguments in support of the timing question, however, does not advance its case. Columbia argues that a different section, Section 89.141, provides that the coal operator must not only provide a description of utility pipelines to be undermined and measures to be taken to minimize damage, it must also provide such further information as requested "in accordance with the policies and procedures of the [DEP]." 25 Pa. Code § 89.141(d)(13). This regulation simply requires "further information" to be provided "as requested." The reference to policies of the Department modifies the information request; it does not by itself convert the Department's Technical Guidance Policy into a regulatory requirement to conduct an investigation.

evaluate the operator's proposed mining area with respect to dwelling barriers was after the surface mining permit had been issued when the operator later sought an authorization to mine. The Department argued that its interpretation was practical due to the fact that an operator might not have decided when or if it would actually mine a particular area and it was possible that property ownership would change during this period, which, according to the Department, would mean that a new waiver from the current owner would be needed.

We concluded that the Department's argument failed in light of the plain meaning of 25 Pa. Code § 86.102(9)(ii)(A). We referenced 25 Pa. Code § 86.103(d), which required the applicant to submit waivers *with the permit application.*

We stated as follows:

> The regulations in the present matter clearly indicate that mining feasibility must be demonstrated prior to the issuance of a permit. The regulations also clearly specify that mining activity is prohibited inside an occupied dwelling barrier unless a waiver is obtained prior to permit issuance. Section 86.37(a)(2) applies to permit issuance and makes no mention of the authorization to mine. 25 Pa. Code § 86.37(a)(2). Mining activities that are prohibited cannot be "feasibly accomplished." The fact that Phase I of the permit contains no dwelling barriers is not relevant since 25 Pa. Code § 86.37(a)(2) applies to the entire permit. The Department's interpretation in this instance led to the issuance of a permit which included at least seven dwelling barriers inside the permit area. Proposed mining activities existed within dwelling barrier areas. According to the joint stipulation in lieu of testimony, the owners of the five remaining dwelling barriers have no intention of granting a waiver. Without waivers, Seven Sisters' mining application and the detailed mining operations map is a mere theoretical plan.[]
>
> During the review of the Laurel Loop mine permit application, the Department clearly was troubled by the fact that mining activities were proposed within dwelling barriers...The Department's argument that it will not approve mining in these areas of the permit until waivers are obtained or the mining plan is altered would seem to protect the public. Unfortunately, such a procedure is neither authorized by the statute nor its accompanying

> regulations; in fact, it contravenes explicit regulatory language. Therefore, if the Department believes that its alternative is advantageous, which it very well may be, the Department should amend its regulations before the appropriate venue--the Environmental Quality Board.
>
> The Board voided a solid waste management permit under circumstances similar to those found in the present appeal. *New Hanover Township v. DEP*, 1996 EHB 668, *aff'd* 2081 C.D. 1996 (Pa. Cmwlth. filed August 19, 1997). In that case, the Board determined that the permit had been issued without adequate information as to the final design of the proposed landfill since a number of conditions had been placed in the permit which essentially authorized construction and operation of a landfill which had yet to be designed. The Department has a duty to approve permits which are based upon a final, approvable design. 1996 EHB 668.

2000 EHB at 215-16. *See also PUSH v. DEP,* 1999 EHB at 575 (problems with accommodating mining and utility service that are anticipated should be reviewed at the permitting stage); *Chestnut Ridge Conservancy v. DEP*, 1996 EHB 217. (Department erred in issuing a noncoal surface mining permit where access to site had not yet been determined).

In the end, the timing of the Department's actions in this case is likely to be one of many factors we must consider in deciding whether the Department erred. We are not willing to say, at least at this juncture, that the Department's approach was deficient as a matter of law. It might be that, given the circumstances of this case, the Department's three-step approach will prove to have been lawful and reasonable. Or not. We need to develop a more complete administrative record before we are willing to say.

In evaluating whether proposed measures are adequate, it must not be forgotten that this appeal involves more than a simple property rights dispute between a gas company and a coal company. The public safety is paramount. It is the Department's responsibility to ensure the protection of the public safety. Among the considerations we have already noted, it is not only

important to keep in mind the respective property interests of the litigants, in assuring the public safety, it is also appropriate to consider such factors as the proximity of the mining to the utility facility, whether subsidence is likely to cause damage, what that damage would be, the availability and practicability of in-mine measures that might reduce the risk of disruption, who has the legal right to take measures regarding the utility's facilities,[7] the safety of mitigation measures, the availability and practicability of measures that can be taken with respect to the facility to reduce the risk, the risk to the customers of the utility and people who live in the vicinity of the line, and other relevant factors. The regulatory goal is to plan and conduct the mining in a manner that minimizes damage, destruction, or disruption of utility services and prevents hazards, 25 Pa. Code § 89.142a, and the mine operator bears at least some of the responsibility for ensuring that that goal is attained, § 89.142a(2). It is with these considerations in mind that we will evaluate the Department's actions as we move forward in this appeal.

Property Rights

Columbia's second major complaint is that the Department failed to ensure as part of the application review process that Eighty Four has the legal right to cause subsidence under Columbia's pipelines. Columbia's contention is built upon the premise that the Department has a regulatory obligation to determine whether Eighty Four has the legal right under applicable property laws to cause subsidence under Columbia's lines. The Department does not question that premise. Eighty Four, however, argues that there was no clear regulatory responsibility or, perhaps even authority, to make such a determination. It cites to our one of our *PUSH* decisions, *PUSH v. DEP*, 1996 EHB 1428, wherein we stated as follows:

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[7] Eighty Four makes much of the fact that it does not have a legal right to implement mitigation measures on someone else's equipment. Query whether arguing that an operator has no duty to employ mitigation measures because it has no right of access to utility facilities is similar to arguing that an operator has no duty to protect and/or replace water supplies because it has no right of access to such supplies.

> Paragraph 3.gr of the notice of appeal objects to the fact that the permit application did not indicate that a right of entry had been obtained for each parcel of land to be affected by coal mining activities. Eighty Four Mining argues that a right of entry is required only for areas to be affected by surface mining activities and since the 1995 permit revision did not authorize any new surface activities, no right of entry documentation was required. Eighty Four Mining notes that a right of entry requirement is contained in Section 4(a)(2)(F) of the Surface Mining Act, 52 P.S. § 1396.4(a)(2)(F), while the Mine Subsidence Act contains no such requirement. In addition, Eighty Four Mining correctly notes that the regulations governing right of entry at 25 Pa. Code § 86.64 require the permit applicant to obtain a right of entry only with respect to surface mining activities. No similar requirement exists for underground mining activities.
>
> PUSH does not respond to this argument in its memorandum, except to assert that surface land is affected by underground mining activities. However, where the language of the regulations is clear and there is no statutory or regulatory requirement to obtain a right of entry for underground mining activities, there is no legal basis for requiring Eighty Four Mining to submit landowner right of entry documentation with its application. Because the law is clear on this subject and there is no issue of material fact, summary judgment is granted to Eighty Four Mining with respect to paragraph 3.gr of the notice of appeal.

1996 EHB at 1464-65.

In reply, Columbia posits that our holding was directed at subsections (b) and (d) of the operative regulation, 25 Pa. Code § 86.64, which deal with landowner consent forms. Columbia suggests that the discussion was not meant to refer the more general subsection (a), which reads:

> (a) An application shall contain a description of the documents upon which the applicant bases his legal right to enter and commence coal mining activities within the permit area and whether that right is the subject of pending court litigation. The description shall identify the documents by type and date of execution, identify the specific lands to which the document pertains and explain the legal rights claimed by the applicant.

25 Pa. Code § 86.64(a). Columbia notes that its argument in this case is based upon Subsection (a).

At a minimum, it appears that an issue of regulatory interpretation may be presented here. We note that most of the cases to date regarding site access other than *PUSH* have involved surface mines. They have not clearly addressed whether the Department has the right or authority to investigate property rights where the only entry on the property in question is via subsidence. *See Empire Coal Mining & Development v. DER*, 678 A.2d 1218 (Pa. Cmwlth. 1996) (surface mining); *Coolspring Stone Supply v. DEP*, 1998 EHB 209 (surface mining); *Chestnut Ridge Conservancy*, 1996 EHB 217 (surface mining); *Lucchino v. DER*, 1994 EHB 380 (surface mining). The legal question has not been sufficiently developed to allow for resolution in the immediate procedural context.

If we eventually determine that the Department had the authority or duty to investigate property rights, we will then need to decide whether the Department acted reasonably and in accordance with the law by taking the approach that it took in this case. As it did with regard to the imminent-hazard issue, the Department did not conduct (or at least complete) a property rights investigation before it issued the permit revision to Eighty Four. Instead, the Department issued the permit revision with the following Special Condition 5:

> Notwithstanding any other provision of this permit, Eighty Four Mining Company is not authorized to conduct any longwall mining beneath or adjacent to the Columbia Gas Transmission Corporation utility structures listed below which will cause surface subsidence unless and until Eighty Four Mining Company has demonstrated to the Department's satisfaction that it has the right to subside these areas or it has entered into an agreement with Columbia Gas Transmission Corporation whereby Columbia consents to such mining. The four utility structures which are addressed by this condition are: Pipeline 36, Pipeline 40, Pipeline 1570, and Pipeline 10221. These structures and adjacent areas are located on portions of the following parcels of property: [listing parcels of land].

The Department's explanation for deferring its determination regarding property rights, however, differs from its explanation regarding deferral of the imminent-hazard determination.

The Department deferred the imminent hazard determination apparently because it did not feel it was necessary at the permit review stage. On the other hand, the Department deferred the property rights determination because Eighty Four did not intend to mine in the locations in dispute for an extended period of time, and because the Department did not have time to perform the investigation before the permit needed to be issued. (Memorandum pp. 6, 18.)[8] The Department does not explain the need to rush.

Columbia's concerns regarding the property rights issue parallel the concerns that it has expressed with the Department's handling of the imminent hazard issue. Columbia's primary contention is that the Department should have evaluated property rights *before* the permit was issued. Proceeding by way of a special condition means that there is no indication by what standard the Department will judge whether Eighty Four has the right to subside. There is no indication as to when or how Eighty Four will be required to make this showing, and the extent to which (if at all) Columbia will have a right or practical ability to appeal any determination made by the Department. The Department has also not indicated if or when information supplied by Eighty Four will be made available to the public and Columbia.

Eighty Four argues that Special Condition 5 adequately protects Columbia's interests. (Eighty Four does not address the effect of the Department's approach on public participation.) Among other things, Eighty Four makes the curious argument that, if all else fails, Columbia can simply refuse to employ any mitigation measures itself "thereby preventing any mining beneath its lines until Eighty Four obtains some form of final decision concerning its rights." This argument ties into the issues regarding imminent hazards. We are not sure *any* of the applicable regulations, however, contemplate a high-stakes game of chicken. We also do not follow why

[8] Eighty Four makes a similar statement to the effect that the Department acted reasonably in not "delaying" the permit issuance. It is not clear with respect to what deadline or pressures there was a "delay."

Columbia's failure to employ mitigation measures of its own due to a property dispute necessarily operates to stop the mining. Given how the permit is currently structured, Eighty Four could, for example, give notice, "demonstrate" to the Department (without any input from Columbia or the public or opportunity for review) that no imminent hazard will occur and that it has the necessary property rights, and proceed to mine. We are reminded of the Department's testimony in *PUSH v. DEP*, 1996 EHB 1411, that a permit with some similarity to the one at issue here would have allowed mining to proceed even if it caused the complete destruction of the pipeline. 1996 EHB at 1420. *See also* DEP Memorandum p. 15 (Eighty Four must resolve any issue regarding imminent hazards "or *risk* being ordered to cease mining (emphasis added).") In any event, we are not convinced, when it comes to assuring the public safety, that traditional practices, good faith, the absence of past accidents, or making predictions about what actions parties are likely to take in the own economic self interest can take the place of clear, enforceable permit conditions. *See New Hanover Township, supra.*

Ultimately, we are not in a position to say at this juncture that the Department acted properly or improperly as a matter of law. As with the imminent hazard determination, the Department's handling of the property rights issue implicates too many issues of both law and fact to allow for resolution in the current context. *See Lucchino*, 1994 EHB at 393 (Department's review is more than merely ministerial; it requires the exercise of discretion). *See generally TJS Mining v. DEP*, EHB Docket No. 2002-136-L, slip op. at 3 (May 22, 2003) (question of reasonableness is essentially a factual inquiry). As previously noted, the explanation of the deferral, and the fact that the disputed parcels are a small percentage of the site and far removed from current mining may come into play. We may need to get into the merits of Columbia's property claims. Whether the Department's approach allowed for

meaningful public participation or hindered access to due process review are also relevant factors. In short, as with the imminent-hazard issue, we will need to examine *all* of the pertinent facts and circumstances.

The Department also stated in its response to Columbia's motion that this Board should hold off addressing this issue because the Department was in the process of modifying Special Condition 5. Indeed, briefing in this matter was stayed at the parties' request in anticipation of a property investigation to be conducted in connection with a separate request to renew Eighty Four's permit. Months have now gone by, briefing was reinstated at the parties' request, and we have no clear indication of what is going on. We need to develop a record on this issue, but the delay may or may not lead some credence to Columbia's argument that it is necessary or at least appropriate to resolve these apparently difficult and time-consuming issues before a permit is issued and mining pursuant to that revision is underway.

Columbia goes on to argue that Eighty Four should have been required to obtain judicial determinations of its access rights on disputed parcels. We are not sure why Eighty Four should be required to go to court simply because Columbia makes a claim, and we do not see anything in the potentially applicable case law that would necessarily impose such a requirement in every case as a matter of law. *See Coolspring Stone Supply*, 1998 EHB at 212-14 (Department not required to withhold issuance of permit until litigation regarding title is resolved; Department's duty not to *resolve* property disputes, but to make an informed decision regarding regulatory compliance); *Chestnut Ridge Conservancy,* 1996 EHB at 229 (same). *But see Empire Coal Mining & Development v. DER*, 678 A.2d 1218, 1223 (Pa. Cmwlth. 1996) (the EHB "has jurisdiction to determine whether a particular document expressly grants or reserves the right to surface mine; however, the question of interpretation of a doubtful grant never arises. An

applicant with a doubtful grant is free to seek a declaration in common pleas court concerning the precise nature of the estate that it holds.") It may be that determining whether the Department has acted properly in not requiring a judicial determination will depend upon the facts and circumstances of each case. Requiring judicial resolution may be entirely appropriate in some cases and inappropriate in others. We will defer resolution of this question, however, pending development of a complete record.

Finally, the Department and Eighty Four allude to the doctrine of administrative finality. The parties do little, however, to develop the argument. Because we have rejected the motion for summary judgment on the grounds raised by Columbia, there is no need to resolve conclusively the claim of preclusive finality at this juncture. It does appear, however, that the argument has a mixed chance of success if it relates to utilities within the revision area. *PUSH v. DEP*, 1996 EHB 1428, 1440 ("PUSH may challenge only those issues which have arisen in connection with the application to add acreage and may not use its appeal of the permit revision as a vehicle for challenging prior permitting actions.") Eighty Four correctly concedes that resolution of the issue will require findings of fact. (Memorandum p. 13.)

For the reasons set forth above, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COLUMBIA GAS TRANSMISSION CORPORATION	:	
	:	**EHB Docket No. 2002-176-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY FOUR MINING COMPANY, Permittee	:	

ORDER

AND NOW, this 14th day of October, 2003, Columbia Gas Transmission Corporation's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: October 14, 2003

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

For the Commonwealth, DEP:
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Southwest Regional Counsel

For Appellant:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WILSON FISHER, JR.	:	
	:	
v.	:	**EHB Docket No. 2002-305-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis

The Board denies motions for summary judgment in an appeal from a civil penalty assessment levied against a sewage enforcement officer. The Department's motion is denied because the facts adduced fail to support all the elements of its case. Also, the crux of the Department's position is that the sewage enforcement officer abused his prosecutorial discretion. We believe that it is necessary to fully appreciate all the facts and circumstances of the matter, including the demeanor and credibility of the witnesses in order to correctly decide the propriety of the Department's action.

The appellant-sewage enforcement officer's motion is denied because he fails to appropriately support any of the factual allegations of his motion as required by the rules of procedure.

OPINION

Before the Board are motions for summary judgment filed by both the Department of Environmental Protection and a *pro se* appellant, Wilson Fisher Jr. (Appellant). This matter is an appeal from the assessment of a civil penalty against the Appellant, a sewage enforcement officer, for failing to adequately perform his duties in resolving violations of the Sewage Facilities Act[1] in a trailer park, involving "wild cat" sewage systems associated with four mobile homes. The gist of the Department's assessment is that the three-and-a-half years it took the Appellant to resolve the situation was an unreasonable amount of time which rises to the level of a violation of the Sewage Facilities Act and the Department's regulations thereunder. In the Department's motion for summary judgment it contends that the facts involved in this matter are undisputed due to the Appellant's failure to file answers to admissions in a timely fashion. It therefore takes the position that the Appellant's violation of the Act and its regulations is clear and that it is entitled to judgment in its favor as a matter of law. The Appellant in his motion argues that he did the best he could to resolve sewage violations in the circumstances and that he acted appropriately within the scope of his authority as an agent of the local agency, Chest Township. He also notes that there are no time limits in the Sewage Facilities Act or its regulations.

Before addressing the substance of the summary judgment motions, we will first address the procedural matter which consumes a large portion of the Department's motion. Namely that we must deem the facts contained in its request for admissions from

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[1] Act of January 24, 1996, P.L. (1965) 1535, *as amended,* 35 P.S. §§ 750.1-750.20a.

the Appellant admitted because the Appellant did not file his answers within thirty days as required by the Pennsylvania Rules of Civil Procedure. As we explain below, we do not believe justice would be served by enforcing the rule in these circumstances as urged by the Department.

Rule 4014(b) of the Rules of Civil Procedure requires that admissions be answered within thirty days of service.[2] The Department states that it mailed to the Appellant a request for admissions on January 8, 2003, which was received by the Appellant on January 10, 2003. However, the Appellant did not mail his answers until March 17, 2003, more than thirty days after receiving the requests. In his response to the Department's motion, the Appellant states that he believed that the Department concurred with his late filing of the answers to the admission requests. He also argues that the Department was not prejudiced by his late filing.

The Department filed a motion to compel on March 4, 2003.[3] This motion sought to compel answers to the interrogatories and production of documents which were filed along with its admissions requests on January 8, 2003. The motion to compel makes no mention of the request for admissions.[4] The Appellant answered the discovery requests, including the admissions, approximately two weeks later, rendering the Department's motion moot. The docket contains no motion from the Department to strike the

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[2] Specifically, the rule states: "The matter is admitted unless, within thirty days after service of the request, or within shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or by the party's attorney . . . ." Pa. R.C.P. No. 4014(b).

[3] See EHB Docket No. 2002-305-MG.

[4] The Department, in its reply, states that it made no mention of the admissions because they were already deemed admitted by operation of the rule at that point.

Appellant's answers to the Department's request for admissions which were filed with the Appellant's answers to the Department's interrogatories and document request.

First, we do not believe that justice would be served by enforcing Rule 4014(b) in this case. This Board has consistently urged parties to avoid overly technical use of the rules in litigation before it. Particularly since the Appellant is not represented by counsel, it would have been courteous for the Department to have brought the issue of the admissions to the Appellant's attention long before the filing of dispositive motions, rather than lying in wait for him to miss a fine point of discovery practice that even some attorneys are not aware of. We believe the spirit of Rule 4014(b) is to prevent such tactics and to provide an incentive to the parties to diligently pursue their claims. This rule is in the nature of a sanction for tardy responses to discovery rather than a trap for the unwary or inattentive.

In this instance, the Appellant merely filed his answers about a month late. He may have had the concurrence of Department counsel. Our rules of procedure allow us to "disregard any error or defect of procedure which does not affect the substantial rights of the parties."[5] Inasmuch as the Department has alleged no prejudice from the Appellant's late filing of his answers to admissions, we decline to deem them admitted.[6]

This view of the rule is illustrative by two cases relied upon by the Department, *DEP v. Lentz*[7], and *Burnside Borough v. DEP*.[8] *Lentz* was written in the context of a

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[5] 25 Pa. Code § 1021.4.

[6] *See DEP v. Barefoot,* EHB Docket No. 2003-134-C (Opinion issued October 6, 2003)(declining to deem the allegations in a complaint admitted where the defendants filed their answer approximately thirty days late.)

[7] 2001 EHB 838.

[8] EHB Docket No. 2002-138-C (Opinion issued March 27, 2003).

discovery motion which sought to compel answers to interrogatories and to order matters deemed admitted. Unlike the matter before us now, the appellant in *Lentz* not only failed to file any response to the Department's discovery requests, but he also failed to respond to the Department's discovery motion before the Board. Accordingly, the Board enforced Rule 4014 against a party who not only failed to diligently pursue his case in discovery, but also evidenced a lack of desire to litigate his claim before the Board by failing to answer a motion. Similar to *Lentz*, in *Burnside Borough* the appellant failed to serve answers to the Department's request for admissions.

Second, based on the Appellant's response to the Department's motion for summary judgment and the lack of a motion to strike the answers to admissions, we believe there is a question as to whether the Department concurred in the Appellant's late filing. The Department contends that it never told the Appellant this, yet there is at least some confusion about what came about. The cover letter that the Appellant included with his discovery answers certainly suggests that he believed, perhaps mistakenly, that the Department did not contest the late filing of his answers, and the Department thereafter made no indication that its position was otherwise.

The Department also seeks to strike the Appellant's motion for summary judgment because it was filed five days late. We will not subject the Appellant to such a harsh sanction for a relatively minor violation of our pre-hearing order. Where we have done so in the past, the late dispositive motions were filed months after the deadline provided for in the Board's orders.[9] The Department's motion is denied.[10]

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[9] *Leatherwood, Inc. v. DEP*, 2001 EHB 13 (dispositive motion filed almost two months after the deadline); *Short v. DEP*, 1997 EHB 837 (dispositive motion filed four

We turn now to the substance of the Department's motion for summary judgment. The Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits show that no genuine issue of material fact exists *and* that the moving party is entitled to judgment as a matter of law.[11] Specifically, in this appeal, the Department's motion must demonstrate that there are no disputed questions of fact which establish each element of its case. Namely, that the Appellant (1) violated the applicable statute or regulations; (2) that the penalty imposed was lawful; and (3) the amount of the civil penalty assessed for the violation reflects an appropriate exercise of discretion.[12] We find that the Department's motion fails to clearly establish that it is entitled to summary judgment on these issues.

Many of the salient facts in this matter are undisputed. The Appellant is a certified sewage enforcement officer (SEO) retained by Chest Township, Clearfied County. Sometime in 1998 the Appellant began inspecting the sewage disposal systems serving four mobile homes on a property owned by Darrell Brady. These systems did not conform to the current requirements of the Sewage Facilities Act. From 1998 until 2002

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months after the deadline). *Compare with Giordano v. DEP*, 2001 EHB 844 (dispositive motion filed one day late permitted).

[10] We might also point out that the Department's papers are not free of procedural error. First, it attempts to introduce new facts in its reply brief which were not included in its motion for summary judgment. *See Township of Florence v. DEP*, 1996 EHB 1399. Second, Rule 1021.94(e) of the Board's rules requires replies to be *concise* and not exceed 25 pages. The Department filed both a "reply" and a "memorandum of law" in support of its reply, which together total more than 50 pages and largely duplicate each other and restate arguments from its summary judgment motion.

[11] 25 Pa. Code § 1021.94(b); Pa. R. Civ. P. 1035.2; *County of Adams v. Department of Environmental Protection,* 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Burnside Borough v. DEP*, EHB Docket No. 2002-138-C (Opinion issued March 27, 2003).

[12] *Stine Farms and Recycling, Inc. v. DEP*, 2001 EHB 796.

the condition remained unresolved. The record contains correspondence from the Appellant to Mr. Brady and reflects meetings which occurred between them. The Appellant also sent letters and met with the person who was leasing at least one of the mobile homes on the Brady property, Richard Kephart. The Appellant also inspected these properties at various times during that period. In September 2001 the Department began to receive complaints concerning the sewage conditions on the Brady property and about the Appellant's performance as an SEO. Thereafter, the Department requested a meeting with the Clearfield County Sewage Committee concerning individual complaints in several municipalities, including Chest Township where the Brady property is located. The Appellant attended the meeting, and the Brady property was discussed.[13] Thereafter, the Appellant appears to have become more aggressive in his attempts to resolve the improper sewage facilities on the Brady property. For example, he issued a notice of violation to Mr. Kephart which required him to relocate the mobile home to a suitable location. He also instituted proceedings before the district magistrate against the owner of the Brady property. The Appellant's efforts to resolve the conditions at the property appear to have continued at least until sometime in 2002.

However, on October 28, 2002 the Department assessed a $5,000 civil penalty against the Appellant for failing to perform his duties as an SEO by not resolving the violations of the Sewage Facilities Act on the Brady property. Specifically it is the Department's position that the three-and-a-half years it took the Appellant to adequately address the persistent violations on the Brady property constitutes a failure to effectively

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[13] The Appellant disputes certain elements of the Department's version of what transpired during this meeting. See Appellant's Response at p. 2.

administer Section 7 of the Sewage Facilities Act[14] and violates the Department's regulations concerning the duties of sewage enforcement officers.

The Sewage Facilities Act is not very explicit concerning the scope of a sewage enforcement officer's enforcement duties. It defines an SEO as:

> The official of the local agency who issues and reviews permit applications and conducts such investigations and inspections as are necessary to implement the act and the rules and regulations thereunder. [15]

The Act also provides that a local agency must either employ or contract with a sufficient number of SEOs to administer the permitting provisions of the Act embodied in Section 7[16] within the time periods set forth in that section for processing permit applications.[17] The Act further requires the local agency to finance an inspection and enforcement program.[18] A local agency may institute suits in equity to restrain or prevent violations of Section 7[19] and may also assess civil penalties.[20] The Act does not explicitly state that an SEO shall also have authority to institute proceedings to restrain violations or assess civil penalties.

The Department's explicit responsibilities relative to SEOs include the training and certification of SEOs. It may revoke or suspend certification of an SEO "for cause"

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[14] Section 7 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. § 750.7. This section governs permitting under the Act.

[15] 35 P.S. § 750.2.

[16] 25 P.S. § 750.7. This section outlines the requirements for permits which are required for sewage facilities.

[17] 35 P.S. § 750.8(1).

[18] 35 P.S. § 750.8(4.1).

[19] 35 P.S. § 750.12(a).

[20] 35 P.S. § 750.13a.

including negligence.[21] The civil penalty provision of the Act does not explicitly provide for the assessment of civil penalties against an SEO for failure to fulfill his duties, but instead broadly provides that a civil penalty may be assessed for a "violation of any provision of this act or any rule or regulation promulgated under this act or any order or permit issued by the department, municipality or local agency . . . ."[22] The Act apparently contemplates that the Department could issue an order or a notice of violation directly against a sewage enforcement officer.[23]

The Department's regulations purport to confer more explicit authority upon sewage enforcement officers:

> A sewage enforcement officer has the power and duty to issue, deny and revoke permits, and to take all other actions necessary to administer and enforce section 7 of the act (35 P.S. § 750.7), except that a sewage enforcement officer may not conduct hearings under section 16 of the act (35 P.S. 750.16).[24]

The Department's regulations also require an SEO to act independently of the local agency which employs or contracts for services with him:

> The sewage enforcement officer shall advise the local agency of a violation of the local agency of its responsibility to restrain a violation of the act or this part and shall independently take action within the scope of his authority necessary to restrain or correct the violation.[25]

It is this regulation that we believe is the crux of the dispute between the Department and the Appellant. The Appellant's position is that he did all he could to resolve the problems within the scope of his authority from Chest Township. The Appellant's view

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[21] 35 P.S. § 750.10.
[22] 35 P.S. § 750.13a.
[23] See 35 P.S. § 750.7(b)(4.3)(iv)(E).
[24] 25 Pa. Code § 71.41(a).
[25] 25 Pa. Code § 72.41(p).

of his duties is that they are largely administrative in nature, and that it is the job of the municipality to undertake actions which are more punitive in nature. The Department appears to interpret this regulation to mean that an SEO has an affirmative duty to act even if he is not authorized to do so by the local agency which retains him. We do not believe that the record has been sufficiently developed for us to decide whether the Department's interpretation is reasonable and consistent with the statute.[26]

Furthermore, what the Department essentially argues is that the Appellant failed to properly exercise his prosecutorial discretion in enforcing the permitting provisions of the Act because it took three-and-a-half years to resolve the matter on the Brady property. It is further the Department's view that this failure constitutes a violation of the Act within the meaning of Section 9 which authorizes the Department to assess civil penalties.[27] The Appellant contends that the Department's regulations do not establish time frames within which violations of the Act must be resolved, therefore he did not violate any specific provision of the Act or its regulations. To resolve this dispute necessarily involves a full understanding of the circumstances surrounding the violations on the property, and the specific measures the Appellant took and whether there were other measures that, in the Department's view, the Appellant should have taken. We can not judge the credibility of the witnesses or fully appreciate the issues involved on the basis of the papers alone. Therefore, it is appropriate to hold a hearing on these issues.

Finally, there are also outstanding questions concerning the reasonableness of the amount of the civil penalty. The Department assessed separate penalties for failing to

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[26] *Tri-State Transfer v. Department of Environmental Protection*, 722 A.2d 1129 (Pa. Cmwlth. 1999).

[27] 35 P.S. § 750.13a.

administer Section 7 of the Act, failing to take all actions necessary to administer Section 7 in violation of Section 72.41(a) of the regulations; failing to independently take action within the scope of his authority to correct violations of the Act in violation of Section 72.41(p) of the regulations; approving an "unapprovable" system by allowing the lessor to maintain an unpermitted sewage disposal system; and allowing a statutory nuisance to exist under Section 14 of the Act. The Department did not develop a legal argument for why it was reasonable for it to assess a penalty for failing to take "all actions necessary" under Section 72.41(a) of the regulations, and also for "failing to independently take action" under Section 72.41(p). We also believe there is a potential causation issue concerning whether or not the Appellant's abuse of discretion "caused" a nuisance within the meaning of the Act.

In sum, we believe that summary judgment in favor of the Department is inappropriate in this case. We do not have a full understanding of the reasonableness of the Appellant's activity or lack thereof. It is unclear whether his lack of activity was so egregious as to constitute a violation of the Sewage Facilities Act and whether a civil penalty is therefore authorized and in a reasonable amount. The Department's motion is denied.

We also deny the Appellant's motion for summary judgment. As the Department takes great pains to point out in its response, the Appellant fails to properly support his factual averments with evidence from the record or affidavits.[28] Further, for many of the reasons described above, we believe that a hearing is necessary in order to judge the

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[28] *See Barkman v. DER*, 1993 EHB 738 (the Board will not sift through the record in order to find support for an appellant's position).

credibility of witnesses and to fully understand the reasonableness of the Appellant's conduct in resolving the sewage violations on the Brady property.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILSON FISHER, JR.,	:	
	:	
v.	:	**EHB Docket No. 2002-305-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 6th day of November, 2003, it is hereby ordered that the motions for summary judgment filed by the Department of Environmental Protection and Wilson Fisher, Jr. in the above-captioned matter are **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Member

DATED: November 6, 2003

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

ROBERT SHUEY, et al.	:	
	:	
v.	:	**EHB Docket No. 2002-269-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and QUALITY AGGREGATES, INC., Permittee	:	**Issued: November 12, 2003**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where the record clearly demonstrates there are genuine issues of material fact, summary judgment may not be granted.

OPINION

This matter involves an appeal of a non-coal surface mining permit issued by the Department of Environmental Protection (Department) to Quality Aggregates, Inc. The permit authorizes the mining of limestone and incidental coal removal at the Myers Mine, adjacent to McConnell's Mills State Park. Before the Board is the Appellants' motion for partial summary judgment, contending that Quality Aggregates failed to submit and the Department failed to review evidence that Quality Aggregates could conduct blasting safely and without danger of injury or death to individuals using the park and without damage to cliff sides at the park.

The Appellants base their argument on three grounds. First, they point to the Department's pre-denial letter, which stated that Quality Aggregates could not conduct blasting in such a way as to prevent damage to boulders along Slippery Rock Creek Gorge. Second, they reference the deposition testimony of the Department's blasting experts, William H. Foringer and Richard Lamkie, which the Appellants claim demonstrates that no one at the Department qualified to review and evaluate the impact of Quality Aggregates' blasting activity and its impact at the park did so. Third, the Appellants contend that the one and only expert report on blasting submitted by Quality Aggregates did not address the impact of vibration and acceleration levels on the existing cliff sides and the potential to create rock fall.

The Department argues that the Appellants' motion is premature since expert witness discovery is not completed and such testimony is required in order to address the assertion that blasting will have an adverse effect on the cliff walls. Both the Department and Quality Aggregates also argue that a number of the factual allegations made by the Appellants are unsupported and therefore should not be considered. Finally, both the Department and Quality Aggregates contend there are disputed issues of material fact and therefore summary judgment is inappropriate.

In response to the Appellants' claim that the impact of blasting on the cliff sides at the park was not considered, Quality Aggregates and the Department have submitted a number of documents, including a document labeled "Supplemental Permit Application Information," containing information on additional measures Quality Aggregates intends to employ with regard to blasting at the site. This document was submitted to the Department in April 2002. Quality Aggregates has also provided copies of two reports prepared by Vibra-Tech Engineers, Inc. dealing with blasting at the site. These too were submitted to the Department by Quality

Aggregates. Also attached is a report prepared by Vibra-Tech in May 2003 addressing the Appellants' allegations that the firm failed to study the impact of blasting on the cliff sides of the gorge. Finally, both the Department and Quality Aggregates dispute the Appellants' allegations regarding the deposition testimony of the Department's blasting experts.

We agree with the Department and Quality Aggregates that there are disputed issues of material fact. First, we do not read the deposition testimony of the Department's experts as saying what the Appellants say it does. The Appellants contend that each of the Department's blasting experts testified "that at no time did he or any other DEP person with qualifications to evaluate the impact of blasting on surrounding natural and man made structures, ever evaluate or consider the impact of [Quality Aggregates'] mining activity and its intended blasting on the integrity of the cliff sides which make up the gorge." (Appellants' Motion, p. 3) On the contrary, Mr. Foringer simply testified that he personally did not conduct such an evaluation and did not consider himself qualified to do so. Mr. Lamkie testified that he did not specifically recall whether the Vibra-Tech report had addressed this issue because it had been awhile since he read it, but did not believe there would be sufficient energy to cause additional rock slides. The deposition testimony of Mr. Lamkie and Mr. Foringer simply does not state what the Appellants would have us believe it does.

In addition, Quality Aggregates has attached to its response the written findings of the Department's District Mining Manager regarding Quality Aggregates' permit application. These findings include the following: "...Quality Aggregates, Inc. has proposed measures to minimize the frequency and vibration of the blasting as recommended in Vibra-Tech's report, which will prevent adverse effects on the boulders along Slippery Rock Creek gorge...." (Quality Aggregates Response, Exhibit A-2) This indicates that the Department did apparently consider

the impact of blasting at the site in deciding whether to grant the permit and relied on the Vibra-Tech study in reaching its conclusion.

Furthermore, as noted earlier Quality Aggregates submitted with its response copies of reports prepared by Vibra-Tech, one of which disputes the Appellants' contention that the issues of vibration and acceleration were not studied by Vibra-Tech.

Summary judgment may be granted only when the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2(2). *Holbert v. DEP*, 2002 EHB 796, 807-09, *citing County of Adams v. DEP*, 687 A.2d 1222, n. 4 (Pa. Cmwlth. 1997). When evaluating a motion for summary judgment, the Board views it in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact are resolved against the moving party. *Goetz v. DEP*, EHB Docket No. 2002-069-K (Opinion and Order on Motion for Summary Judgment issued January 16, 2003).

Based on the Department's and Quality Aggregates' responses to the Appellants' motion and the exhibits submitted in support of their responses, as well as our reading of Mr. Lamkie's and Mr. Foringer's deposition testimony as being other than that asserted by the Appellants, it is obvious there are genuine issues of material fact here that preclude the grant of summary judgment. Based on this conclusion, we need not address the other arguments raised by Quality Aggregates and the Department in support of a denial of summary judgment.

We enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT SHUEY, et al.	:	
	:	
v.	:	**EHB Docket No. 2002-269-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and QUALITY AGGREGATES, INC., Permittee	:	

ORDER

AND NOW, this 12th day of November 2002, the Appellants' motion for summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: November 12, 2003

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

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Southwest Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DALE HOLLOBAUGH	:	
	:	
v.	:	**EHB Docket No. 2002-159-R**
	:	**(Consolidated with 2002-194-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 13, 2003**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand Administrative Law Judge

Synopsis:

Based on the Appellant's continued failure to file a pre-hearing memorandum in violation of the Board's rules at 25 Pa. Code §1021.104 and Pre-Hearing Order No. 2, his failure to address the issues raised in the Department of Environmental Protection's motion to dismiss, and where the hearing in this matter is scheduled to begin in approximately one week, the appeal is dismissed as a sanction pursuant to 25 Pa. Code § 1021.161.

OPINION

This matter involves a consolidated *pro se* appeal by Dale Hollobaugh of the following actions taken by the Department of Environmental Protection (Department): a compliance order issued on May 31, 2002 and a forfeiture of bonds on August 5, 2002. Both the compliance order and bond forfeiture pertain to a surface coal mine operated by Mr. Hollobaugh in Jefferson

County known as the Gertz Mine.

Before the Board is a motion to dismiss filed by the Department. The Department seeks dismissal of the appeal as a sanction for Mr. Hollobaugh's failure to comply with the Board's Pre-Hearing Order No. 2 by failing to file a pre-hearing memorandum. According to the Department's motion, Mr. Hollobaugh has also failed to respond to discovery served on him by the Department. A hearing in this matter is scheduled to begin on November 18, 2003.

By Order dated October 10, 2003, the Board directed Mr. Hollobaugh to file a response to the Department's motion, along with a supporting memorandum of law. Instead, Mr. Hollobaugh filed a short letter saying he is proceeding without an attorney, he feels there are two broken agreements with the Department, and he believes he deserves to have his say in this matter.

Having received no formal response from Mr. Hollobaugh to the Department's motion and still not having received Mr. Hollobaugh's pre-hearing memorandum, which was due on September 18, 2003, the Board attempted on numerous occasions to schedule a conference call with the parties, but Mr. Hollobaugh failed to return the Board's telephone calls.

The Board may impose sanctions upon a party for failure to abide by a Board order or rule of practice and procedure. 25 Pa. Code § 1021.161; *Yourshaw v. DEP*, 1998 EHB 1063, 1067. The sanctions may include dismissal of an appeal. *Id.* Where an appellant fails to file a proper pre-hearing memorandum after being given ample opportunity to do so, that is grounds for dismissal of his appeal. *Yourshaw, supra.*

Here, we have given Mr. Hollobaugh every opportunity to file his pre-hearing memorandum, which is now nearly two months overdue. He has failed to file it in violation of both Pre-Hearing Order No. 2 and the Board's rules at 25 Pa. Code § 1021.104. A hearing in

this matter is scheduled to begin next week. Allowing Mr. Hollobaugh to proceed with the hearing, having filed no pre-hearing memorandum outlining the factual issues in dispute, would clearly result in prejudice to the Department. Based on Mr. Hollobaugh's continued failure to comply with Pre-Hearing Order No. 2, we shall dismiss his appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DALE HOLLOBAUGH	:	
	:	
v.	:	**EHB Docket No. 2002-159-R**
	:	**(Consolidated with 2002-194-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 13th day of November 2003, the appeal of Dale Hollobaugh is **dismissed.**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

EHB Docket No. 2002-159-R
(Consolidated with 2002-194-R)

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATE: November 13, 2003

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

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Southwest Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BOROUGH OF EDINBORO MUNICIPAL AUTHORITY OF THE BOROUGH OF EDINBORO	:	
v.	:	**EHB Docket No. 2000-125-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 14, 2003**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

An appeal challenging an Administrative Order of the Department requiring Edinboro to jointly address regional sewage needs with a neighboring township and requiring both municipalities to prepare and submit a Joint Official Plan Update Revision is dismissed. The Department has the authority to order neighboring municipalities to jointly address the sewage needs of their region. An order requiring such joint action does not constitute a taking.

The evidence clearly demonstrates that Edinboro's sewage conveyance system is hydraulically overloaded. A system is "hydraulically overloaded" when flow spills out or exits the conveyance system in places other than at the permitted discharge point. Edinboro violated 25 Pa. Code § 94.12 when it failed to identify numerous sewage overflows in its Chapter 94 reports.

Pa.R.C.P. 4003.5 applies only to expert testimony that was acquired or developed in

anticipation of litigation. The opinions of Department employees on the issue of hydraulic overload were not subject to Pa.R.C.P. 4003.5 because they were not arrived at with an eye toward litigation. However, if any party, including the Department, wishes to present what would be considered expert testimony of one of its employees, then even if that party would not be required to identify that employee as an expert or produce an expert report under Pa.R.C.P. 4003.5, it is still required under the Board's rules at 25 Pa. Code §§ 1021.101 and 1021.104 to identify the expert, answer expert interrogatories and/or provide expert reports or summarize the expert's testimony in its pre-hearing memorandum.

Introduction

On May 9, 2000 the Department of Environmental Protection (Department) issued an Administrative Order to the Borough of Edinboro, the Municipal Authority of the Borough of Edinboro, (collectively referred to as Edinboro), Washington Township, and the Washington Township Sewer Authority (collectively referred to as Washington Township). All entities appealed the Administrative Order to the Environmental Hearing Board (Board). Prior to the scheduled hearing, Washington Township amicably resolved the issues raised in its Appeal with the Department.

A merits hearing lasting eight days was held concerning Edinboro's Appeal. The transcript consists of 1,011 pages with multiple exhibits. Based on the testimony and the evidence admitted during the hearing, we make the following:

FINDINGS OF FACTS

1. Appellants are the Borough of Edinboro and the Municipal Authority of the Borough of Edinboro (Edinboro). (Com Ex. 2, pg 4; Com Ex. 47)

2. Washington Township is a municipality located in Erie County. The Washington Township Sewer Authority is a municipal authority. Both Washington Township and the Washington Township Sewer Authority (Washington Township) maintain a mailing address in Edinboro, Pennsylvania. (Com Ex 2; Com Ex. 27, pg 2-3)

3. The Department of Environmental Protection (Department) is the agency with the duty and authority to administer and enforce The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"); the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §§ 750.1-750.20a ("Sewage Facilities Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder. ("Regulations")

4. Edinboro is located in the southern portion of Washington Township in Erie County, Pennsylvania. (Com Ex 2, pg 4)

5. Both Washington Township Sewer Authority and The Municipal Authority of the Borough of Edinboro own separate Publicly-Owned Treatment Works. Both of these sanitary sewage systems collect, convey, and treat sewage as defined in Section 1 of the Clean Streams Law, 35 P.S. § 691.1 (T. 207; 17-22; 651: 11-12)

6. The Municipal Authority of the Borough of Edinboro's Publicly-Owned Treatment Works is operated by the Borough of Edinboro.

7. In 1988, Edinboro built a 1.2 million gallon per day sewage treatment plant financed by municipal bonds which will be paid off in 2007. (T. 182, 192, 193)

8. The Edinboro sewage treatment plant has an excellent sewage treatment plant operator who

oversees operations. (T. 180-181)

9. Edinboro is responsible for operating and maintaining its Public Owned Treatment Works (POTW) in good working order as required by Edinboro's NPDES Permit No. PA00031792 and 25 Pa. Code § 94.51(4). (T. 399: 13-15)

10. In 1996, Donald, Gary, and Robert Orr (the "Orr Brothers") began discussing with Edinboro the possibility of developing a 16-acre parcel of property which they own next to their golf property. In order to develop this property they need to connect to the Edinboro sewage system. (Com Ex.9; Borough Exhibit 61-Kuholski Report)

11. The Orr Brothers, who owned property in both Washington and Edinboro, were not allowed to connect to Edinboro's sewerage system. (T. 22: 22-24)

12. The Orr Brothers proposed to develop up to 100 Equivalent Dwelling Units ("EDUs"). The term EDU is a unit of measurement for volume of sewage flow. (T. 422: 6-9; 466: 21-23)

13. The Orr Brothers' proposed development would cover six acres located in Washington Township and 16 acres in Edinboro (T. 465: 15-16)

14. The Orr Brothers did not have access from the development to Washington Township's POTW. (T. 467: 11-18)

15. Erie County Planning Commission, upon providing their required approval, stated that the Washington Township portion of the Orr Brothers' proposed development should be serviced by Edinboro for water and sewer. (T. 517: 1-8)

16. The Orr Brothers' map of their proposed development was filed with the Erie County Recorder of Deed's office. The map bears an "unbuildable" stamp because sewage disposal was not available for that property. (Com. Ex. 16)

17. In a report (Kuholski Report) dated June 3, 1998 authored by Edinboro's engineer, which was not directly provided to the Department, problems with the Edinboro sewage system were discussed in detail. Page 1 of the Kuholski Report states:

> Due to excessive inflow/infiltration within the tributary sanitary sewer system, the Route 6N/Maple Drive sewer system is periodically surcharged. This condition would indicate that additional capacity is NOT available for any future development serviced by the Route 6N/Maple Drive sewer system. More significantly, such surcharging indicates that this sewer system is currently hydraulically overloaded. This hydraulic overload must be corrected with or without any future development.
>
> Existing "surcharging" (i.e., sewers are flowing above design capacity) of the Route 6N/Maple Drive sanitary sewer system indicates that this section of the Edinboro sanitary sewer system is hydraulically overloaded. This problem must be corrected to provide available capacity for any future development tributary to this sanitary sewer system. However, this hydraulic overload must be corrected by the Borough of Edinboro whether or not additional development occurs tributary to this sewer system. The purpose of this study is to provide the Borough of Edinboro with recommended "solutions" to resolve the existing and any future hydraulic capacity problems on this sewer system. (App. Ex. 61)

18. The Department has been notified numerous times of environmental problems with Edinboro Lake, including high levels of coliform which have required Edinboro to close the public beaches. (T. 230: 10-14, 235: 2-7; 285: 2-7)

19. The outlet of Edinboro Lake goes to Conneautree Creek, a tributaty to French Creek. (Com. Ex. 2, pg 9)

20. Edinboro Lake is a natural kettle lake formed by glaciation. (T. 231: 13-18; 559: 5-6)

21. Edinboro Lake has been determined to be environmentally sensitive. (T. 231: 17-18)

22. Edinboro Lake is a recreational attraction for the area. (T. 230: 5-8)

23. Edinboro Lake also has public beaches. (T. 230: 8-9)

24. Whipple Creek is a small tributary stream that flows into the west side of Edinboro Lake. (Com. Ex. 27, pg 4)

25. In March of 1982, the United States Environmental Protection Agency ("EPA") investigated the environmental impact of Edinboro's POTW and Washington POTW on Edinboro Lake. The EPA detailed its findings in an Environmental Impact Statement ("EPA's EIS"), EPA's EIS concluded that any expansion of Washington's STP would require the relocation of the discharge of treated effluent to a location below Edinboro Lake, thereby eliminating the effect of that discharge on the Lake. (Com. Ex. 5)

26. Eutrophication is a process whereby nutrient loading ages a lake over time and sediments fill the lake ultimately causing it to become a wetland or bog. (T. 561: 6-15) (Com. Ex. 5, pg 4)

27. EPA's EIS found that the character and water quality of Edinboro Lake was rapidly changing due to eutrophication. (T. 234: 18-23; 284:22-24) (Com. Ex. 5, Ch 2, pg. 4; Com. Ex. 5, pg. 4)

28. EPA found that the eutrophication of Edinboro Lake had been accelerated by human activities such as wastewater discharges, agriculture, and development in Edinboro Lake's watershed. (Com. Ex. 5, pg.4)

29. The EPA found that Washington Township's discharge contributed approximately ten percent of the phosphorus load into Edinboro Lake. (Com. Ex. 5, pg. v)

30. The proposed relocation of Washington Township's discharge to below Edinboro Lake was a way to mitigate phosphorous contribution to the eutrophication of Edinboro Lake. (T.560: 20-25; T. 561: 1-4)

31. Edinboro Lake is still eutrophic. (T. 561: 16-17)

32. The public beach on Edinboro Lake remains downstream of Washington Township's discharge. (T. 562: 1-6)

33. During the Task Force meetings, it became clear to the Department that even without the Orr Brothers' proposed development, that the Maple Drive interceptor was hydraulically overloaded. (T. 607: 1-25; 608: 22-25; 609: 1-8)

34. There was a need for improvements of the collection systems for both Edinboro and Washington Township. (T. 568: 4-17)

35. The alternatives discussed at the Task Force meetings were solutions to community-wide sewage problems. (T. 213: 16-21)

36. Regional alternatives were considered during the Task Force meetings. (T. 582: 12-14)

37. On-lot systems are not preferable to dispose of sewage in densely populated areas. (T. 585: 23-25; 586: 1-3)

38. In addition, the soils in Washington Township are unable to accommodate on-lot sewage disposal technologies. (T. 584: 10-12)

39. One of the benefits of regionalization of sewage collection and treatment is that the more customers there are in a sewage collection system the lower the operation and maintenance costs and the lower the rate increases. (T. 514: 5-6)

40. A sanitary sewer overflow must be identified in the Annual Chapter 94 Report. (T. 260: 6-9)

41. A backup of sewage into people's homes must be included in the Annual Chapter 94 Report. (T. 260: 10-13)

42. Hydraulic overload is defined in 25 Pa. Code § 94.1 as "the condition that occurs when the monthly average flow entering a plant exceeds the hydraulic design capacity for three consecutive

months out of the preceding 12 months or when the flow in a portion of the sewer system exceeds its hydraulic carrying capacity."

43. Mr. Kuholski's conclusion of hydraulic overload was not included as required in Edinboro's Annual Chapter 94 Report for 1998. (T. 258: 15-21; 259: 1-72)

44. Once a municipality determines that it is hydraulically overloaded, a Corrective Action Plan ("CAP") must be submitted in accordance with 25 Pa. Code § 94.21.

45. From 1995 through 2001, at least 35 backups of sewage occurred into people's homes in Edinboro or sewage overflowed from manholes which were directly related to problems with Edinboro's sewer lines. (T. 42: 19-23; Com Ex. 75-76)

46. A separate sanitary sewer system conveys exclusively sanitary sewage. (T. 675: 24-25; 676: 1)

47. Sanitary sewer systems are designed not to be greatly impacted by weather events. (T. 688: 8-11)

48. A sanitary sewer overflow occurs when a portion of the sewer system exceeds its carrying capacity and flow escapes. (T.238: 10-20)

49. Raw, untreated sewage is discharged from a separate sanitary system when a sanitary sewer overflow occurs. (T. 240: 3-6)

50. Sanitary sewer overflows are illegal and prohibited by law, the Department, and the Environmental Protection Agency. (T. 238: 16; 240: 7-12; 388)

51. Once it has been determined that a community is in either existing or projected hydraulic overload, it is required by the regulations and specifically 25 Pa. Code § 94.21 and § 94.22 to prohibit new connections to the sewage system and to submit a Corrective Action Plan to address

their problems. (T. 243: 12-22; 251: 10-13)

52. The hydraulic carrying capacity of a pipe is the actual capacity of a pipe at that time. (T. 262)

53. Chapter 94 provides a wide variety of tools and places a wide variety of obligations on the Department and on sewer facility operators/permittees in connection with monitoring sewer loading and preventing overloading.

54. The primary diagnosis and informational tool used by the Department to enforce and implement the Chapter 94 program are the Chapter 94 Annual Reports required to be filed by each operator of sewerage facilities.

55. Based on its review of the Annual Reports, the Department may determine that facilities are either in an "existing overload" situation or a "projected overload" situation. See 25 Pa. Code §§ 94.21, 94.22.

56. If the Annual Report establishes, or the Department separately determines, that there is an existing hydraulic overload, Section 94.21 applies which provides that the operator is to: (1) prohibit new sewer connections with certain exceptions; (2) immediately begin to plan and build additional sewerage capacity; and (3) submit a Corrective Action Plan for review and approval of the Department.

57. If there is not an existing overload, but there is a 5 year projected overload, Section 94.22 applies which provides that the operator is to: (1) submit a Corrective Action Plan within 90 days; and (2) limit new connections to and extensions of the sewage facilities based upon remaining available capacity under a plan submitted in accordance with the Corrective Action Plan.

58. A "Private Request" is a request from a citizen or property owner to the Department requesting that the Department order a municipality to revise or implement its Official Plan to

accommodate the sewage disposal needs of its citizens. (T. 544; 23-25; 545: 1-13)

59. A Private Request can only be made after a prior written demand upon the municipality to implement or revise its Official Plan. (T. 545-47)

60. Once a municipality refuses to revise or implement their Official Plan or the municipality fails to respond to the written demand within 60 days, a person may then file a Private Request. (T. 546: 8-23)

61. On February 2, 2000, the Orr Brothers' attorney sent a written demand letter, pursuant to 25 Pa. Code Section 71.14(a) to Edinboro to implement or revise its Official Plan because the Official Plan was not being met or was inadequate to meet the Orr Brothers' sewage disposal needs for their proposed subdivision. (T. 490-91) (Com Ex. 31)

62. This written demand stated that the sewage from the Orr Brothers' proposed development could not be serviced by the Maple Drive line because of a lack of capacity. (Com. Ex. 31)

63. On February 10, 2000, Edinboro's Manager wrote to the Orr Brothers' counsel and quoted portions of the 1998 Kuholski Report. (T. 492: 18-25; 493: 1-24)

64. Edinboro's Manger's letter noted that "the . . .report in essence identifies an existing hydraulic capacity problem in an existing sanitary sewer system serving existing development," and concludes that this problem needs to be corrected. The letter also sets forth some "solutions" from among a range of possible solutions. (T. 493: 20-24) (Com. Ex. 33, pg 2) (App. Ex. 13)

65. He further emphasized that Edinboro was working to correct the problems but that additional capacity was not currently available for any future development serviced by the Maple Drive sewer line. (Com. Ex. 33, pg 1) (App. Ex. 13)

66. On February 18, 2000, the Orr Brothers' counsel sent a letter to Edinboro which, in part, put

Edinboro on notice that the Orr Brothers believed that the current plan was inadequate to meet the Orr Brothers' sewage disposal needs. (T 495: 8-11) (Com. Ex. 35)

67. On February 28, 2000, Mr. McFadden responded to the Orr Brothers' counsel informing him that Edinboro had determined that the Route 6N/Maple Drive sewer line could now accept 24 EDUs because it had been cleaned since the 1998 Kuholski Report. (T. 496: 18-25) (Com.Ex. 38) (App. Ex. 19)

68. Mr. McFadden, however, did not state that Edinboro could definitely meet the Orr Brothers' sewage needs. (T. 497: 1-4)

69. On March 17, 2000, the Orr Brothers' counsel filed a Private Request pursuant to 25 Pa. Code § 71.14(a) with the Department ("Orr Brothers' Private Request") stating that their sewage needs were not being adequately addressed by Edinboro. (T. 225: 9-13) (Com. Ex. 42)

70. The Orr Brothers' Private Request requested that the Department order Edinboro to revise the Official Plan because, although they owned property in Edinboro, they were prohibited from connecting to Edinboro's POTW. (T. 223: 22-24) (Com. Ex. 42)

71. Attached to the Orr Brothers' Private Request was the 1998 Kuholski Report. (T. 274: 1-3)

72. Prior to March 2000, Edinboro had not provided a copy of the 1998 Kuholski Report to the Department. (T. 259: 17-18)

73. The Orr Brothers' Private Request stated that Edinboro's conveyance lines could not meet the Orr Brothers sewage needs. (Com. Ex. 42)

74. Orr Brothers' Private Request contained a map detailing the property owned by the Orr Brothers which formed the basis for the Private Request. (Com. Ex. 42)

75. A planning module is required prior to construction to evaluate the most appropriate cost

effective, environmentally sensitive sewage facility for a subdivision. (T. 549: 15-22)

76. A planning module is not required to be submitted before a person may submit a Private Request. (T. 552: 7-9)

77. Nonetheless, the Orr Brothers began the planning module process before submitting their Private Request. (T. 487: 14-19)

78. It could cost between $20,000 and $30,000 to complete the Orr Brothers' planning module for the proposed development. (T. 488: 15-22; 516: 11-13)

79. The Department addressed the Orr Brothers' Private Request by issuing the Administrative Order. (T. 264: 21-23; 581: 4-11) (Com. Ex. 47)

80. 25 Pa. Code § 94.12 requires a community to plan for a five year period and determine existing and future sewage flows and report it to the Department in its Annual Chapter 94 Report.

81. Chapter 94 is a preventative regulation that is meant to address existing problems and to prevent projected or future problems. (T. 250: 8-10)

82. One of the purposes of Chapter 94 is to prevent the loss of sewage from a sewage system before it occurs. (T. 677: 16-19)

83. 25 Pa. Code § 94.12(6) requires that a municipality identify portions of a sewage system that are or will exceed its capacity.

84. 25 Pa. Code § 94.12(9) requires a municipality to acknowledge an existing or projected overload.

85. In the 1998 Chapter 94 Report, Edinboro stated that it had appropriated money in the 1999 budget for flow and velocity equipment to do a study on the sewage system. (Com. Ex. 15) (App. Ex. 4)

86. In the 1998 Chapter 94 Report, Edinboro stated that a subdivision was proposed for Route 6N West. The sewage line for the subdivision would normally tie into the existing Maple Drive sewer line. Nonetheless, the 1998 Chapter 94 Report proposed the installation and use of a pump station and parallel pressure line on Maple Drive. (Com. Ex. 15, Section 6) (App. Ex. 4)

87. The 1998 Chapter 94 Report did not identify any backups of sewage into Edinboro residents' homes. (Com. Ex. 15) (App. Ex. 4)

88. The 1999 Chapter 94 Report did not identify any backups of sewage into Edinboro residents' homes. (Com. Ex. 24) (App. Ex. 5)

89. On March 24, 1995, sewage backed up in Mr. Maurice Holloway's home at 149 Meadville Street. (T. 36: 8-16) (Com. Ex. 75A)

90. On June 14, 1995, sewage backed up in Mr. John Furcron's home at 136 Harrison Drive. (T. 36: 24-25; 37: 1-10; 51: 21-23; 111: 12-16) (Com. Ex. 75B)

91. The sewage backup at Mr. Furcron's was caused by a problem in Edinboro's line, not Mr. Furcron's. (T. 114: 1-4)

92. Between 8-12 inches of raw sewage and toilet paper flowed into Mr. Furcrons basement during this backup. (T. 114: 10-22)

93. On August 29, 1995, sewage overflowed from Edinboro's line into Darrow's Creek. (T. 37: 21-25; 38: 1-14) (Com. Ex. 75C)

94. This overflow of sewage on August 29, 1995, caused a fish kill. (T. 38: 12-14)

95. Edinboro paid a fine for this fish kill. (T. 38: 9-11) (Com. Ex. 75C)

96. On January 24, 1996, Mrs. Edward Lasher had a blocked sewer line to her home at 304 Meadville Street. (T. 38: 18-22; 119: 1-10; 119: 24-25) (Com. Ex. 75D)

97. On January 25, 1996, sewage backed up in Mr. Larry Scheffler's home at 131 Sunset Drive. (T. 41: 20-25) (Com. Ex. 75E)

98. This sewage backup was caused by roots in the Edinboro line. (T. 43: 8-13; 94: 20-25)

99. On December 24, 1997, sewage backed up in Mrs. Robert Matthews' home at 147 Meadville Street. (T. 46: 19-25) (Com. Ex. 75I)

100. Mrs. Matthews has lived in this same house for almost 25 years without any previous problems with sewage. (T. 125: 19-20)

101. Mrs. Matthews' grandchildren use her basement to play in. (T. 131: 13-20)

102. Between 6-8 inches of raw sewage flowed into Mr. Matthews' basement on December 24, 1997. (T. 126: 12-16)

103. Mrs. Matthews became sick to her stomach from the smell in her basement. (T. 129: 9-13)

104. The smell in Mrs. Matthews' basement did not dissipate quickly. (T. 129: 14-15)

105. On January 7, 1998, an overflow of sewage and bubbling of sewage occurred out of the sanitary sewer at the Maple Drive intersection. (T. 30: 12-18)

106. On September 4, 1998, sewage backed up in Mrs. Robert Matthews' home. (T. 52: 2-7; 96: 10-12) (Com. Ex. 75N)

107. On September 5, 1998, sewage again backed up in Mrs. Robert Matthews' home. (T. 53: 1-12; 96: 10-12) (Com. Ex. 75O)

108. This sewage backup damaged Mrs. Matthews' belongings. (T. 131: 1-8)

109. Again, Mrs. Matthews became sick to her stomach from the sewage backup. (T. 132: 6-10)

110. The weather on September 4, 1998, was nice. (T. 132: 10-14)

111. In 1999, the "4 inch" sewer line that services Mr. Steve Hazelwood's home at 100 Brookside

Drive, "seeped" because the sewer line owned by Edinboro was plugged. (T. 54: 15-17; 55: 7-9) (Com. Ex. 75Q & 76)

112. On February 23, 2000, sewage backed up in Mr. Larry Scheffler's home at 131 Sunset Drive due to roots in a line owned by Edinboro. (T. 55: 21-25; 56: 1-7) (Com. Ex. 75R)

113. A manhole at 6N West and Maple Drive did surcharge during the period from July 30, 2000, to August 3, 2000. (App. Ex. 67, pg. 5; App. Ex. 68, pg. 5)

114. On August 3, 2000, sewage backed up in Mr. John Yonko's home at 204 Shelhamer Drive. (T. 56: 24-25; 57: 1-8; 89: 4-12) (Com. Ex. 75T)

115. On August 3, 2000, sewage backed up in Mrs. Dorothy Burfield's home at 220 Shalmer. (T 57: 13-17) (Com Ex. 75U)

116. On August 3, 2000, sewage backed up in Mrs. Robert Matthews' home. (T. 126: 1-2; 132: 19-21)

117. On December 14, 2000, sewage backed up in Mrs. Robert Matthews' home. (T. 57: 22-25) (Com. Ex. 75V)

118. Mrs. Matthews was told by Edinboro that her back ups were caused by the fact that the Borough needs new sewers. (T. 135: 16-22)

119. On December 21, 2000, sewage backed up in Mr. Maurice Holloway's home at 149 Meadville Street. (T. 58: 16-18) (Com. Ex. 75W)

120. On August 3, 2001, sewage backed up in Mrs. Robert Matthews' home at 147 Meadville Street. (T. 125: 23-25) (Com. Ex. 76., pg. 4)

121. On August 3, 2001, sewage backed up in Mr. and Mrs. Lawrence's home at 205 Hillcrest Drive. (T. 166: 16-25; 167: 1) (Com. Ex. 75AA)

122. On August 3, 2001, sewage backed up in Mr. and Mrs. Jewell's home at 203 Hillcrest Drive. (T. 166: 5-10) (Com. Ex. 75Z)

123. On August 3, 2001, sewage backed up in Mr. and Mrs. John Kemp's home at 206 Hillcrest Drive. (T. 165: 7-20)(Com. Ex. 75Y)

124. On August 20, 2001, sewage backed up in Mr. Jack Widner's home at 112 Hillcrest Drive. (T. 168: 11-14) (Com. Ex. 75DD)

125. During August of 2001, the manhole at the Maple Drive intersection was bubbling. (Com 19, pg. 12) (Com. 76, pgs. 1&5)

126. On November 2, 2001, sewage backed up in Ms. Hazel Peterson's home at 105 West Normal Street. (T. 168: 18-21) (Com. Ex. 75EE)

Background

Presently before the Board is the fundamental question raised in this Appeal as to whether the Department acted reasonably and lawfully when it issued its Administrative Order to Edinboro. Edinboro raises various arguments contending that the Department was legally and factually wrong in issuing the Administrative Order. The Department indicates that it based the Administrative Order on its determination that the Edinboro sewage conveyance system was hydraulically overloaded and that the problems experienced by both Edinboro and Washington Township required regional cooperation. The Administrative Order prohibited new connections and directed Edinboro to file a written Corrective Action Plan setting forth the actions to be taken to reduce the hydraulic overload and provide the needed additional capacity in accordance with the Sewage Facilities Act. Among other things, the Administrative Order directed that Edinboro and Washington Township develop and submit jointly to the Department for its review and approval a single Update Revision to

Edinboro's and Washington Township's Official Plans which will provide proper sewage facilities to meet the current and anticipated sewage disposal needs of Edinboro and Washington Township.

The Department's job and mission is to serve the public by protecting the environment. In this respect, one of its fundamental tasks is to protect the waters of the Commonwealth for present and future generations. The General Assembly has enacted a wide array of laws, including the Clean Streams Law and the Sewage Facilities Act, to enable the Department to accomplish this goal. These two statutory enactments especially provide for a Department administered comprehensive program of water quality management. In addition, one of the themes threading through this statutory framework and the underlying regulations is a pubic policy of encouraging inter-municipal cooperation.

A. **Standard of Review**

It is well-established that the Board's review of Department actions is *de novo*. Stated another way, the Board's review is not limited only to the evidence which was considered by the Department at the time it issued its Administrative Order, but instead includes evidence which may not have been considered or even available. *Warren Sand and Gravel, Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975). We must fully consider the case anew and are not bound by any findings or determinations reached by the Department. Stated another way, rather than deferring in any way to findings of fact made by the Department, the Board, based solely on the evidence of record in the case presented to it, makes its own factual findings and draws its own conclusions based on those findings. The Commonwealth Court in the seminal case of *Warren Sand and Gravel* held that:

> [T]he Board is not an appellate body with a limited scope of review

> attempting to determine if DER's action can be supported by the evidence received at DER's factfinding hearing. The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board. If DER acts pursuant to a mandatory provision of a statute or regulation, then the only question before the Board is whether to uphold or vacate DER's action. If, however, DER acts with discretionary authority, then the Board, based upon the record before it, may substitute its discretion for that of DER. 341 A.2d at 565.

This standard of review was reaffirmed and extended by the Commonwealth Court in *Pequea Township v. Herr*, 716 A.2d at 678 (Pa. Cmwlth. 1998). Citing *Warren Sand and Gravel*, the Commonwealth Court held that where the Board finds, based on evidence presented to it at trial, that the Department has abused its discretion, then the Board may properly substitute its discretion for that of the Department and order the relief requested. Importantly, "this includes the power to modify the Department's action and to direct the Department in what is the proper action to be taken." 716 A.2d at 687. *See also Leatherwood, Inc. v. Department of Environmental Protection*, 819 A.2d 604, 611 (Pa. Cmwlth. 2003) (reaffirming the Board's power of *de novo* review).

Chief Judge Krancer recently summarized our standard of review in *Smedley v. DEP,* 2001 EHB at 131. The Board makes its own factual findings based solely on the evidence of record in the case before us. *Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19. As Judge Krancer succinctly stated:

> The important point is that this description of the Board's function outlines the nexus between the rights of the Appellant challenging a Department action and its defenders. The Board operates at that center-point. The Board does not review a matter before it on the basis of an already developed record. The Pennsylvania Legislature and the Commonwealth Court have unambiguously delineated that the Board is a judicial tribunal of ***first*** impression.
>
> The Board protects the procedural due process rights of persons who

> allege and can prove that they are adversely affected by an action of the Department. ...The Board proceeding is the ***first*** instance that a party challenging a Department action has the right to judicial-type discovery and, in turn, to present evidence so developed to an independent quasi-judicial tribunal. 35 P.S. §§ 7513(a), 7514(c), 25 Pa. Code § 2021.111. The Board is the first opportunity any party challenging a Department action has to a full adjudicatory hearing where one can present a full case in open court with the rights to subpoena witnesses, examine and cross-examine witnesses and present oral and documentary evidence. 2001 EHB at 156-157.

B. **Burden of Proof**

The Department has the burden of proof in this case.[1] It therefore must establish by a preponderance of the evidence presented and admitted before the Board that its action was reasonable and lawful. *Concerned Residents of the Yough, Inc. v. DER*, 1995 EHB 41, 76; *Whitemarsh Disposal Corp. v. DEP*, 2000 EHB 300, 365-366.

C. **Factual Background**

In December 1997, Washington Township submitted an updated revision of its Act 537 Official Plan to the Department. Washington Township proposed to expand its sewage treatment plant facilities with continued discharge to Whipple Creek and to make various repairs and improvements to its sewage collection and conveyance system. It requested the Department's permission to more than double its discharge from 200,000 gallons per day to 430, 000 gallons per day.

After thoroughly reviewing the updated revision, in August 1998 the Department advised Washington Township of various environmental concerns it had with the proposed plan. Specifically, the Department expressed concern with the proposed doubling in the effluent discharge

1 25 Pa. Code § 1021.22. Burden of proceeding and burden of proof. (b) The Department has the burden of proof in the following cases: (4) When it issues an order.

to Whipple Creek. In fact, the 1973 official sewage plan for Washington Township identified the present sewage treatment plant as a "temporary" facility to be abandoned when flows exceeded 200,000 gallons per day in favor of a regional sewage treatment plant. Furthermore, the Department recommended the relocation of Washington Township's wastewater effluent discharge line below Edinboro Lake so as to relieve the environmental degradation Edinboro Lake was experiencing partly as a result of Washington Township's discharges into Whipple Creek.

Washington Township's sewage treatment facility is "hydraulically overloaded" as defined in the regulations since the average daily flow to the sewage treatment plant exceeded 200,000 gallons per day for ten months in 1996, eight months in 1997, and six months in 1998. Consequently, in September 1999, the Department and Washington Township entered into a Consent Order and Agreement which required Washington Township to, among other things, implement an Updated Revision to its Official Plan to remedy the hydraulic overload at Washington Township's sewage treatment plant. In addition, Washington Township was required to submit a Corrective Action Plan to resolve the hydraulic overload.

In March 1999, the Department, based on information received from Edinboro, concluded that Edinboro's sewage treatment system was near capacity. The Department requested that Edinboro meet with the Department and Washington Township to discuss the sewage needs within-the-greater Edinboro and Washington Township community. This group, which later included other interested parties including Franklin Township, became known as "the Task Force. " The Task Force met on almost a monthly basis through May, 2000.

During these meetings the Department became aware of various problems Edinboro was experiencing. Many of these problems had not earlier been identified in Edinboro's Chapter 94

Reports. For example, the 1996, 1997, and 1998 reports did not identify any backups of sewage into Edinboro residents' homes. These backups occurred at various locations throughout the Borough and were not caused by any problems with the homeowners' individual sewer lines. Instead, these backups were the result of hydraulic overloads of Edinboro's sewage conveyance lines. This is information which legally should have been included in these annual reports.

The Orr Brothers own a golf course on which they would like to develop housing. In order to do so, they need to connect to Edinboro's sewer system. The Orr Brothers began talking to Edinboro officials about this development in August 1996. However, they were eventually told that there was not capacity to connect to the Edinboro System on Maple Drive. Although various alternatives were discussed, including the construction of an expensive lift station evidently to be financed by the Orr Brothers, no resolution was reached which would allow the Orr Brothers to economically connect their proposed development to the Edinboro sewage treatment system.

Mr. Art Kuholski is a Professional Engineer who has worked for Edinboro for over ten years and has dealt with the Department throughout his professional career. He is a very competent engineer who has a thorough knowledge and understanding of the Pennsylvania Sewage Facilities Act and supporting regulations.

At least in part prodded by the Orrs' proposed development, Mr. Kuholski prepared a report in June 1998 entitled "Sanitary Sewer Improvements Route 6N/Maple Drive Are." (the Kuholski Report). The Kuholski Report reached several important conclusions:

1) Additional sewage capacity was not currently available;

2) Edinboro's sewer system was hydraulically overloaded;

3) This hydraulic overload must be addressed even without the additions

of added flows from the proposed Orr Brothers' development;

4) The sewer system periodically surcharges due to excessive inflow/infiltration; and

5) This problem has existed for many years.

In fact, Mr. Kuholski used the term "hydraulic overload" at least six times in his report. One of the purposes of the Kuholski Report was to determine whether a proposed subdivision by the Orr Brothers could be supported by Edinboro's sewage system. A fair reading of the Kuholski Report leads to the inescapable conclusion that Edinboro's sewage system could not support the Orr Brothers development.

The Kuholski Report was distributed to various Edinboro public officials, and the first part and then later the whole report was given to the Orr Brothers. It was not sent to the Department. Moreover, the Kuholski Report's conclusion that Edinboro's sewage system was hydraulically overloaded was not even mentioned in Edinboro's Chapter 94 Report. In addition, other relevant information contained in the Kuholski Report was not included, as it should have been, in Edinboro's Chapter 94 Report for 1998.

During this same time period, Mr. Zamierowski, Edinboro's zoning officer, wrote a report to Edinboro officials in which he echoed the conclusions set forth in the Kuholski Report that additional capacity was not available to support the Orr Brothers' proposed development. The Orr Brothers, after reviewing both the Kuholski Report and the report of Edinboro's zoning officer together with their numerous conversations with Edinboro officials, rightly concluded that there was no capacity in the Edinboro sewage system to economically connect to Maple Drive.

A Private Request pursuant to the Department's regulations is a request from a property

owner to the Department requesting that the Department order a municipality to revise or implement its Official Plan to accommodate the sewage disposal needs of its citizens. 25 Pa. Code § 71.14. In February 2000, counsel for the Orr Brothers sent a letter to Edinboro demanding that Edinboro implement or revise its Official Plan because the Official Plan was not being met or was inadequate to meet the Orr Brothers' sewage disposal needs for their proposed development. An exchange of letters ensued but the bottom line is that the Edinboro Official Plan could not support additional capacity as required by the proposed subdivision.

Therefore, on March 17, 2000 the Orr Brothers filed a Private Request with the Department asking the Department to order Edinboro to revise its Official Plan in order to allow the Orr Brothers to connect their proposed development to the Edinboro sewage system in an economically feasible manner. Attached to the Orr Brothers' Private Request was the 1998 Kuholski Report.

The Orr Brothers' Private Request contained a map detailing the property owned by the Orr Brothers which formed the basis for the Private Request. Edinboro responded to the Orr Brothers' Private Request and provided the Department with its written comments.

The Department addressed the Orr Brothers' Private Request by issuing the Administrative Order under Appeal in this case. The Administrative Order, *inter alia*, required Edinboro to prohibit new connections to its overloaded sewage facilities pursuant to Section 94.21 of the Regulations, 25 Pa. Code § 94.21, immediately begin work for the planning, design, financing and operation of their sewage facilities so as to meet anticipated demands on the system, submit for approval to the Department a Corrective Action Plan to reduce the hydraulic overload and provide additional needed capacity, develop with Washington Township a single Updated Revision that would provide sewage facilities to meet current and anticipated sewage disposal needs of Edinboro and Washington

Township, adopt a plan that is consistent with a regional program of water quality management, and cooperate with one another to achieve these goals. Edinboro and Washington Township both appealed the Administrative Order. As noted earlier, Washington Township eventually settled its Appeal with the Department.

Testimony at the hearing revealed at least 35 backups of raw sewage into either people's homes or where sewage overflowed from manholes. These backups and overflows were directly related to problems with Edinboro's sewer lines. The Department's role, as the main protector of the environment in this Commonwealth, is heavily dependent on receiving accurate information from sewage facilities. The statutes and regulations require it. More importantly, if the Department is not aware of problems such as those experienced over a period of years in Edinboro, it is not in a position to help devise a solution to the problems. Moreover, if it is not advised of the problems then it is not aware of threats to the environment caused by such overflows which it is mandated by law to prevent and minimize.

Edinboro raises various arguments in its Appeal of the Administrative Order. Edinboro contends that the Department did not have any factual or legal basis to issue the Order, the Edinboro sewage system is not hydraulically overloaded, there was no basis to order a revision to Edinboro's Official Plan which requires a regional approach, the Department had no right to rely on the Orr Brothers' Private Request as a basis for the Administrative Order, Edinboro should not be responsible for Washington Township's sewage problems, the Department had failed to prove that Edinboro's actions are causing any pollution to the waters of the Commonwealth, the Department's Order represents a taking of Edinboro's property, and the testimony of the Department's employee who signed the Order should have been excluded. We will review each of these arguments.

D. **Discussion**

One of the policy declarations set forth in the Sewage Facilities Act is "(2) To promote intermunicipal cooperation in the implementation and administration of such plans by local government." 35 P.S. Section 750.3(2). Another policy goal is "(3) To prevent and eliminate pollution of waters of the Commonwealth by coordinating planning for the sanitary disposal of sewage waste with a comprehensive program of water quality management." 35 P.S. § 750.3(3). Edinboro argues that the Department acted unreasonably in issuing the Administrative Order. It argues that the Administrative Order must be based on facts and in accordance with the applicable statutes and regulations.

We certainly agree with Edinboro that the Department does not have unbridled authority to issue Administrative Orders and such orders must be in conformance with the law. However, the evidence in this case leads to the inescapable conclusion that the Department's Administrative Order was issued in accordance with the applicable statutes and regulations and is strongly supported by a myriad of facts. Although we believe the Department proved by a preponderance of the evidence that the Edinboro sewage system is hydraulically overloaded, this finding is not necessary to uphold issuance of the Department's Administrative Order.

A fair reading of the Clean Streams Law, the Sewage Facilities Act, and the supporting Regulations mandate that the Department take a proactive role in preventing pollution of the waters of the Commonwealth. Both Washington Township and Edinboro operate sewage systems which clearly have a host of problems. Washington Township readily admits that its system is hydraulically overloaded and needs to be expanded to meet the needs of its residents. Although Edinboro has vigorously resisted the Department's Order, parts of its sewage conveyance system are

also hydraulically overloaded. Thirty-five sewer backups are not acceptable under its Official Plan. Mr. Kuholski's report of June 1998, which evidently was not written for the Department's eyes, clearly states at least six times that portions of the Edinboro sewer system are hydraulically overloaded and can not support new development such as that specifically requested by the Orr Brothers. Edinboro's attempts to explain away this testimony are simply not credible.

The Department has broad statutory authority pursuant to the Clean Streams Law and the Sewage Facilities Act to order Edinboro to revise its official plan under the facts of this case. 35 P.S. § 691.5(b); 35 P.S. § 750.10; *Whitemarsh Disposal Corporation v. DEP*, 2000 EHB 300, 364-365. As pointed out by the Department, when issuing an order, the Clean Streams Law specifically requires the Department to consider water management and pollution in the watershed as a whole; the present and future uses of particular waters; the feasibility of combined or joint treatment facilities; and the immediate and long-range economic impact upon the Commonwealth and its citizens. 35 P.S. § 691.5. As noted by the Department's Mr. David Milhous, the topography of the area, the proximity of the communities, and the importance of Edinboro Lake to the entire region, demand joint solutions to these issues.

The Department's Administrative Order is supported by 1) the evidence of approximately 35 back-ups of sewage into Edinboro's residents' homes and overflows from manholes that occurred from 1995 through 2000; 2) Edinboro's own Chapter 94 Reports from 1995-2001 (most of which omitted any mention of the backups) which indicated that parts of the sewage collection and conveyance system were nearing capacity during extreme weather and flow conditions; 3) the 1998 Kuholski Report (which was not provided to the Department by Edinboro) which states numerous times that Edinboro's sewage collection and conveyance system is "hydraulically overloaded" and 4)

Edinboro's inability to allow the Orr Brothers or others to connect to its existing sewage system because of a lack of capacity of the sewage collection and conveyance system.

When sewage fills people's basements or bubbles up into the streets through manhole covers this is a serious health risk and concern. The Department is mandated to oversee and enforce the Commonwealth's environmental laws. One of the main purposes of the Sewage Facilities Act is to prevent raw sewage from being discharged from a municipality's sewage system. The backups in the Edinboro system are indicative of problems in the system that Edinboro certainly recognizes and has taken steps to correct. What Edinboro seems to be resisting, however, is that such problems clearly require them to submit a corrective action plan as set forth in the regulations and as directed by the Department in its Administrative Order.

Both the Clean Streams Law and the Sewage Facilities Act give the Department the authority to issue Administrative Orders to municipalities to revise their Official Plans when the plans are not adequately meeting the sewage needs of their residents or because of newly discovered facts. The Department may also order a municipality, in the appropriate circumstances, to "negotiate with other municipalities for combined or joint sewer systems and treatment facilities. 35 P.S. § 691.203(b); 35 P.S. §§ 750.3 and 750.10; 25 Pa. Code §§ 71.11 and 71.13; *Montgomery Twp. v. DER*, 1995 EHB 483, 515-16; *Shrewsbury Twp. v. DER*, 1975 EHB 436, 439; *Butler Twp. v. DER*, 1984 EHB 472, 490, *aff'd*, 513 A.2d 508, 514 n.16 (Pa. Cmwlth. 1986); *DER v. Derry County*, 351 A.2d 606, 612 (Pa. 1976); *Lower Towamensing Twp. v. DEP*, 1993 EHB 1442, 1464-65.

Since both Washington's and Edinboro's sewage systems are hydraulically overloaded, and because both communities' sewage needs are not being met, the Department correctly determined that both municipalities needed to revise their Official Plans. 35 P.S. § 691.203(b); 35 P.S. § 750.10;

25 Pa. Code § 71.13. Moreover, since Edinboro Lake, which is vital to both communities is being degraded due to sewage discharges, the Department correctly decided that a regional approach to these joint concerns would be more beneficial to both communities and the Commonwealth. 35 P.S. § 691.203 (b); 35 P.S. § 750.10; 25 Pa. Code § 71.13. Therefore, it was entirely appropriate for the Department to direct Edinboro and Washington to jointly assess their future sewage needs in a regional manner and to submit a Joint Official Plan Update Revision.

E. **Hydraulic Overload**

Edinboro argues strenuously that its sewage conveyance system was not hydraulically overloaded. It argues that the numerous overflows including basement backups of sewage are sanitary sewer overflows and somehow not hydraulic overloads. It further contends that the actual evidence of sewage overflows is not sufficient to show that the carrying capacity of the sewer pipes was exceeded because the Department did not perform any specific modeling tests. Edinboro, in other words, argues that simply because the sewage overflowed approximately three dozen times, is not proof that their sewage conveyance system is hydraulically overloaded.

"Hydraulic overload" is defined by the regulations as follows:

> The condition that occurs when the monthly average flow entering a plant exceeds the hydraulic design capacity for 3–consecutive months out of the preceding 12 months or *when the flow in a portion of the sewer system exceeds its hydraulic carrying capacity.* 25 Pa. Code § 94.1. (emphasis added)

The Department's position is that the second prong of the definition is applicable to this case. It further equates a sanitary overflow with a hydraulic overload. A sanitary overflow is defined as follows:

> An intermittent overflow of wastewater, or other untreated discharge

> from a separate sanitary sewer system (which is not a combined sewer system) which results from a flow in excess of the carrying capacity of the system *or from some other cause prior to reaching the headworks of the plant.* 25 Pa. Code § 94.1. (emphasis added)

In *Ainjar,* 2001 EHB 927, Chief Judge Krancer, writing for a unanimous Board, in interpreting the meaning of the second prong of the regulatory definition concentrated on the term "hydraulic carrying capacity." 2001 EHB at 974. Judge Krancer pointed out that the term was indirectly defined in the regulations through the related term "sanitary sewer overflow." *Id.* Judge Krancer opined that the:

> carrying capacity is that point just short of where actual overflow from the system takes place. In this regard, the term carrying capacity can be regarded in common parlance or layman's terms as non-spilling capacity. *Id.*

In this case, we have thirty-five instances of sewage overflows into people's basements or from manhole covers. This is graphic evidence of sewage in excess of the non-spilling capacity of the Edinboro sewage conveyance system. It spilled from the sewage pipes and actually overflowed from the system.

Moreover, unlike in *Ainjar*, in which testimony of one isolated overflow occurred and then only in rebuttal, we have testimony of nearly three dozen overflows. The Edinboro Official Plan clearly does not envision discharges of sewage overflow into people's basements or through manhole covers. The sewage clearly exceeded the carrying capacity of the pipes numerous times as we both heard in graphic testimony and observed in photographs and videotape.

Our conclusion is further buttressed by Edinboro's own expert. In his report, which we discussed earlier, issued in June 1998 for Edinboro officials partially in response to the Orr Brothers' request to develop a 16-acre parcel of property adjacent to their golf course, Mr. Kuholski wrote:

> Due to excessive inflow/infiltration within the tributary sanitary system, the Route 6N/Maple Drive sewer system is periodically surcharged. This condition would indicate that additional capacity is NOT available for any future development serviced by the Route 6N/Maple Drive sewer system. More significantly, such surcharging indicates that this sewer system is currently hydraulically overloaded. This hydraulic overload must be corrected with or without any future development.
>
> Existing "surcharging" (i.e., sewers flowing above design capacity) of the Route 6N/Maple Drive sanitary sewer system indicates that this section of the Edinboro sanitary sewer system is hydraulically overloaded. This problem must be corrected to provide available capacity for any future development tributary to this sanitary sewer system. However, this hydraulic overload must be corrected by the Borough of Edinboro whether or not additional development occurs tributary to this sewer system. The purpose of this study is to provide the Borough of Edinboro with recommended "solutions" to resolve the existing and any future hydraulic capacity problems on this sewer system. App. Ex. 61.

In his report Mr. Kuholski agrees with the position advanced by the Department in this case regarding what defines a hydraulic overload. Edinboro's furious backpedaling from this clearly stated position by contending that Mr. Kuholski was not using the term "hydraulic overload" according to its regulatory definition is nonsensical. Mr. Kuholski's testimony that he was not using the term in a regulatory sense and that he performed no calculations to support his conclusions so therefore we can not rely on his report is an explanation we find lacks credibility. Mr. Kuholski is a very experienced engineer. We are certain that in reviewing the information he had as to the numerous backups and overflows that occurred he could correctly reach the conclusion he did in the June 1998 Report that "[M]ore significantly, such surcharging indicates that this sewer system is currently hydraulically overloaded." The fact that he did not perform laboratory tests under laboratory conditions is not necessary in light of such overwhelming evidence of hydraulic overload.

On cross-examination, he could not refute what he had written, and as stated above we find his testimony in this instance not credible. Mr. Kuholski correctly and coherently defined the term and the condition of parts of the Edinboro sewage conveyance system in his June 1998 report. The Department was justified in relying on that Report as a basis for issuing its Administrative Order.

Edinboro's Chapter 94 Reports, although incomplete in many respects, also form a basis for the Department's determination that Edinboro's sewage conveyance system was hydraulically overloaded. The 1995 Chapter 94 Report identified the 6N Constriction. In the 1997 Chapter 94 Report, Edinboro advised that its pumps were forced to run almost nonstop in extreme wet weather conditions. In fact, this cause for concern was repeated in its Reports for the years 1998 through 2001.

In the 1998 Chapter 94 Report, Edinboro advised that a proposed development that would normally tie into the Maple Drive sewer line might install a parallel line. This led the Department to correctly conclude that the Maple Drive sewer line had sewage capacity problems. In addition, in Edinboro's 1998 Chapter 94 Report, Edinboro informed the Department that it had appropriated money to purchase equipment to do a sewage conveyance system study. According to the Department, this type of study is normally undertaken by a permittee pursuant to a Corrective Action Plan because of a hydraulic overload situation. In fact, the Department informed Edinboro in August of 1998 that it should project a hydraulic overload because parts of its collection and conveyance system were nearing capacity. Instead, Edinboro advised the Department in October 1998, that it would not project a hydraulic overload.

Extensive testimony was presented regarding the numerous instances of sewage backing up into Edinboro residents' basements. Some of these backups occurred during wet weather but many

of the overflows also occurred in dry weather. Most of the backups occurred when sewage backed up through floor drains in the basements. We agree with the Department that such backups graphically point out that the carrying capacity of Edinboro's lines in these instances was such that they could not physically carry one more drop of liquid. These overflows indicate a systemic problem in Edinboro's sewage conveyance system where the sewage flowing through the system is in excess of its non-spilling capacity, and thereby constitutes a hydraulic overload of the system.

The overflows that occurred in wet weather also are not acceptable. As noted in *Ainjar*, extreme wet weather conditions that would cause a system to experience flows in excess of hydraulic carrying capacity to the degree experienced here are very rare and would only occur in unusual conditions. 2001 EHB at 976. Furthermore, the Edinboro sewage system is permitted as a separate sanitary system. In a separate sanitary system, stormwater should never enter the sewage system. Since some of the overflow occurred in wet weather that is a clear indication that stormwater is infiltrating Edinboro's sewage conveyance system and exceeding the system's hydraulic carrying capacity.

The Department, contrary to Edinboro's argument, is not required to conduct flow tests to prove that 35 overflows is unacceptable. This is not a laboratory project at stake here but the health and welfare of the citizens of Edinboro. Raw sewage backing up in basements is simply not in accordance with Edinboro's Official Plan and certainly constitutes a serious threat to health and the environment. Mr. Kuholski, in his June 1998 Report, was perfectly comfortable in looking at the evidence of the overflows and concluding that the surcharging of the lines indicated that the Maple Drive sewage conveyance line was hydraulically overloaded and that this problem needed to be addressed.

F. **The Orr Brothers' Private Request**

One of the factors which precipitated this Administrative Order under Appeal was the Private Request submitted by the Orr Brothers. Edinboro argues that the Department did not follow the statutory and regulatory requirements necessary to issue its Administrative Order in response to the Private Request. We disagree.

For approximately four years the Orr Brothers conferred with Edinboro officials regarding the development of their land. They were repeatedly told by Edinboro that there was insufficient capacity in the sewer conveyance system. Eventually, the Orr Brothers made a "Private Request" to the Department regarding the inability of Edinboro to meet their sewage needs.

A Private Request is a request from a property owner to the Department "requesting that the Department order the municipality to revise its Official Plan if the resident or property owner can show that the Official Plan is not being implemented or is inadequate to meet the resident's or property owner's sewage disposal needs." 35 P.S. § 750.5(b). A Private Request "may be made only after a prior written demand upon and written refusal by the municipality to so implement or revise its Official Plan or failure of the municipality to reply in either the affirmative or negative within 60 days or, failure of the municipality to implement its Official Plan within the time limits established in the Plan's implementation schedule or failure to revise its Official Plan within the time limits established in this chapter." 25 Pa. Code § 71.14(a).

On February 2, 2000, the Orr Brothers' attorney sent a written demand letter, pursuant to the Department's Regulations, to Edinboro to implement or revise its Official Plan because the Orr Brothers contended that the Official Plan was not being implemented or it was inadequate to meet the Orr Brothers' sewage disposal needs for their proposed subdivision. The Orr Brothers stated that

sewage from their proposed development could not be serviced by the Maple Drive line because of a lack of capacity.

Eight days later, on February 10, 2000, Edinboro's Manager, Mr. E.R. McFadden, responded to the Orr Brothers' attorney. Mr. McFadden quoted specific portions of the 1998 Kuholski Report. He also noted that the referenced report in essence identified an existing hydraulic capacity problem in an existing sanitary sewer system serving existing development and that the problem needed to be corrected. He further emphasized that Edinboro was working to correct the problem but that additional capacity was not available presently on the Maple Drive line.

On February 18, 2000, the Orr Brothers' attorney replied to Mr. McFadden's letter by reiterating that the Orr Brothers believed the current Edinboro Official Plan was inadequate to meet the sewage disposal needs of the proposed subdivision. On February 28, 2000, Mr. McFadden indicated that Edinboro had determined that the Maple Drive sewer could accommodate 24 EDUs (which was not sufficient for the proposed development). Therefore, on March 17, 2000, the Orr Brothers' counsel filed with the Department a Private Request pursuant to 25 Pa. Code Section 71.14(a) alleging that the sewage needs of the Orr Brothers were not being met by Edinboro. He requested that the Department order Edinboro to revise its Official Plan accordingly. Attached to the Private Request was a copy of the 1998 Kuholski Report which had not been earlier provided to the Department.

One month later the Department formally notified Edinboro of the Orr Brothers' Request and informed Edinboro that it had until May 4, 2000 in which to provide written comments to the Orr Brothers' Private Request. On May 2, 2000, Edinboro provide extensive written comments to the Orr Brothers' Private Request. (T. 571: 25; 272:1) (Com Ex. 46) (App. Ex. 29)

Edinboro raises hyper-technical objections regarding the Private Request submitted by the Orr Brothers. Edinboro alleges that the Orr Brothers should have undertaken expensive steps which ignores the issue of whether Edinboro was meeting the needs of its citizens regarding sewage. The regulations, and specifically 25 Pa. Code Section 71.14(a), place the onus on Edinboro, not the Orr Brothers. Thus, when Edinboro failed to address the hydraulic overload condition on Maple Drive as outlined by its own engineer, it failed to meet the Orr Brothers' sewage disposal needs.

Edinboro argues that the Department failed to comply with the 45 day comment period set forth in 25 Pa. Code Section 71.14(c). First, we note that Edinboro submitted its comments and the Department had the benefit of them prior to issuing its Administrative Order. Second, and most importantly, the Department received the Private Request on March 17, 2000 and issued its Administrative Order 52 days thereafter.

Edinboro further contends that the Private Request was not sent by the Orr Brothers to other interested governmental agencies such as the Erie County Health Department. However, the Department sent the Private Request to the Erie County Health Department and others on April 17, 2000. Edinboro further contends that the Orr Brothers never indicated what was deficient with its Official Plan.

Although there may have been some technical glitches by the Orr Brothers in submitting their Private Request, the Department cured these *de minimus* errors. A review of the testimony and exhibits clearly shows that Edinboro was well aware of the problems with its sewage conveyance system in the Maple Drive area. It had been engaged in discussions with the Orr Brothers and their consultants for approximately four years. In fact, Edinboro clearly knew of its problems better than any of the other parties as we have discussed earlier in this Adjudication. It also knew that the

offering of additional units at the eleventh hour was not sufficient to meet the proposed sewage needs of the Orr Brothers. The "postcard" or planning module was not required at this point in the project as found by the Department.

The Orr Brothers' frustration in dealing with the situation came through clearly in the testimony. The testimony clearly shows that the Orr Brothers were sent on a "paper chase" which always ended with them seemingly no closer to getting sewage service for their proposed development.

The Department properly relied on the Private Request as support for its Administrative Order.

G. **Taking**

Edinboro asserts that the Administrative Order issued by the Department requiring it to submit a joint Updated Revision to its official plan amounts to a taking of its property. The United States Constitution provides that private property may not be taken for public use without just compensation. U.S. CONST. Amend. V. The Pennsylvania Constitution similarly states "Nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." PA. CONST. Art. I, Section 10.

"A government action that limits a property owner from making certain uses of private property is not ordinarily considered a taking of private property for which compensation must be paid. It is only where a government action 'goes too far' that it constitutes a taking." *Davailus v. DEP*, EHB Docket No. 96-253-L (Adjudication issued February 6, 2003), p. 21, citing *Machipongo Land and Coal Co. v. Department of Environmental Protection,* 799 A.2d 751 (Pa. 2002), at 765, cert. denied, 537 U.S. 1002 (2002). A government action is considered to go "too far" if "it forces

'some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole.'" *Machipongo*, 799 A.2d at 765 quoting *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

Edinboro cites the case of *North Coventry Township v. Pottstown Borough Authority*, 53 Pa. D.&C. 4th 377 (Chester County, 2001), in which North Coventry Township had sought to exercise its power of eminent domain to condemn the water distribution system that was located within its boundaries and supplied portions of the township with water but which was operated by the Pottstown Borough Authority. The Chester County Court of Common Pleas held that the Second Class Township Code authorized second class townships to exercise eminent domain to condemn privately owned water systems only, not water systems owned by a municipal corporation.

The *North Coventry* case has no application to the matter before us. Contrary to Edinboro's assertion, the Administrative Order does not have the effect of either authorizing or requiring the condemnation of Edinboro's sewage treatment plant. It simply requires that Edinboro and Washington Township work jointly to address the sewage needs of both communities. It most certainly does not require Edinboro and Washington Township to create a joint authority or a joint municipality. The order also does not require that Edinboro and Washington Township construct one single sewage treatment plant.

The Department has the authority to require this action pursuant to Section 203 of the Clean Streams Law, which reads in relevant part as follows:

> ...the department may issue appropriate orders to municipalities where such orders are found to be necessary to assure that there will be adequate sewer systems and treatment facilities to meet present and future needs or otherwise to meet the objectives of this act. Such orders may include, but shall not be limited to, orders requiring

> municipalities...to negotiate with other municipalities for combined or joint sewer systems or treatment facilities....

35 P.S. § 691.203(b). In addition, the Pennsylvania Supreme Court has recognized the Department's statutory authority to issue orders to municipalities requiring negotiation with other municipal authorities for the regionalization of that municipality's sewage treatment system. *Department of Environmental Resources v. Derry Township*, 466 Pa. 31 (Pa. 1976). *See also, Butler Township Board of Supervisors v. Department of Environmental Resources*, 513 A.2d 508 (Pa. Cmwlth. 1986) (Court affirmed Board's decision upholding an order of the Department requiring township and several surrounding municipalities and authorities to enter into an agreement for construction of a regional sewage treatment plant at a specific site within the township's boundaries.)

The Department further argues that Edinboro has no grounds to assert a takings claim against the Commonwealth when it is exercising its police power, and cites us to the case of *Department of Environmental Resources v. Westmoreland-Fayette Municipal Sewage Authority*, 336 A.2d 704 (Pa. Cmwlth. 1974). That case involved a Department order requiring four municipalities to "'negotiate, develop and execute such agreements and other documents as are necessary" to abate the pollution caused by the discharge of untreated and inadequately treated sewage into waters of the Commonwealth in violation of The Clean Streams Law." *Id.* at 705. Three of the municipal entities joined in an appeal of the order to the Board, asserting the Department had no authority to issue such an order. The Board ruled in favor of the Department and an appeal was taken to the Commonwealth Court. As grounds for reversal of the Board's decision, the appellants argued that enforcement of the Department's orders would effectuate a denial of their due process rights because it would amount to a taking of their property without just compensation. Citing the United States Supreme Court's decision in *Hunter v. Pittsburgh*, 207 U.S. 161 (1907), the court held that a

municipality may not assert a due process claim against actions taken by its sovereign regardless of whether the property in question is used for proprietary or governmental purposes. *Westmoreland-Fayette*, 336 A.2d at 705-06.

Moreover, a government action does not go "too far," as set forth in *Machipongo*, if it simply prohibits behavior that could be abated as a nuisance or that could be prohibited by general principles of state property law. 799 A.2d at 772, citing *Lucas v. South Carolina Council*, 505 U.S. 1003 (1992); *Devailus*, *slip op.* at 22. Thus, as stated in *Devailus*, "the government's prohibition of an illegal activity or nuisance does not constitute a compensable taking." *Id.* at 23.

In the present case, the evidence clearly shows that the Edinboro sewage treatment system experiences hydraulic overloads and is unable to meet the current and anticipated sewage needs of its customers. This has resulted in overflows of raw sewage into residents' homes. Likewise, Washington Township has signed a Consent Order and Agreement with the Department recognizing that its sewage system is hydraulically overloaded. The fact that the Department requires Edinboro to address its capacity problems jointly with its neighboring municipality, Washington Township, is, as we have previously stated, well within the scope of the Department's authority under the Clean Streams Law.

If we were to adopt Edinboro's position, any order by the Department requiring a municipality to upgrade its sewage treatment facility to bring it into compliance with the requirements of the Sewage Facilities Act, Clean Streams Law and underlying regulations would constitute a taking. Here, the Department has simply ordered Edinboro and Washington Township to work jointly to address the sewage needs of their communities. The Administrative Order provides the two municipalities with extreme flexibility in fashioning a joint Updated Revision that best meets

their needs. How they proceed to accomplish this is up to Edinboro and Washington Township, so long as it accomplishes the requirement of the Department's Administrative Order, i.e. providing proper sewage facilities to meet the current and anticipated sewage disposal needs of both communities. Legally, this cannot constitute a taking.

H. **Edinboro's Motion to Exclude Testimony of Department Witnesses**

Edinboro contends that the Board should exclude the opinion testimony of two Department employees, Mr. David Milhous and Mr. Michael Zimmerman, who are also professional engineers. Edinboro argues for exclusion of any opinion testimony because although these witnesses were identified and deposed during discovery they were not specifically identified as experts and they did not prepare expert reports or answer expert interrogatories. Thus, Edinboro claims it is prejudiced if the Board considers any of these gentlemen's testimony and any opinions they have on the issues in this case should be specifically excluded.

Pennsylvania Rule of Civil Procedure 4003.5 specifically governs the discovery of expert testimony. The Department argues that Rule 4003.5 does not apply to Mr. Milhous and Mr. Zimmerman and even if it does there is no prejudice in allowing them to testify as Edinboro was neither surprised nor prejudiced by their testimony. The Department further contends, that its employees are not "experts" under Rule 4003.5. Therefore, it was not required to file expert reports, answer expert interrogatories, or even list them as experts. *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 531-532 (Pa. 1995).

In addition to Pennsylvania Rule of Civil Procedure 4003.5, the Board's own Rules require parties to identify and produce, when requested, either expert reports or answers to expert interrogatories. Moreover, 25 Pa. Code Section 1021.104 governing the filing of Pre-Hearing

Memorandum before the Board specifically requires that:

> (a) A pre-hearing memorandum shall contain the following:
>
> (5) For each expert witness a party intends to call at the hearing, answers to expert interrogatories and a copy of any expert report provided under Section 1021.101(a)(2). In the absence of answers to expert interrogatories or an expert report, a summary of the testimony of each expert witness.

In this case, the Department specifically set forth in its Pre-Hearing Memornadum that it did "not intend to introduce any expert witnesses at the hearing." This simply reiterated what it indicated in its answers to interrogatories where the Department stated that it did not intend to call any experts at the hearing.

The Department argues strenuously that Pennsylvania Rule of Civil Procedure 4003.5 was not meant to apply to its professional employees such as Mr. Zimmerman and Mr. Milhous who arguably did not reach their opinions in anticipation of litigation. Edinboro counters that to allow the Department to shield their employee experts from discovery and for them not to have to write a report or answer interrogatories is unfair. Edinboro argues that a whole host of horribles befell it at the hearing because of the lack of expert reports from Mr. Zimmerman and Mr. Milhous. It analogizes that if the Department's interpretation of Rule 4003.5 is correct then large organizations, whether the government or corporations, would enjoy a distinct and unfair advantage in litigation because they often employ professional employees who could testify at trial without their opponents having the benefit of their expert reports which would provide "a road map of their testimony."

We initially agreed with Edinboro. Immediately prior to the hearing in this matter the Board granted Edinboro's Motion to preclude the Department from offering expert testimony because it had

not identified any experts, answered expert interrogatories, or submitted any expert reports. The Department, during its case-in-chief, called Mr. Milhous and Mr. Zimmerman, who testified concerning their involvement in this case and the issues in question. However, after the Department rested, it filed a Motion to Reopen its Case-In-Chief and Present Opinion Testimony. After oral argument on the Department's Motion, we vacated (but did not overrule) our earlier ruling and allowed the Department to reopen its case-in-chief to offer additional testimony. However, we indicated that this issue would be revisited another day and decided by the entire Board following the Board's review of the post-hearing briefs. That day has now arrived.

Edinboro argues that we should preclude any testimony which would be considered expert or opinion testimony from Mr. Milhous and Mr. Zimmerman. The Department argues just as strenuously that its witnesses were not retained experts but employees so it neither had to identify them as experts nor provide any expert discovery to Edinboro pursuant to the specific language of Rule 4003.5 of the Pennsylvania Rules of Civil Procedure.

The Department points out that Rule 4003.5 by its clear language simply does not apply to Department employees.

> (a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and *acquired or developed in anticipation of litigation or for trial*, may be obtained as follows .... Rule 4003.5(a) of the Pa. R.C.P.

Mr. Milhous and Mr. Zimmerman were employees of the Department whose facts and opinions, the argument goes, were arrived at prior to issuing the Administrative Order or were not developed in anticipation of litigation or trial. Therefore, they are not covered by this Rule. This is seemingly in accord with the language of the Rule, the official comment to the Rule, and several Pennsylvania

appellate decisions involving civil cases.

In the official explanatory comment to Rule 4003.5 there is arguably further support of the Department's interpretation.

> This subdivision is not intended, as pointed out by the federal draftsmen, to permit discovery of experts who may have been informally consulted by a party. Finally, it applies only to experts "retained or specifically employed." A *regular employee of a party who may have collected fact, prepared reports, and rendered opinions, and who may be qualified as an expert, is not covered by this sub-section and has no immunity from discovery, simply because the party elects not to call him at the trial. He is not an "expert" within the meaning of the Rule; he is simply a witness, an employee of a party*. (emphasis added)

In *Katz v. St. Mary Hospital*, 816 A.2d 1125 (Pa. Super 2003), the Pennsylvania Superior Court held there was no error in allowing the defendant physician to testify as an expert and render his medical opinions at the trial even though he had failed to disclose such opinions during discovery in the form of an expert report or in response to an Order compelling him to serve complete and verified answers to expert witness interrogatories. The Superior Court held that the appellee medical doctor;

> did not acquire or develop his medical opinion on the treatment of appellant's conditions in preparation for trial; appellee's medical opinions and knowledge were acquired long before this action commenced. As such, appellee's opinion proffered at trial fall outside the scope of Rule 4003.4 816A.2d at 1127

The Court further went on to hold that:

> Based on the aforementioned, this Court, once again, finds Rule 4003.5 of the Pennsylvania Rules of Civil Procedure has no application to a party such as Appellee but rather is applicable only where the expert witness' opinions were "acquired or developed in anticipation of litigation or for trial." Pa. R.C.P. 4003.5(a); *Neal by Neal, supra* at 106-08. *See also Miller v. Brass Rail Tavern, Inc.*, 541

> Pa. 474, 664 A.2d 525, 531-532 (1995); *Toogood v. Rogal*, 764 A.2d 552, 558 (Pa Super. 2000), *appeal granted*, 568 Pa. 38, 791 A.2d 1154 (2002). 816 A.2d at 1128.

The Court stated in a footnote that the Appellants had been free to explore the doctor's opinions through interrogatories or by oral deposition during discovery.

Miller v. Brass Rail Tavern, Inc., supra, was a decision of the Pennsylvania Supreme Court. In this case, the Pennsylvania Supreme Court first decided that both the trial court and Superior Court erred when they held that the county coroner, who was a mortician but not a physician, could not testify as of the time of death of the decedent. The Supreme Court reversed, finding that the coroner, by his training and experience, had special knowledge which would qualify him as an expert under Pennsylvania's liberal rule regarding experts.

Next, the Supreme Court considered whether the trial court was justified in its alternative ground of excluding the expert testimony of the coroner because he was not identified as an expert prior to trial pursuant to Rule 4003.5.

> Following Appellant's proffer with respect to the coroner's proposed testimony, Appellees objected based upon the fact that, even though they knew the coroner was slated to be a factual witness, they had not been provided information that the coroner would be providing an opinion as to the time of...death. They argued that if the coroner were permitted to testify on that issue, they would be substantially prejudiced in their ability to cross-examine him and in their ability to present a defense. 664 A.2d at 530.

The Supreme Court emphasized that the coroner had determined the facts surrounding the death as part of his official duties as coroner and not related to the eventual litigation in which he was called to testify. Moreover, the Court specifically found that the opinions of the coroner, "especially relating to cause of death and time of death, constitute expert opinion." 664 at 531.

Nevertheless, because the opinions were not acquired or developed in anticipation of litigation Rule 4003.5 was not applicable.

> Instead, the general discovery provisions of Rule 4003.1 would have applied to Coroner Wetzler. Therefore, just as Rule 4003.5 would not have applied to limit discovery of Coroner Wetlzer's testimony, the rule cannot be invoked to sanction Appellant for non-compliance. Accordingly, the trial court's exclusion of Coroner Wetzler's testimony based on Pa.R.C.P. 4003.5 was in error. 664 A.2d at 532.

Edinboro deposed both Mr. Milhous and Mr. Zimmerman. However, Edinboro nevertheless contends it was prejudiced because no expert reports were filed and it claimed to rely on the Department's statement that it was not going to offer expert testimony. A close review of the record reveals no prejudice. A comparison of the trial testimony of these two gentlemen with their deposition testimony shows their testimony was consistent. If anything, counsel for Edinboro went into far more detail concerning their opinions at the depositions than at the hearing.

Edinboro's argument that expert reports should be required for all expert testimony is certainly one we sympathize with but it is certainly not required from this class of witnesses if we look *solely* to the Pennsylvania Rules of Civil Procedure. In any event, when applied to the facts of this case, Edinboro's argument is not sustainable because it suffered neither prejudice nor surprise.

The Pennsylvania Rules of Civil Procedure were developed mainly to apply to the wide range of cases heard by the civil courts of the Commonwealth of Pennsylvania. The Environmental Hearing Board is a "quasi-judicial administrative tribunal" that is basically established as the state-wide environmental trial court. 35 P.S. § 7513(a). The Board has its own Rules of Practice and Procedure that govern actions before it. 35 P.S. § 7514(g). These Rules were developed in close conjunction with the Environmental Hearing Board Rules Committee. 35 P.S. § 7515. The

Environmental Hearing Board Rules Committee is composed of nine attorneys who practice before the Board and are appointed by various public officials including the Governor, the Secretary of the Department of Environmental Protection, an environmental interest group, and legislative leaders of both the House and Senate. Currently, two of the nine members include the Department's Chief Counsel and its Director of Litigation.

Our Rules require all parties offering expert testimony to identify their experts, file expert reports or answer expert interrogatories, or in lieu of the latter if it was not requested, then file a summary of the expert testimony. The Department did not do so in this case. Yet we find absolutely no prejudice to Edinboro. Therefore, we will not exclude the testimony of Mr. Milhous and Mr. Zimmerman. This is not a situation where "surprise expert witnesses" appeared. Quite the contrary, the roles Mr. Zimmerman and Mr. Milhous played in this matter were clearly identified during discovery.

Our conclusion is supported by *Brass Rail.* The Supreme Court in *Brass Rail*, although holding that Rule 4003.5 was not triggered under the facts of that case, emphasized that preclusion of an expert's testimony where the Rule is applicable is not obligatory. Instead, the tribunal must undertake a balancing test between the facts and circumstances of each case to determine the prejudice to each party. *Feingold v. Southeastern Pennsylvania Transportation Authority,* 517 A.2d 1270, 1273 (Pa. 1986). The basic considerations the tribunal should review are:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or [sic] willfulness in failing to comply with the court's order. 664 A.2d at 532 n.5.

Pennsylvania Rule of Civil Procedure 4003.5 shields expert witnesses from being deposed unless agreed upon by the parties or ordered by the tribunal. Here both Mr. Milhous and Mr. Zimmerman were deposed exhaustively by Edinboro's counsel. Indeed, Edinboro's counsel questioned both witnesses in excruciating detail concerning their views (and thus the Department's) on hydraulic overload and the other related issues in this case. We have thoroughly reviewed the deposition transcripts filed by the Department. The transcripts reveal extraordinary thorough and detailed questioning of the Department witnesses by Edinboro's extremely able lawyer. Therefore, Edinboro suffered neither surprise nor prejudice by the trial testimony of Mr. Millhous and Mr. Zimmerman.

We reiterate the Board's reasoning in *Kleissler v. DEP and Pennsylvania General Energy Corp.*, 2002 EHB 617, which clearly stated that Department employees who are offered as expert witnesses must adhere to the rules of discovery regarding experts. In other words, in order to testify before the Board as an expert, pursuant to the Board's Rules of Practice and Procedure, it does not matter if the proposed expert is an employee of the party or not or whether the opinion was developed in anticipation of litigation. The employee still must be identified as an expert. Assuming discovery has been directed to that party, not only must the expert be identified but interrogatories concerning the expert's opinion must be answered or an expert report must be provided.

Practice before the Board has evolved over the past 31 years. For many years, the Department did not provide expert reports or even detailed summaries of their "employee experts" and there were only rare objections. In recent years, and in most cases, the Department has usually answered expert interrogatories and identified its own employees as experts when they fit that role.

The Department has prepared expert reports. Yet cases such as this one point out the need for a "bright line rule" so that the Department, the public, and all parties before the Board are clear that the Board's Rules apply to all parties before it. Therefore, from this point forward, if any party, including the Department, wishes to proffer expert testimony, it will need to fully follow both the Pennsylvania Rules of Civil Procedure and the Board's Rules and orders and identify its proposed experts, answer expert interrogatories and/or provide expert reports, and identify the expert and summarize his or her testimony in its pre-hearing memorandum. If any party, including the Department does not follow these requirements, it may be precluded from offering such witnesses at trial in accord with applicable law.

We should emphasize that although we have found no prejudice to Edinboro none of our findings concerning hydraulic overload or the other issues in this case were dependent on any testimony presented by the Department after we granted its motion to reopen its case. In fact, our findings of fact and legal conclusions stemming from the application of the law to these facts are based on the Department's testimony and exhibits introduced prior to the Department reopening its case together with testimony and exhibits introduced by Edinboro.

Since the Administrative Order was properly issued we will enter an Order dismissing Edinboro's Appeal.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has subject matter jurisdiction over the parties and this appeal.
2. The scope of the Board's review is *de novo*. Stated another way, the Board's review is not limited only to the evidence which was considered by the Department at the time it issued its

Administrative Order, but instead includes evidence which may not have been considered or even available. 35 P.S. § 7514(c); *Warren Sand and Gravel, Inc. v. Department of Environmental Resources,* 341 A.2d 556 (Pa. Cmwlth. 1975); *Pequea Township v. Herr*, 716 A.2d 678, 685-687 (Pa. Cmwlth. 1998); *Leatherwood, Inc. v. Department of Environmental Protection*, 819 A.2 604, 611 (Pa. Cmwlth. 2003); *Smedley v. DEP*, 2001 EHB 131.

3. Actions before the Board involve the Board's *de novo* determination of whether the Department's action is reasonable and appropriate and otherwise in conformance with the law. *Smedley*, *supra.*

4. The Department of Environmental Protection satisfied the burden of proof by showing by a preponderance of the evidence presented and admitted before the Board that its action in issuing the Administrative Order was reasonable and lawful. *Whitemarsh Disposal Corp. v. DEP*, 2000 EHB 300, 365-366.

5. Both the Clean Streams Law and the Sewage Facilities Act give the Department the broad authority to issue an order to a municipality to jointly address regional sewage needs with other municipalities. *Montgomery Twp. v. DER*, 1995 EHB 483, 515-16; *Shrewsbury Twp. v. DER*, 1975 EHB 436, 439; *Butler Twp. v. DER*, 1984 EHB 472, 490; *DER v. Derry Twp.*, 351 A.2d 606, 612 (Pa. 1976); *Lower Towamensing Twp. v. DEP*, 1993 EHB 1442, 1464-65.

6. Given the similar problems and issues facing both Washington Township and Edinboro in regards to their sewage needs and the Clean Streams Law's and the Sewage Facility Act's promotion and encouragement for inter-municipal cooperation in regards to sewage issues in the community, the Department acted reasonably and lawfully when it issued the Administrative Order requiring Washington and Edinboro to submit a Joint Official Plan

Update Revision to the Department. 35 P.S. § 691.203(b); 35 P.S. §§ 750.3 and 750.10; 25 Pa. Code §§ 71.11 and 71.13; *Montgomery*, 1995 EHB at 515-16; *Shrewsbury*, 1975 EHB at 431; *Butler Twp.* 1984 EHB at 490; *Derry Twp.*, 351 A.2d at 612; *Lower Towamensing Twp.* 1993 EHB at 1464-65.

7. Under the second prong of the tem "hydraulic overload" a sewage conveyance system is considered to be hydraulically overloaded when the current flow through the system spills out or exits out of the conveyance system in places other than at the permitted discharge point at the sewage treatment plant.
8. The facts in this case clearly show that portions of Edinboro's sewage conveyance system was and are hydraulically overloaded.
9. The numerous overflows throughout Edinboro over the past five years clearly indicate a systemic problem whereby the sewage flowing throughout Edinboro's conveyance system is in excess of its non-spilling capacity, thereby constituting a hydraulic overload of the system.
10. The Department's review and approval of the Orr Brothers' Private Request was in accordance with 35 P.S. § 750.5 and 25 Pa. Code § 71.14.
11. The Orr Brothers' Private Request complied with the requirements in 35 P.S. § 750.5 and 25 Pa. Code § 71.14.
12. The annual Chapter 94 Reports are the primary diagnostic and informational tool used by the Department to annually review the permittee's sewerage facilities; to ensure that there is ample time to address existing operational or maintenance problems; and to plan for future sewage needs. 25 Pa. Code § 94.12; *Ainjar*, 2001 EHB 927, 964.
13. Edinboro violated 25 Pa. Code § 94.12 when it failed to identify in its Chapter 94 Reports

those areas where its conveyance capacity is being exceeded and the numerous sewage overflows that occurred throughout Edinboro in the years of 1995-2000.

14. The Department acted reasonably and in compliance with the law when it ordered Edinboro and Washington to submit a Joint Update Revision of their Official Plans because Washington's STP is hydraulically overloaded; Edinboro's sewerage conveyance system is, in part, both hydraulically overloaded, and projected to be hydraulically overloaded; both Whipple Creek and Edinboro Lake have serious water quality issues; and there are increasing pressures from prposed developments coming to bear on the region.

15. The Department's issuance of the Administrative Order to Edinboro and Washington to negotiate with each other and submit a joint Update Revision was well within the broad powers with which to achieve the objectives of both the Clean Streams Law and the Sewage Facilities Act, including watershed management. *Derry Twp.*; *Butler County*; *Lower Towamensing.*

16. Pa.R.C.P. No. 4003.5 only applies to expert testimony that was "acquired or developed in anticipation of litigation or for trial." *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 530-31 (Pa. 1995).

17. Mr. Milhous' and Mr. Zimmerman's opinions on the issue of hydraulic overload were not subject to Rule 4003.5 because their opinions were not arrived at with an eye toward litigation. *Miller.*

18. Edinboro was clearly on notice as to Mr. Milhous' and Mr. Zimmerman's opinions regarding the issue of hydraulic overload.

19. Parties have an obligation to identify any witnesses who will be presenting expert testimony,

whether they would fall under Pennsylvania Rule of Civil Procedure 4003.5 or not. They also have an obligation to summarize expert testimony or provide copies of expert reports or answers to interrogatories.

20. If a party, including the Department, wishes to present what would be considered expert testimony of one of its employees, then even if it would not be required to identify such employees as an expert or produce an expert report under Pennsylvania Rule of Civil Procedure 4003.5, the party is required under Board Rules 25 Pa. Code §§ 1021.101 and 1021.104 to identify the expert, answer expert interrogatories and/or provide expert reports, or summarize the expert's testimony in its pre-hearing memorandum . *Kleissler v. DEP and Pennsylvania General Energy Corp.*, 2002 EHB 617; 25 Pa. Code §§ 1021.101 and 1021.104.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF EDINBORO MUNICIPAL AUTHORITY OF THE BOROUGH OF EDINBORO	:	
v.	:	**EHB Docket No. 2000-125-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

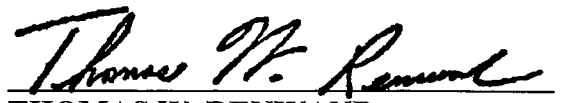
ORDER

AND NOW, this 14th day of November, 2003, the Appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **November 14, 2003**

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

KING DRIVE CORPORATION and RICHARD C. ANGINO, PRESIDENT	:	
v.	:	**EHB Docket No. 2003-296-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 19, 2003**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

Appellants' petition for supersedeas is denied without a hearing where the petition includes no affidavits supporting the facts averred, fails to explain the absence of affidavits, cites no legal authority to support the request, and offers no explanation as to how Appellants meet the criteria for issuance of a supersedeas.

BACKGROUND

On October 30, 2003, Appellants King Drive Corporation (KDC) and its President, Richard C. Angino, appealed an order issued to them by the Department of Environmental Protection (DEP) on October 22, 2003. The Order was issued pursuant, *inter alia*, to the Clean Streams Law[1] and the Dam Safety and Encroachments Act (DSEA).[2]

KDC owns an approximately 650-acre resort called Felicita Golf, Garden, Spa Resort

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

[2] Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. § 693.1. *et seq.*

located on Fishing Creek Valley Road in Harrisburg, Dauphin County (the Site). DEP recently conducted two inspections of the Site during which DEP determined that KDC had excavated fill from the channel and floodway of an Unnamed Tributary to Fishing Creek located at the Site, without having first obtained a required water obstruction and encroachment permit. DEP further determined that the stream channel of the tributary is unstable and eroding as a result of the alleged excavation. Citing Appellants with violation of the DSEA and the Clean Streams Law for failing to obtain a permit prior to excavating the stream channel and floodway, DEP's Order directed KDC to: (1) restore the stream channel and floodway to its original cross section and contours within fifteen days; (2) temporarily stabilize the tributary's stream banks and floodway with annual rye grass and mulch within forty-eight hours of restoring the channel and floodway; and, (3) permanently stabilize the tributary's stream banks and floodway with a permanent vegetative cover by May 15, 2004.

In their notice of appeal, Appellants object to the factual and legal bases of DEP's Order. They contend that they did not excavate fill from the channel and floodway, and maintain the stream channel is not unstable and eroding.[3] Appellants also assert that they "did not need a water obstruction and encroachment permit to do what they did because fill was not removed, [and] the basic channel was not deepened or widened." (Notice of Appeal, at ¶ 8-10).

Simultaneous with their notice of appeal, Appellants filed a petition for supersedeas requesting that the Board supersede DEP's October 22nd Order. The petition was not supported by any affidavits, and contained no explanation why affidavits were not included. In their

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[3] Notice of Appeal, at ¶ 7-8. Appellants' describe their activity at the Site as follows: they "cleaned out" a 30-50 foot section of a stream channel, "pretty much left the east side of the channel as it was except for adding some rock, tanbark, and plants[,] but then reshaped the eastern side of the channel so that it would not be so steep, [and] could better handle planted material, removed the weed trees and shrubs and replaced same with vegetative material . . . . [KDC] did not excavate fill from the channel and floodway. The depth of the channel did not change, and the width of the actual water channel was not significantly altered. Rather the taper on the east side was improved following the removal of weeds, trees, and shrubs to better conform with the 3-1 taper preferred by the Department." *Id.* at ¶ 8.

petition, Appellants merely reference the DEP Order, attach a copy of their notice of appeal and summarily reiterate the appeal's contentions, and assert that a failure to comply with the Order "may result in civil and criminal penalties." Finally, without further explanation, they "represent that irreparable harm will result if supersedeas is denied, grant of supersedeas will not result in irreparable harm to the Commonwealth [sic], and Petitioners have a strong likelihood of success on appeal." (Petition for Supersedeas, at ¶ 9-10).

The Board issued an order on November 3, 2003 directing DEP to file its response to the petition by no later than November 12, 2003; DEP filed a timely opposition requesting that the Board deny the petition. Having carefully reviewed the parties' submissions, I will grant DEP's request and deny the petition without a supersedeas hearing.

DISCUSSION

The Board may grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1). However, a supersedeas is "an extraordinary remedy" which will not be granted absent a clear demonstration of need, and the petitioner bears the burden of demonstrating that the criteria for a supersedeas have been met. *Oley Township v. DEP*, 1996 EHB 1359, 1361-62. A supersedeas petition may be denied without a hearing for an "inadequately explained failure to support factual allegations by affidavits"; a lack of particularity in the legal authority cited as the basis for a supersedeas; or, a failure to state grounds sufficient for granting a supersedeas. 25 Pa. Code § 1021.62(c).

DEP argues that the petition should be denied for: (1) failing to comply with the procedural requirements concerning the content of a supersedeas petition, *see* 25 Pa. Code § 1021.62; and, (2) failing to satisfy the criteria for issuance of a supersedeas, *see* 25 Pa. Code § 1021.63. I agree that the petition fails on both counts.

Unquestionably, Appellants' petition is procedurally deficient. A supersedeas petition shall "plead facts with particularity" and, be supported by affidavits—prepared as specified in

Pa.R.C.P. 76 and 1035.4—setting forth facts upon which issuance of the supersedeas may depend. 25 Pa. Code § 1021.62(a). If a petition does not include affidavits, it must include an explanation as to why affidavits have not accompanied the petition. *Id.* Moreover, a supersedeas petition must "state with particularity the citations to legal authority the petitioner believes form the basis for the grant of supersedeas." 25 Pa. Code § 1021.62(b).

Appellants' petition does not include any affidavits and has no explanation as to why affidavits were not included. The petition simply attaches Appellants' notice of appeal, and briefly summarizes certain factual allegations contained in the notice of appeal. However, attaching a notice of appeal to a supersedeas petition is not an acceptable substitute for submission of affidavits in accordance with Rule 1021.62. *See, e.g., Goodman Group, Ltd. v. DEP*, 1997 EHB 697, 701. Further, the petition does not contain any citations to legal authority which Appellants believe will support the grant of a supersedeas. The petition clearly fails to meet the procedural requirements for the contents of a supersedeas petition and should be denied without a hearing on that basis. *See, e.g., May Energy, Inc. v. DEP*, 1997 EHB 637.

In addition, Appellants' petition does not set forth sufficient grounds for granting a supersedeas.[4] The petition conclusorily states that irreparable harm will be suffered by Appellants in the absence of a supersedeas, but does not explain the nature of such irreparable harm or how the DEP Order will cause such alleged harm. While Appellants assert that they "have a strong likelihood of success on appeal," there is no legal discussion to support this assertion. Finally, Appellants have not provided any means of determining whether or not the

[4] The factors the Board considers when determining whether to issue a supersedeas are: (1) irreparable harm to the petitioner; (2) the likelihood of the petitioner prevailing on the merits; and, (3) the likelihood of injury to the public or other parties, such as the permittee in third party appeals. 25 Pa. Code § 1021.63(a); *Citizens Alert Regarding the Environment v. DEP*, No. 2002-289-C, 2003 Pa. Envirn. LEXIS 13, at *7 (EHB, Feb. 19, 2003). Notably, a "supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect." 25 Pa. Code § 1021.63(b).

public will be injured, or pollution will occur, as a result of entry of a supersedeas of the Order under appeal. The petition does not state grounds sufficient for the granting of a supersedeas, 25 Pa. Code § 1021.62(c), and must be denied, without a hearing, on that basis as well.

Accordingly, I will enter the following Order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

KING DRIVE CORPORATION and RICHARD C. ANGINO, PRESIDENT	:	
v.	:	**EHB Docket No. 2003-296-C (10-22-03 Order)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of November, 2003, pursuant to 25 Pa. Code §§ 1021.62 and 1021.63, it is hereby ORDERED that Appellants' Petition for Supersedeas is denied without a hearing.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: November 19, 2003

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SECHAN LIMESTONE INDUSTRIES, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-222-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 20, 2003**

OPINION AND ORDER ON PETITION TO INTERVENE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board grants the Petition to Intervene of two organizations, whose members hike, fish, whitewater raft, and observe nature and wildlife in a state park in close proximity to a proposed landfill. Various members also use a creek which might be affected by the proposed landfill. The Petitioners, at this stage of the litigation, have sufficiently demonstrated that they have a substantial, direct and immediate interest in the subject matter of the Appeal. The Appellant retains a continuing right to challenge the Petitioners' standing at the hearing on the merits.

OPINION

Background

Presently before the Environmental Hearing Board (Board) is the Petition to Intervene filed by Citizens for Pennsylvania's Future (Penn Future) and Friends of McConnell's Mill State Park,

Inc. (Friends of McConnell's Mill). Penn Future and Friends of McConnell's Mill seek to intervene in this Appeal filed by Sechan Limestone Industries, Inc. (Sechan Limestone). The Appeal was filed by Sechan Limestone after the Pennsylvania Department of Environmental Protection (Department) denied its permit application to construct and operate a 40-acre Class I Residual Waste Landfill near McConnell's Mill State Park. Sechan Limestone opposes the Petition to Intervene. The Department did not file an answer to the Petition to Intervene.

Penn Future and Friends of McConnell's Mill assert they are interested parties and have taken an active role in opposing the issuance of the permit by hiring experts and attorneys to present their positions. The Petition to Intervene contends that members of both Penn Future and Friends of McConnell's Mill "regularly use McConnell's Mill State Park to hike, whitewater raft, picnic, watch birds, fish, relax, take photographs, and enjoy the overall aesthetics offered by the Park. Further, members of McConnell's Mill use Slippery Rock Creek, which runs through the Park, as a source of drinking water." (Petition to Intervene, paragraph 11) They further contend that they should be allowed to intervene because the Department will not present all of the evidence and arguments they contend support the Department's decision to deny the permit application.

Sechan Limestone contends that Penn Future and Friends of McConnell's Mill State Park do not allege interests that are substantial, direct, and immediate so as to confer legal standing which would allow them to intervene in this Appeal. Although the Petition to Intervene is accompanied by a Verification, Sechan Limestone argues that the Verification does not properly support the Petition

to Intervene and therefore the Petition should also be denied on this ground.

Standard for Intervention

The standard for intervention in proceedings before the Board is set forth in Section 4(e) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7516, which states that "[a]ny interested party may intervene in any matter pending before the Board." *Id.* at § 7514(e). The Commonwealth Court has defined "any interested party" in the context of intervention to mean "any person or entity interested, i.e. concerned, in the proceedings before the Board. The interest required...must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will either gain or lose by direct operation of the Board's ultimate determination." *Browning-Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060-61 (Pa. Cmwlth. 1991); *Orix-Woodmont Deer Creek I Venture L.P. v. DEP*, 2001 EHB 82, 83; *Ainjar Trust v. DEP*, 2000 EHB 75, 78; *Connors v. Sate Conservation Commission*, 1999 EHB 669, 670.

A person or entity seeking to intervene has standing if its interest in the matter is substantial, direct and immediate. *Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226, 231-233 (Pa. Cmwlth. 1992) *petition for allowance of appeal denied*, 608 A.2d 32 (Pa. 1992); *Orix-Woodmont*, at 84. For an interest to be "substantial" there must be a discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law. *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282. To be "direct" and

"immediate" there must be a causal connection between the action at issue and the alleged harm. *Connors*, 1999 EHB at 671.

An organization has standing to intervene if at least one of its members has standing. *Orix-Woodmont*, 2001 EHB at 84; *Rand Am, Inc. v. DEP*, 1995 EHB 998, 1000.

Discussion

We are satisfied that the petitioners have demonstrated a substantial, immediate and direct interest in the subject matter of this appeal. Members of Pen Future and Friends of McConnell's Mill live, hike, fish and enjoy nature and wildlife at McConnell's Mill State Park and in the vicinity of the proposed landfill. They also drink from a creek that could be affected by the landfill. Their interest clearly is more than a general interest in the proceedings. Whether the landfill would actually affect the petitioners' use of the state part or the creek is a factual determination that need not be decided now. At this stage of the proceedings, in order to demonstrate standing, Penn Future and Friends of McConnell's Mill need only show that there is an objectively reasonable threat that adverse effects will occur if the permit decision of the Department is reversed. We also decline to deny the Petition because the Verification could have been more clearly drafted. *See* 25 Pa. Code § 1021.4.

Since Sechan Limestone raises factual challenges to the petitioners' standing this issue will be resolved at the hearing on the merits. In the meantime, we are satisfied that Penn Future and Friends of McConnell's Mill have sufficiently demonstrated in their petition that they have

substantial, immediate and direct interests in this Appeal sufficient to allow us to grant their Petition to Intervene.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

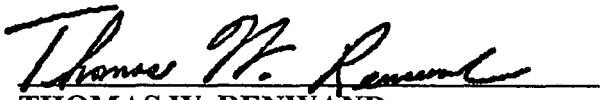
SECHAN LIMESTONE INDUSTRIES, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-222-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 20th day of November, 2003, the Petition to Intervene filed by Penn Future and Friends of McConnell's Mill is ***granted***. The caption is amend as follows:

SECHAN LIMESTONE INDUSTRIES, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-222-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor and FRIENDS OF MCCONNELL'S MILL STATE PARK, INC., Intervenor	:	

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: November 20, 2003

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CONSOL PENNSYLVANIA COAL COMPANY AND EIGHTY-FOUR MINING COMPANY	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and COLUMBIA GAS TRANSMISSION CORPORATION, WHEELING CREEK WATERSHED CONSERVANCY, and CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenors	:	**EHB Docket No. 2002-112-L (Consolidated with 2002-178-L)**
	:	**Issued: December 1, 2003**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

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

Synopsis:

In appeals that concern the effect of mine subsidence on surface waters, the Board denies motions for summary judgment because there are genuinely disputed issues of fact and inadequately developed questions of law related to the lawfulness and reasonableness of requiring deep mine operators to obtain permits pursuant to 25 Pa. Code Chapters 93 and 105, and because it is not clear that the Department has in fact imposed new performance standards that are not authorized by 25 Pa. Code Chapter 89.

OPINION

The Department of Environmental Protection (the "Department") issued a revision to Eighty-Four Mining Company's ("Eighty-Four's") permit for its Eighty-Four Mine in Somerset

Township, Washington County. Eighty-Four's appeal from the issuance of that revision is docketed at EHB Docket No. 2002-178-L. The Department also issued a revision to Consol Pennsylvania Coal Company's ("Consol's") permit for its Bailey Mine in Richhill Township, Greene County. Consol's appeal from the issuance of that permit revision is docketed at EHB Docket No. 2002-112-L. We granted the parties' request to consolidate these two appeals because they both involve challenges to the following permit condition:

> If the permittee wishes to conduct full extraction mining in the revision area it must submit another permit revision application seeking approval pursuant to, among other things, 25 Pa. Code Chapters 86, 89, 93 and 105. Where full extraction mining affects the course, current or cross section of a watercourse (including intermittent or perennial streams), floodway or body of water (including wetlands) a permit is required under Chapter 105 as part of the permit authorizing full extraction mining. No full extraction mining may occur in the Revision Area until such a permit is approved by the Department.

(Condition 26 in the Bailey Mine Permit.)[1] In an order that we issued on December 31, 2002 in response to an earlier motion for partial summary judgment, we changed the Bailey Mine permit by deleting the references to Chapters 93 and 105. *Consol Pennsylvania Coal Company v. DEP*, 2002 EHB 1038 ("*Consol I*"). In response to petitions for reconsideration, we issued an Opinion and Order that added Chapter 93 back into the permit condition. *Consol Pennsylvania Coal Company v. DEP*, EHB Docket No. 2002-112-L (March 10, 2003) ("*Consol II*").

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[1] Condition 35 in the Eighty-Four mine permit is nearly identical:

> If permittee wishes to conduct full extraction mining in the revision area issued July 10, 2002 it must submit another permit revision application seeking approval pursuant to, among other things, 25 Pa. Code Chapters 86, 89, 93 and 105. Where full extraction mining affects the course, current or cross section of a watercourse (including intermittent and perennial streams), floodway or body of water (including wetlands) a permit is required under Chapter 105 as part of the permit authorizing full extraction mining. (No full extraction mining may occur in the Revision Area until such a permit revision is approved by the Department.)

Consol and Eighty-Four now have jointly filed another motion for summary judgment. The Department has filed a response in opposition to the Appellants' motion, as well as its own cross-motion for summary judgment.[2] The Wheeling Creek Watershed Conservancy and Citizens for Pennsylvania's Future ("Intervenors") oppose the Appellants' motion. Columbia Gas Transmission Corporation takes no position.

Chapter 105

Consol and Eighty-Four present the following issue:

> Whether DEP can require [Eighty-Four] to apply for and obtain an Encroachment Permit before [Eighty-Four] can conduct full extraction underground mining beneath surface waters.

(Memorandum p. 2.) Consol and Eighty-Four (hereinafter collectively referred to as "Consol") are making what would have appeared to be a straightforward request that we apply *Consol I*, which involved the Bailey Mine, to the Eighty-Four Mine permit. In *Consol I*, we held that the Department may not insist upon an encroachment permit pursuant to the Dam Safety and Encroachments Act (DSEA), 32 P.S. § 693.1 *et seq.*, and 25 Pa. Code Chapter 105 because underground mining beneath surface waters is not in and of itself an encroachment that is located in, along, across, or projecting into those surface waters. The Department argues that we were wrong and it has preserved the issue for appeal, but it does not contend that there is a material difference between Condition 35 in the Eighty-Four Mine permit and Condition 26 in the Bailey Mine permit.

The Department, however, has added a new twist in its motion and response. The Department argues that it may require an encroachment permit, not only for the mining (i.e. coal

[2] Although titled as motions for summary judgment, the motions are actually motions for *partial* summary judgment because there appear to be issues that go beyond Conditions 26 and 35. The standards for addressing motions for summary judgment are set forth in Pa.R.C.P. 1035.1-1035.5, which are incorporated into our rules pursuant to 25 Pa. Code § 1021.94.

extraction) itself, but also for the repair work that the mine operator will need to perform in the future in surface waters. In other words, the Department knows that mining is likely to harm the surface waters before the Department issues the mining permit. The Department predicts that in-stream repair work will be needed to mitigate the harm. The Department may, therefore, require the operator to obtain an encroachment permit in advance of mining authorizing that in-stream repair work. Permit Conditions 26 and 35 are, according to the Department, justified on that basis.

Despite our holding in *Consol I*, the Department's new argument gives us some pause because in-stream work, such as cutting a new channel, is the sort of encroachment that normally does require a permit. It is not clear, however, whether it is lawful and reasonable to require a permit in advance of mining, based upon a prediction that nonmining activity will occur, presumably as a prerequisite to the mining itself.

In light of the Department's new argument, we need to develop a thorough record on exactly what Conditions 26 and 35 mean. What is their purpose and intent? How are they to be implemented? We cannot adequately address whether the conditions are lawful and reasonable with respect to predicted in-stream work unless we fully understand them.

For example, the permit conditions cite 25 Pa. Code Chapter 86. As we discussed in *Consol I*, that chapter requires an operator to demonstrate that there is no presumptive evidence of potential pollution of the waters of the Commonwealth before a mining permit may be issued. 25 Pa. Code § 86.37(a)(3). In other words, Consol must prove that pollution will not occur as a result of its mining activities. *Harman Coal Company v. DER*, 384 A.2d 289, 290-91 (Pa. Cmwlth. 1978); *Rand Am v. DEP*, 1997 EHB 351, 360; *Magnum Minerals v. DER*, 1988 EHB 867, 892. Subsidence impacts can constitute pollution. *Consol I*, 2002 EHB at 1045-46. If the

Department is anticipating that there will be such a detrimental impact to waters of the Commonwealth that in-stream repair work will be necessary, is there not "presumptive evidence of potential pollution"? If there is presumptive evidence that pollution is going to occur, why is a mining permit being issued? If there is no presumptive evidence of potential pollution, why refer to Chapter 105? By referring to Chapter 105, is the Department as a practical matter conceding that operators need not comply with Chapters 86 and 89? Is it acceptable to cause pollution, so long as you show the Department how you are going to attempt to fix it in advance? The record in its current state does not allow us to answer these questions.

Perhaps the Department will explain that the predicted damage is only temporary. But that explanation raises questions of its own. How is the Department able to predict that the damage will only be temporary? Is temporary damage acceptable under Chapters 86 and 89, and if it applies, Chapter 93?

We also need a better understanding of what standard the Department intends to use in evaluating the Chapter 105 permit application for the in-stream repair work. The issuance of an encroachment permit often entails application of a harms/benefits analysis. 25 Pa. Code § 105.16. It may involve an alternatives analysis. *See, e.g.,* 25 Pa. Code § 105.18a. By requiring an encroachments permit, is the Department proposing that the operator must demonstrate that the benefits of mining clearly outweigh the harms of mining, including the adverse impacts visited upon the stream? Or is the Department simply proposing that the benefits of the in-stream repair work must outweigh the harms of the in-stream repair work? If the Department intends to use the in-stream work as a vehicle for evaluating and weighing the benefits and harms of the mining itself, that approach would arguably constitute a dramatic change in how mining is regulated in Pennsylvania. A similar change in approach, accomplished through rulemaking, has

given rise to continuing controversy in the context of regulating solid waste disposal. *See Tri-County Industries, Inc. v. DEP*, 818 A.2d 574 (Pa. Cmwlth.), *petition for allowance of appeal granted,* 179 MAL 2003 (Pa. Nov. 12, 2003). We cannot uphold the Department's approach in the context of summary judgment motions without a better understanding of what it is that we would be upholding.

If the Department does, in fact, intend to use the Chapter 105 permit for in-stream mitigation measures as a vehicle for evaluating the mining itself, its approach might prove to be little more than an attempted end run around our holding that the mining itself is not an encroachment within the scope of the DSEA. In other words, we must consider whether there is any practical or meaningful difference between requiring an advance DSEA permit for in-stream work (which might be allowed) and requiring a DSEA permit for the deep mining itself (which is not allowed). This question will need to be clarified to assess whether the Department has exceeded its authority or otherwise acted unlawfully. And to come full circle on the legal issues, if the Department's newly articulated approach survives the preceding inquiries, we may need to assess whether requiring a DSEA permit in advance of mining based upon a prediction that nonmining activity will be necessary, presumably as a prerequisite to the mining itself, is a change in approach that must be accomplished through rulemaking.[3]

There are also numerous important but unresolved issues of fact in these appeals. How is the Department able to predict that subsidence will occur?[4] How is the Department able to predict the nature of the harm in a particular waterway? How is the Department able to predict

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[3] Consol has preserved this administrative-law argument in its pending motion. We did not reach the rulemaking issue regarding the need for a DSEA permit for the mining itself in *Consol I* due to our finding that there is no statutory authority to demand such a permit. The issue may now be properly raised given the Department's new focus on the need for an advance DSEA permit for the in-stream work.

[4] Interestingly, the Department's argues in its reply not so much that *it* is making predictions. According to the Department, the mining industry is claiming to be able to make predictions and the Department has apparently accepted that claim.

what remedial work will be necessary or appropriate? To what extent are these predictions reliable? The Department cites to computer models and technical principles, but Consol argues that it is not currently possible to accurately predict either the extent to which a stream will suffer damage or whether a stream can be effectively restored. (Hasenfus affidavit.)[5] These are precisely the type of issues that we are loathe to address in the context of summary judgment.

The Department argues that there are "good and practical reasons" for requiring an encroachment permit in advance. It states that delay in obtaining a permit after the fact of the damage is "almost always detrimental to the stream and the aquatic communities that live, or once lived" in the stream.[6] According to the Department, requiring permits in advance reduces the need for emergency permits, reduces administrative burdens, and allows for more informed public participation. Of course, if the law does not allow for this approach, whether it is a good idea or not is beside the point. But beyond that, all of the proposed justifications raise issues of fact.

Last but certainly not least, the parties have presented their positions on the encroachment question in a manner that is largely divorced from the realities of the Bailey and Eighty-Four mines. This approach is not atypical of summary judgment motions, but it is contrary to our strong preference to adjudicate specific cases based upon real circumstances. We know almost nothing about either mine or the surface waters that may be at issue. It may be that the unique facts will not ultimately make a difference, but it is also possible that they could be relevant. For example, the record reflects that the Department has now approved mining in two of the three panels of the Bailey Mine revision area. We are not aware that anyone has complained or

[5] The Department in its reply asks the following rhetorical question: If it is not possible to predict damage, can an operator affirmatively demonstrate that there is no presumptive evidence of potential pollution? To us, the question is more than merely rhetorical; it needs to be answered.

[6] Again, we look forward to a better understanding of why permits are issued where such detrimental effects are anticipated.

appealed from those revisions. It would seem that the encroachment question was not problematic for those two panels. Is it truly problematic for the remaining panel? We do not know. We do know that we are not in the business of resolving purely academic disputes. *Goetz v. DEP*, 2001 EHB 1127, 1134.

In sum, for all of these reasons, the only appropriate course at this point in light of the Department's insistence that it is actually requiring a permit for in-stream repair work is to proceed to a hearing on the merits. So that there is no confusion, however, we emphasize that the time and opportunity for reconsideration of our prior holding that a Chapter 105 permit is not required for the deep mining itself has passed.

Chapter 93

The second issue that Consol presents in support of its motion for summary judgment is as follows:

> Whether DEP can require [Consol] to submit a second permit revision application pursuant to 25 Pa. Code Chapter 93 before [Consol] can conduct full extraction underground mining beneath surface waters in the circumstances present here.

The Department responds that it is actually the Department that is entitled to summary judgment because Chapter 93 unquestionably provides the Department with legal authority to protect surface waters that overlie underground mines from the adverse effects of subsidence. The Intervenors, perhaps more precisely, oppose Consol's motion because, they argue, the water quality standards in Chapter 93 apply to the subsidence impacts of underground mining. In other words, they do not cite to Chapter 93 as a freestanding source of authority; Chapter 93 sets the standards for implementing the authority to control or prevent pollution that is found elsewhere.

In *Consol I*, we deleted the reference to Chapter 93 in Condition 26 because we held that Chapter 93 is limited by its own terms to the regulation of "discharges," and because we found

that subsidence is not a "discharge," we concluded that Chapter 93 does not apply. Our holding engendered petitions for reconsideration, which we granted, not on the merits, but because Consol had not clearly raised the issue in its first motion. *Consol II.* Consol and the Department have clearly raised the issue in the motions that are now before us.

Now that we have refocused on the issue, we have the same hesitation resolving the Chapter 93 question on summary judgment as we have with resolving the Department's new Chapter 105 issue on summary judgment.[7] We do not know exactly why the Department has included a reference to Chapter 93 in Conditions 26 and 35 or how the Department intends to implement the conditions with respect to Chapter 93. If we do not fully understand the meaning, purpose, and intent of the conditions, we are not fully equipped to rule whether they are lawful and reasonable.

As previously discussed, Chapter 86, also referenced in the permit, prohibits the issuance of a permit if there is presumptive evidence of potential pollution. Chapter 93 allows for what might technically and in its most literal sense constitute pollution of Pennsylvania's equivalent of Tier I waters so long as existing uses are protected, and what might technically constitute pollution of High Quality Waters with appropriate justification. How does the Department intend to simultaneously implement *both* Chapters 86 and 89, and Chapter 93, in permitting approved subsidence? Put another way, why is it lawful and appropriate to evaluate Consol's

[7] It is no accident that our discussion of Chapter 93 parallels our discussion of Chapter 105. Consol's key arguments as we understand them essentially boil down to one point: The regulation of the adverse impacts of mine subsidence on surface waters was debated in the regulatory context, and the resolution of that debate is reflected in Chapter 89, Subchapter F. Nothing else applies, not even the Clean Streams Law. As Consol puts it, the issues being litigated in this case are nothing more than after-the-fact justifications "for what was a decision by a handful of 'new' DEP bureaucrats to impose 'new' regulatory requirements in the absence of any current statutory or regulatory authority." In our view, there is little doubt that Consol is correctly reading Subchapter F to be limited in certain respects to perennial streams. The issues being debated here arise because of our holding in *Consol I* that Subchapter F is not preemptive. Had we held in *Consol I* that Subchapter F was preemptive, the instant motions would probably not be before us.

mining request pursuant to Chapter 93, which defines allowable pollution in certain settings, if Chapters 86 and 89 do not contemplate that there will be any pollution as a result of mining operations? Or is it that Chapter 93 defines the term "pollution" as that term is used in Chapter 86? Does satisfying the antidegradation standards of Chapter 93 also satisfy the requirement in Chapters 86 and 89 that the hydrologic balance be protected? If Chapters 86 and 89 brook *no* pollution or adverse alteration of the hydrologic balance, but Chapter 93 allows some pollution so long as uses are protected, Consol may have a point when it says that the reference to Chapter 93 is contradictory and/or superfluous.[8]

Thus, there is an inherent analytical tension between the broad and literal definition of "pollution" found in such places as Chapter 86 and the Clean Streams Law, 35 P.S. § 691.1, on the one hand, and the concepts of degradation and protection of uses as embodied in Chapter 93 on the other hand. The parties gloss over it in their briefs.[9] The inconsistency, if it is an inconsistency, has been largely ignored, and we managed to skirt the issue in *Consol I. See* 2002 EHB at 1046. We did note, however, that our Supreme Court very recently spoke to the issue, albeit in the context of a takings analysis. *Id.*, 2002 EHB at 1046 n.6, quoting *Machipongo Land and Coal Company v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 799 A.2d 751, 774 (Pa.), *cert. denied*, 123 S.Ct. 486 (2002) ("The nature of the public use of the water should not be the focus of our inquiry. To the contrary, we have

[8] We acknowledge that Consol is attempting to loosen, not tighten, the review standards, but once the question of an internally inconsistent permit condition is raised and vigorously pursued by all of the parties (for and against), the inconsistency must be resolved in accordance with the law, wherever that may lead.

[9] For example, the Intervenors state that the Department may apply the antidegradation requirements *and* the Clean Streams Law's prohibition against causing pollution, which might suggest that these are two different things. If so, which one applies here in the event of a conflict? The Department states that use-protection is the "floor" for measuring impacts to surface waters. What does that mean? Where does the mining regulations' requirement that there be no presumptive evidence of pollution fit in relation to this so-called "floor"?

explained that 'we believe that the public has a sufficient interest in clean streams alone regardless of any use thereof....'") (*quoting Commonwealth v. Barnes & Tucker Company*, 319 A.2d 871 882 (Pa. 1974)). The matter is further complicated by the requirement to protect the hydrologic balance set forth in both Chapters 86 and 89.[10]

The issue is not simply an academic one. For example, Consol's expert points out that subsidence in a particular stream under discussion in his affidavit caused pooling. Pooling is a change in the flow of a stream and, as discussed above, fits within the broad definition of pollution. The expert argues, however, that the pooling was not shown to have had "any adverse impact on the designated uses of [the stream] for aquatic life and as a warmwater fishery...." (Exhibit 2 ¶ 12.) If precisely this sort of event is anticipated in the permit application, should the permit be issued? A strict interpretation of Chapters 86 and 89 might say no, but Chapter 93 might allow it.

Assuming, arguendo, that there is no incongruity in applying both Chapters 86 and 89, as well as Chapter 93, the Department will need to explain how it proposes to apply Chapter 93 concepts to mine subsidence. Consol complains that "some type of approval" is being required under Chapter 93, and we think that characterizing the Department's demand as being somewhat vague is warranted. We do not believe it would be appropriate to hold as a matter of law that the permit conditions are lawful without some understanding of how they are to be implemented. For example, does the Department in fact propose to authorize flow changes so long as existing or regulatorily prescribed uses are protected? How will the Department determine that uses will be protected? (It will be recalled that Consol claims that such predictions are impossible.) Will

[10] Still further, what appears to be a slightly different standard is found in 25 Pa. Code § 89.142a(h)(1), which requires mining to be planned and conducted "in a manner which maintains the value and reasonably foreseeable uses of perennial streams, such as aquatic life; water supply; and recreation as they existed prior to coal extraction beneath streams."

the Department establish water-quality based limits on subsidence? Are there High Quality Waters at these sites, thereby necessitating social and economic study? If so, how will this additional evaluation interact with the evaluations required under Chapters 86 and 89? What can an operator do in advance vis-à-vis subsidence to meet the precise standards mandated by Chapter 93?

Putting these preliminary questions regarding the meaning of the permit conditions aside, our original ruling (and Consol's continuing argument) regarding Chapter 93 was (and is) premised upon the "Scope" section of Chapter 93, which reads as follows:

> This chapter sets forth water quality standards for surface waters of this Commonwealth, including wetlands. These standards are based upon water uses which are to be protected and will be considered by the Department in its regulation of discharges.

25 Pa. Code § 93.2(a).

The Department in its materials describes what purports to be its current interpretation of Section 93.2(a), as well as its interpretations of the terms "discharge" and "nonpoint source." The Department, however, provides us with no record to support its claim that these are in fact the Department's official, programmatic interpretations and not just, say, arguments of counsel. We need to develop *record* evidence of the Department's various interpretations.

The Department argues that we must defer to its interpretations. The Department concedes, however, that its "regulatory interpretation may not be inconsistent with the language of the regulation." (Memorandum p. 15.) The existing record does not convince us that the Department's interpretation of Section 93.2 is, using the Department's phrase, "consistent" with the regulation. Further, Consol correctly points out that no deference is due when the agency has advanced inconsistent or conflicting interpretations. *Gibson v. Unemployment Compensation Board Review*, 682 A.2d 422, 424 (Pa. Cmwlth. 1996). Consol states that the Department has

never applied Chapter 93 to mine subsidence in the past. If the record bears out Consol's claims of inconsistent interpretations, it could affect our resolution of this question. This is yet another example of why we need to deal with these appeals by way of an adjudication, not summary judgment.

Turning to the amount of deference due, the Department does not insist upon blind deference, but at one point states that we must defer if its interpretation is "reasonable." (Memorandum p. 16.) At another point, it says we must defer unless its interpretation is "clearly erroneous." (Memorandum p. 17.) The Department does little, however, to convince us that its interpretation (that Chapter 93 applies to mine subsidence) is, in fact, reasonable or something other than clearly erroneous. The Department gets quite far afield with a discussion about the Land Recycling and Environmental Remediation Standards Act ("Act 2"), erosion and sedimentation controls, total maximum daily loads ("TMDLs"), water supply withdrawals, and the like, but neglects the issue at hand: the reasonableness of interpreting Chapter 93 in such a way that it applies to mine subsidence. Suggesting that mine subsidence is not a distinct and difficult issue and instead may be lumped together with all other activities affecting waters of the Commonwealth is, perhaps, an oversimplification that does more to cloud than clarify the issue.

There is a great deal of discussion in the parties' briefs regarding *Oley Township v. DEP*, 1996 EHB 1098. Perhaps too much. *Oley Township* does not hold that Chapter 93 applies to *all* nondischarge related activities. Air emissions have some effect on water resources, but no one seems to be suggesting in this case that air pollution control permits are to be evaluated pursuant to Chapter 93. We also do not think that it is accurate to suggest that the Board was squarely faced with or that it definitively held that Chapter 93 applies to all pollution-causing activities in *Oley*. *Oley* turned on the Department's failure to evaluate the effect of a water withdrawal on

wetlands. Because there was no evaluation of any kind, we did not reach the question of how much of an effect on the wetlands would have been acceptable. Here, as discussed above, the difference may be more significant. Still further, we were not faced in *Oley Township* with the problem that we face in this mining case, which is how to square Chapters 86 and 89 (no presumptive evidence of pollution; protection of hydrologic balance) with Chapter 93 (no degradation that interferes with existing uses). We do not question the precedential value of *Oley Township*; we are merely suggesting that its applicability in this case regarding the Chapter 93 issue may have been exaggerated.[11]

In *PUSH v. DEP*, 1999 EHB 457, *aff'd,* 789 A.2d 319 (Pa. Cmwlth. 2001), a mining case, we noted that *Oley Township* was not perfectly clear regarding the distinction between pollution in the strictest sense and degradation that interferes with uses. 1999 EHB at 560. This was not intended as self-criticism, because, as we just discussed, there was no need to distinguish between those concepts (if there is, in fact, any distinction) in *Oley Township*. *PUSH* suggests, but does not clearly hold, that it is the protection of uses that matters, but the issue was not squarely presented or necessary to the result in that case either. *See* 1999 EHB at 560 n.13.

Finally, as we said with regard to Chapter 105, these questions would best be decided in the real-life context of the Bailey and Eighty-Four mines, not in a vacuum. Rather than try to deal with these issues hypothetically, we will assess the issue in light of the surface waters present above or near the revision areas.

New Performance Standard

Consol's third argument is as follows:

> Whether DEP properly imposed new permit performance

[11] Similarly, the parties are wrong in suggesting that the precise issues presented here (e.g. the potential conflict between Chapters 86 and 89 and Chapter 93; the "scope" of Chapter 93) were actually debated or decided in *Birdsboro v. DEP*, 2001 EHB 377.

> requirements on [Consol] relating to mining beneath Intermittent Streams and other surface water bodies not specifically covered by 25 Pa. Code Chapter 89.

The Department denies that it has created a new *performance* standard. (Response, ¶ 37.) Consol in its memorandum qualifies its argument by stating: "*To the extent that* Condition 26 and Condition 35 impose a performance requirement," they are invalid. We agree that it is unclear and disputed whether the conditions create a performance standard. The conditions on their face appear to be limited to the permitting context. Questions regarding a performance standard might not be ripe at this stage.[12] As we have already and, perhaps, painfully made clear, we will need to evaluate the meaning of the conditions based upon a complete record. That evaluation will include Consol's third claim that the Department has actually created a new performance standard.

We would note, however, that there appears to be very little difference between Consol's current argument regarding Chapter 89, Subchapter F and the arguments that we rejected in *Consol I.* Consol argues that Chapter 89, Subchapter F, in effect, authorizes the destruction through subsidence of intermittent streams; by virtue of this part of Chapter 89, Consol is free to pollute or even eliminate intermittent streams. Consol also suggests that it is free to pollute or eliminate perennial streams so long as Consol repairs them after the fact, but that it is excused from repairing adverse impacts to perennial streams if it is not economically feasible to do so. We held in *Consol I* that such counterintuitive affronts to the fundamental principles that would normally apply to all waters of the Commonwealth as embodied in the Clean Streams Law, Chapter 86, and the remainder of Chapter 89 would need to be unequivocally expressed, and no such expression is to be found. To the contrary, there is a savings clause in the Bituminous Mine

[12] We acknowledge the Intervenors' point that there may be little analytical difference between permitting and performance standards when it comes to an authority issue. We will explore the point further as we move forward with the appeals.

Subsidence and Land Conservation Act. *Consol I*, 2002 EHB at 1047, citing 52 P.S. § 1406.9a(d). Further, we noted that the Subchapter F constraints are not necessarily incompatible with other statutory and regulatory constraints. This is not a case where we are forced to choose between contradictory laws. In short, we found that Subchapter F should not be read as dispensation to freely disregard all other regulatory requirements. It is not immediately apparent why our reasoning in these respects as it relates to *permitting* standards should not apply with equal force to *performance* standards, to the extent that issue has been properly raised.

For the reasons set forth above, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL COMPANY AND EIGHTY-FOUR MINING COMPANY	:	
v.	:	**EHB Docket No. 2002-112-L (Consolidated with 2002-178-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and COLUMBIA GAS TRANSMISSION CORPORATION, WHEELING CREEK WATERSHED CONSERVANCY, and CITIZEN'S FOR PENNSYLVANIA'S FUTURE, Intervenors	:	

ORDER

AND NOW, this 1st day of December, 2003, the Appellants' and the Department's motions for summary judgment are denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Dated: December 1, 2003

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

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Michael J. Heilman, Esquire
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SECHAN LIMESTONE INDUSTRIES, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-222-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor and FRIENDS OF McCONNELL'S MILL STATE PARK, INC., Intervenor	:	**Issued: December 3, 2003**

OPINION AND ORDER ON PETITION TO INTERVENE BY COUNTY OF LAWRENCE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board grants the Petition to Intervene of a County which is the site of a proposed landfill. The County contends that it will be impacted in various ways if the proposed landfill is approved. The County, at this stage of the litigation, has sufficiently demonstrated that it has a substantial, direct, and immediate interest in the subject matter of the Appeal. The Appellant retains a continuing right to challenge the County's standing at the hearing on the merits.

OPINION

Background

Presently before the Environmental Hearing Board (Board) is the Petition to Intervene filed

by the County of Lawrence (Lawrence County). The Appeal was filed by Sechan Limestone Industries, Inc. (Sechan Limestone) after the Pennsylvania Department of Environmental Protection (Department) denied its permit application to construct and operate a 40-acre Class I Residual Waste Landfill in the vicinity of McConnell's Mill State Park. The proposed landfill would be located on a single piece of land located both in Butler County and Lawrence County. Sechan Limestone vigorously opposes the Petition to Intervene. The Department is in favor of Lawrence County's intervention as a party while the other intervenors filed no response to the Petition to Intervene.

Lawrence County asserts it is an interested party and has taken an active role in opposing the issuance of the permit by hiring engineers and attorneys to review the permit applications and submit comments. The Petition to Intervene contends, *inter alia*, that Lawrence County's infrastructure, emergency management system, law enforcement services, and citizens will all be negatively impacted by the proposed landfill. It further contends that it should be allowed to intervene because the Department will not present all of the evidence and arguments it contends support the denial of Sechan Limestone's permit application. These arguments specifically include "evidence concerning the harms and benefits associated with the proposed landfill and [Sechan Limestone's] failure to properly address and assess those harms and benefits. ..." (Petition to Intervene, Paragraph 26).

Sechan Limestone argues that Lawrence County's Petition to Intervene should be denied because its contentions do not constitute an "immediate interest" necessary to support legal standing and thus grant it intervenor status. Sechan Limestone contends that since the Department based its

denial on the harms benefit requirements of the regulations even if the Board would reverse the Department's decision no permit would issue at that point. Instead, the Department would still have to complete the technical review of the permit application and render a decision. Only at that time, according to the Appellant, should Lawrence County have an opportunity to raise any arguments or objections to the approval of a landfill permit.

Standard for Intervention

The standard for intervention in proceedings before the Board is set forth in Section 4(e) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7516, which states that "[a]ny interested party may intervene in any matter pending before the Board." *Id.* at § 7514(e). The Commonwealth Court has defined "any interested party" in the context of intervention to mean "any person or entity interested, i.e. concerned, in the proceedings before the Board. The interest required ... must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will either gain or lose by direct operation of the Board's ultimate determination." *Browning-Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060-61 (Pa. Cmwlth. 1991); *Sechan Limestone Industries, Inc. v. DEP*, EHB Docket No. 2003-222-R (Opinion issued November 20, 2003); *Orix-Woodmont Deer Creek I Venture L.P. v. DEP*, 2001 EHB 82, 83; *Ainjar Trust v. DEP*, 2000 EHB 75, 78; *Connors v. State Conservation Commission*, 1999 EHB 669, 670.

A person or entity seeking to intervene has standing if its interest in the matter is substantial,

direct and immediate. *Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226, 231-233 (Pa. Cmwlth. 1992) *petition for allowance of appeal denied*, 608 A.2d 32 (Pa. 1992); *Orix-Woodmont*, at 84. For an interest to be "substantial" there must be a discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law. *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282. To be "direct' and "immediate" there must be a causal connection between the action at issue and the alleged harm. *Connors*, 1999 EHB at 671.

An organization has standing to intervene if at least one of its members has standing. *Orix-Woodmont*, 2001 EHB at 84; *Rand Am, Inc. v. DEP*, 1995 EHB 998, 1000.

Discussion

We are satisfied that Lawrence County has demonstrated a substantial, immediate and direct interest in the subject matter of this appeal. Citizens of Lawrence County live, hike, fish and enjoy nature and wildlife at McConnell's Mill State Park and in the vicinity of the proposed landfill. They also drink from a creek that could be affected by the landfill. The County contends that its infrastructure, emergency management system, law enforcement services, and citizens will be specifically and negatively impacted by the proposed landfill. Its interest clearly is more than a general interest in the proceedings. Whether the landfill would actually affect the County in the myriad ways it contends is a factual determination that can not be decided now. At this stage of the proceedings, in order to demonstrate standing, Lawrence County need only show that there is an

objectively reasonable threat that adverse effects to it will occur if the permit decision of the Department is reversed. This it clearly has done.

We also reject Sechan Limestone's argument that somehow Lawrence County should be denied the right to present evidence on the harms benefits test to avoid piecemeal appeals. Either this is a final action of the Department or it is not. If it is, then all interested parties should have the right to participate in the Board's *de novo* hearing of this issue.

Since Sechan Limestone raises factual challenges to Lawrence County's standing this issue will be resolved at the hearing on the merits. In the meantime, we are satisfied that Lawrence County has sufficiently demonstrated in its petition that it has substantial, immediate and direct interests in this Appeal sufficient to allow us to grant its Petition to Intervene.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SECHAN LIMESTONE INDUSTRIES, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-222-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor and FRIENDS OF McCONNELL'S MILL STATE PARK, INC., Intervenor	:	

ORDER

AND NOW, this 3rd day of December, 2003, the Petition to Intervene filed by County of Lawrence is ***granted***. The caption is amended as follows:

SECHAN LIMESTONE INDUSTRIES, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-222-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor FRIENDS OF McCONNELL'S MILL STATE PARK, INC., Intervenor and COUNTY OF LAWRENCE, Intervenor	:	

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: December 3, 2003

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

KING DRIVE CORPORATION and RICHARD C. ANGINO, PRESIDENT	:	
v.	:	**EHB Docket No. 2003-296-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 4, 2003**

OPINION AND ORDER GRANTING MOTION TO DISQUALIFY COUNSEL

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department's motion to disqualify Richard C. Angino, Esquire as trial counsel for Appellant King Drive Corporation is granted. Pennsylvania Rule of Professional Conduct 3.7 prohibits Mr. Angino from acting as an advocate for the corporate appellant at trial—which includes both supersedeas and final merits hearings. Rule 3.7 does not prohibit Mr. Angino from continuing to represent the corporate appellant in pre- and post-hearing proceedings, nor from representing himself throughout all stages of this appeal.

BACKGROUND

This matter concerns an appeal filed on October 30, 2003 by King Drive Corporation (KDC) and its President, Richard C. Angino from an order issued to them on October 22, 2003 by the Department of Environmental Protection (DEP).[1] The Order was issued pursuant, *inter*

[1] The October 22nd Order was specifically addressed to:

alia, to the Clean Streams Law[2] and the Dam Safety and Encroachments Act (DSEA).[3] KDC owns an approximately 650-acre resort called Felicita Golf, Garden, Spa Resort located on Fishing Creek Valley Road in Harrisburg, Dauphin County (the Site). Richard C. Angino is the president and sole stockholder of KDC, and he controls the activities of KDC's employees.

During two recent inspections, DEP determined that KDC had excavated fill from the channel and floodway of an Unnamed Tributary to Fishing Creek located at the Site, without having first obtained a water obstruction and encroachment permit. DEP also concluded that the stream channel of the tributary is unstable and eroding as a result of the alleged excavation. Citing Appellants with violations of the DSEA and the Clean Streams Law for failing to obtain a permit prior to excavating the stream channel and floodway, DEP's Order directed KDC to: (1) restore the stream channel to its original cross section and contours within fifteen days; (2) temporarily stabilize the tributary's stream banks with annual rye grass and mulch within forty-eight hours of restoring the channel and floodway; and, (3) permanently stabilize the tributary's stream banks and floodway with a permanent vegetative cover by May 15, 2004.

King Drive Corporation
Richard C. Angino, President
Angino & Rovner, P.C.
4503 North Front Street
Harrisburg, Pennsylvania 17110

See Notice of Appeal (attached Order dated October 22, 2003, at p. 1). The form of address in the Order is noticeably ambiguous as to the precise recipients of the action. The list of parties stated in the Notice of Appeal included the entity "Angino & Rovner, P.C." as a party, and the original caption of this appeal consequently followed that list. However, the parties filed a joint stipulation on December 1, 2003 informing the Board that the October 22nd Order was not directed to "Angino & Rovner, P.C." and that the Order should have indicated that it was being sent to KDC and Mr. Richard Angino, President "c/o" Angino & Rovner, P.C. The parties jointly requested that "Angino & Rovner, P.C." be dismissed as a party and the caption amended, and an Order was issued on December 3, 2003 amending the caption by removing Angino & Rovner, P.C. as a party. Notably, there was no indication in the joint stipulation that the October 22nd Order was not also directed to Mr. Angino, an individual distinct from the corporate entity, albeit acting in his capacity as an officer of KDC. Moreover, according to DEP's motion papers the Order was issued to both KDC and to "Richard C. Angino in his capacity as president" of KDC; Appellants do not dispute this description in their response to the Motion.

[2] Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1. *et seq.*

[3] Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. § 693.1. *et seq.*

The law firm of Angino & Rovner, P.C., and specifically Richard C. Angino, Esquire, entered their appearance as attorneys for both Appellants through the filing of the notice of appeal. Appellants contest the factual and legal bases of DEP's Order, contending that they did not excavate fill from the channel and floodway, and maintaining that the stream channel is not unstable and eroding. Appellants also assert that the activities they recently conducted along the Unnamed Tributary at the Site do not come within the scope of the DSEA, the Clean Streams Law or their implementing regulations. They consequently object that they were not required to obtain a water obstruction and encroachment permit, that the fundamental premises of the Order are incorrect, and the Order is therefore invalid.

Presently before me is a Motion to Disqualify Counsel, filed by DEP on November 13, 2003, seeking to disqualify Mr. Angino from acting as an advocate at trial for KDC. The motion raises an issue nearly identical to a similar motion previously ruled on in a related case. *See DEP v. Richard C. Angino, King Drive Corporation and Sebastiani Brothers*, Dkt. No. 2003-004-CP-C, 2003 Pa. Envirn. LEXIS 31 (EHB, May 13, 2003) (granting motion and precluding Angino from acting as advocate on behalf of corporate defendants at merits hearing, but not from representing corporate defendants in pre- and post-hearing procedures, nor from representing himself throughout proceedings). The parties have essentially reiterated their same positions on the question in the present motion.[4] There is a slight twist present here; DEP argues that Mr. Angino should be disqualified from acting as an advocate for KDC at any supersedeas hearing held in this matter, as well as any merits hearing. In addition, the complaint in *DEP v. Angino* specifically named Richard C. Angino as an individual party defendant; here, the Order is

[4] As in the earlier ruling in *DEP v. Angino*, DEP's Motion here does not seek to disqualify the law firm Angino & Rovner, P.C. from acting as counsel for Appellants, nor does it seek to disqualify Mr. Angino from representing KDC during pre- and post-hearing proceedings. DEP also does not contend that Mr. Angino is not entitled to represent himself as an individual.

directed to "Richard C. Angino, President." In other words, the Order is addressed to Mr. Angino in his capacity as an officer of the corporation, and DEP implies that, for purposes of the advocate/witness question presented, addressing the Order separately to Mr. Angino as an officer of the corporation is distinct from simply naming him as an individual. I find these distinctions insignificant and will hold to the course established in my ruling on the same issue in *DEP v. Angino*, 2003 Pa. Envirn. LEXIS 31.

DISCUSSION

Mr. Angino's representation of KDC at the hearing on the merits in this matter would violate Rule 3.7 of the Pennsylvania Rule of Professional Conduct (RPC), and must therefore be prohibited. The Board "has the authority to disqualify counsel in a particular case, not for purposes of imposing discipline or even necessarily for purposes of protecting the interests of a represented party, but rather, for purposes of protecting the interests of the opposing party and ensuring the orderly and just conduct and disposition of proceedings that are before it." *DEP v. Whitemarsh Disposal Corporation, Inc.*, 1999 EHB 588, 590; *see also DEP v. Angino*, 2003 Pa. Envirn. LEXIS 31, at *5-*6. *See generally Estate of Pedrick*, 505 Pa. 530, 542 (1984); *McCarthy v. SEPTA*, 772 A.2d 987, 991 (Pa. Super. 2001).

RPC 3.7(a) states:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

RPC 3.7(a). DEP asserts, and Appellants admit, that Mr. Angino will be a necessary witness at the hearing of this appeal. The prohibition of RPC 3.7 clearly applies here; moreover, with respect to the stated exceptions there is only a conclusory statement in Appellant's opposition brief that disqualification of Mr. Angino from representing KDC at a hearing will work

substantial hardship on KDC. However, Appellants provide no evidentiary substance to support that assertion, and I can discern no substantial harm to the corporation. *See DEP v. Angino*, 2003 Pa. Envirn. LEXIS 31, at *11-*13. The considerations animating the decision in *DEP v. Angino*, 2003 Pa. Envirn. LEXIS 31 apply equally in this appeal; I need not repeat at length those same considerations but rather direct the parties to the rationale set forth in the related case. *See DEP v. Angino*, 2003 Pa. Envirn. LEXIS 31, at *7-*13.[5] I instead focus on the two minor distinctions raised by the present motion.

RPC. 3.7 states that a "lawyer shall not act as advocate *at a trial* in which the lawyer is likely to be a necessary witness." DEP argues that, in the EHB context, this prohibition includes a supersedeas hearing as well a final hearing on the merits. Appellants do not dispute this argument in their opposition. I agree with DEP that, for purposes of the application of RPC 3.7 to Board proceedings, there is no material distinction between a supersedeas hearing and a final hearing on the merits. Consequently, I will preclude Mr. Angino from acting as an advocate for KDC at any supersedeas hearing that may be held in this matter, as well as any final hearing on the merits.

Second, Mr. Angino is not prohibited by RPC 3.7 from representing himself at any hearing in this matter. The Order was addressed both to KDC and to Richard C. Angino, President, and both the corporation and Mr. Angino the individual are currently parties to this appeal. Although the Order apparently intended to name Mr. Angino only in his capacity as an officer of the corporation, he was still named as an individual—separate and distinct from the

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[5] Appellants' reliance on *Angino v. Confederation Life Insurance Co.*, 37 Pa. D. & C.4th 38 (Pa. C.P. Ct. 1997) is misplaced. DEP's motion requests that Mr. Angino be prohibited from representing the *corporation KDC* at a supersedeas or final merits hearing in this appeal. That case held that an attorney/witness could not be prohibited by RPC 3.7 from representing himself, *pro se*, in the proceeding before the court. *Id.* at 41-44. The *Angino* court did not address the questions presented here. Moreover, DEP does not contest Mr. Angino's right to represent himself, *pro se*, despite the fact that he is a necessary and key witness in this appeal.

corporate entity—and the Order appears to cite both Mr. Angino and KDC with violations of the DSEA and the Clean Streams Law. Thus, Mr. Angino is not precluded from representing himself throughout this action. *See DEP v. Angino*, 2003 Pa. Envirn. LEXIS 31, at *12 n.4.

Finally, the following discussion from my earlier ruling applies with equal force here:

> Mr. Angino is not precluded by my decision from participating in all pre- and post-hearing procedures on behalf of KDC . . . . *See First Republic Bank v. Brand*, 51 Pa. D. & C.4th 167, 190 (2001) (consensus in Pennsylvania is that an attorney-witness is still permitted to participate in pretrial activity); *see also Caplan v. Fellheimer, Eichen, Braverman & Kaskey*, 876 F. Supp. 710, 711 (E.D. Pa. 1995). Thus, Mr. Angino will still be able to apply his knowledge of the events giving rise to this action for the benefit of [KDC] during pre-trial proceedings and trial preparation. Moreover, RPC 3.7 specifically provides that a lawyer/witness's law firm is not vicariously disqualified along with an attorney unless either RPC 1.7 or RPC 1.9 is violated, and DEP has not asserted any violation of RPC 1.7 or 1.9. *See Davisair Inc. v. Butler Air Inc.*, 40 Pa. D. & C.4th 403, 406 (1998) (RPC 3.7 "disqualifies only the lawyer who will offer testimony on contested issues; other lawyers within the law firm may continue to represent the client at trial"). The other members of Mr. Angino's law firm, Angino & Rovner, are not prohibited from presenting the case at the hearing on behalf of KDC . . . . Mr. Angino may select another member of his law firm as hearing counsel and continue to direct the litigation on behalf of [KDC].

DEP v. Angino, 2003 Pa. Envirn. LEXIS 31, at *11-*12 (footnote omitted).

Accordingly, I enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KING DRIVE CORPORATION and RICHARD C. ANGINO, PRESIDENT	:	
v.	:	**EHB Docket No. 2003-296-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 4th day of December, 2003, it is hereby ORDERED as follows:

1. The Department's Motion to Disqualify Counsel is granted;

2. Richard C. Angino, Esquire is precluded from acting as advocate on behalf of King Drive Corporation (KDC) at all supersedeas and final merits hearings held in this appeal, but he may continue to represent KDC during pre- and post-hearing procedures;

3. Richard C. Angino, Esquire may continue to represent himself (*i.e.*, Appellant Richard C. Angino, President) *pro se* throughout all stages of this action; and

4. The law firm of Angino & Rovner, P.C. shall not be disqualified from representing KDC at any hearing held in this appeal.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: December 4, 2003

Service list on next page.

EHB Docket No. 2003-296-C

c: **Via Regular Mail:**

DEP Bureau of Litigation
Attention: Brenda Houck, Library

Via Telefax and Regular Mail:

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SECRETARY TO THE BOARD

BOROUGH OF ROARING SPRING and ROARING SPRING MUNICIPAL AUTHORITY; APPLETON PAPERS, INC.; and ROARING SPRING AREA CITIZENS COALITION	:	**EHB Docket No. 2003-106-C (Consolidated with EHB Dkt. No. 2003-111-C and EHB Dkt. No. 2003-121-C)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW ENTERPRISE STONE & LIME COMPANY, INC., Permittee	:	**Issued: December 30, 2003**

OPINION AND ORDER ON APPELLANTS' PETITIONS FOR SUPERSEDEAS

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

Appellants' supersedeas petitions are denied. Appellants failed to meet the criteria for superseding a noncoal surface mining permit amendment which allows the permittee to mine a section of its limestone and dolomite quarry to a lower depth. In particular, Appellants did not prove they will suffer irreparable harm during the pendency of this appeal.

BACKGROUND

This consolidated matter involves three third-party appeals from a revision to Noncoal Surface Mining Permit No. 4274SM11 issued by the Department of Environmental Protection (DEP) to New Enterprise Stone & Lime Company, Inc. (New Enterprise) on April 7, 2003.[1]

[1] The Borough of Roaring Spring and the Roaring Spring Municipal Authority filed a notice of appeal on May 5, 2003; Appleton Papers, Inc. filed its appeal on May 6, 2003; and the Roaring Spring Area Citizens Coalition filed an appeal on May 22, 2003. The three appeals were subsequently consolidated by Order dated July 21, 2003.

New Enterprise operates the Roaring Spring Quarry, a limestone and dolomite quarry located in Taylor Township, Blair County, Pennsylvania. The permit has been revised several times over the years, having been previously amended in March 2000. As part of the 2000 permit revision, New Enterprise was authorized to mine Phase I—an approximately 60-acre section of limestone and dolomite reserves on the northern side of the quarry—down to an elevation of 1000 feet mean sea level (msl).[2] The essence of the April 2003 permit revision (the Permit Revision), and the source of the current dispute, is the permission to mine the Phase I quarry section from a depth of 1000 ft msl to elevation 950 ft msl.

Appellants are concerned that the pumping of groundwater associated with lowering the depth of the quarry to 950 ft msl will have a detrimental impact on water resources in the area, particularly on the Roaring Spring—an extraordinary spring located in the Borough of Roaring Spring. The Spring, situated about a mile to the south of the quarry sump, currently issues over 6,500,000 gallons of water a day. The Borough and the Roaring Spring Municipal Authority are concerned because the Borough depends on the Spring for its public water supply. Appleton Papers has an interest in protecting the Spring because it operates a pulp and paper mill which relies on the Spring as the source of more than four million gallons of water used daily in its manufacturing processes. Appellant Roaring Spring Area Citizens Coalition (RSACC) is an association of area residents who use local water resources, specifically Plum Creek and Halter Creek, for recreational purposes. They are anxious about potential effects of quarry pumping on the water quality of these streams and consequent impacts to aquatic life the streams support.

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[2] *See* Joint Stipulation of Facts (Jt. Stip.), at ¶ 4; Affidavit of John Showalter, at attached exhibit A (March 29, 2000 permit revision); Exh. S-31 (Module 8 Operations Map). The parties stipulated as to the authenticity and admissibility of all documents identified in their exhibit lists, and all document attached to any petition, response, brief or affidavit filed in connection with the notices of appeal and the supersedeas petitions. Jt. Stip. at ¶ 19.

A. Appellants' Notices of Appeal

In their notice of appeal, the Borough/Authority allege that lowering the quarry to 950 ft msl will result in a decrease of at least 40,000 gallons per day in the volume of water flowing from the Spring. They contend that because the Roaring Spring is the primary source of water for the Borough, any decrease in the Spring's volume will severely impact the Borough. The Borough is also concerned about potential added financial cost. They allege that the mining may harm the quality of the Spring's water, thus compelling the Authority to incur treatment costs which it need not now expend. They also assert that the quarrying may impact certain residential wells; the Authority may then have to connect some of these residences to the Borough's public water supply placing added cost on the Authority and increasing overall use of the Spring.

Appleton similarly objects that the Permit Revision does not adequately protect the interests of the Roaring Spring's users. Appleton generally alleges that the permit application did not contain sufficient information to support DEP's action, and that the agency's review of the application was deficient because DEP did not adequately assess the potential impacts of the proposed mining on the Roaring Spring, Halter and Plum Creeks and other springs in the area.

RSACC's appeal contains a series of more wide-ranging objections. For example, RSACC alleges that the Permit Revision fails to adequately regulate air quality impacts of the mining operations, and fails to address alleged contamination of water wells from an overburden pile at the site. RSACC also asserts that DEP did not account for alleged negative economic impacts on Borough residents caused by quarry operations and uncertainty surrounding reliability of the Spring. Like Appleton, RSACC contends that DEP did not conduct an adequate technical review of the impacts of the proposed mining on area water resources, and that the permit revision application did not affirmatively demonstrate that mining to 950 ft msl will not cause pollution to Commonwealth waters.

THE SUPERSEDEAS PETITIONS

As of August 2003, New Enterprise had mined 14.1 acres of the dolomite reserves in the Phase I section down to an elevation of 1,000 ft msl; there remained 9.3 acres of dolomite reserves to mine in the 1,000-foot bench. Mining of an access ramp leading down to the 950 ft msl level had commenced. On August 5, 2003, Appleton filed a petition, joined by RSACC and the Borough, requesting a supersedeas of the Permit Revision during the pendency of this appeal. RSACC filed its own petition on August 13, 2003; the Borough/Authority also filed a petition on its own behalf on September 12, 2003.[3]

Appleton's petition attempts to portray a problem with decreasing flow volume from the Spring over the past several years. Drawing on data compiled in reports prepared by New Enterprise hydrogeology consultants,[4] Appleton states that from 1995 through 1998 the average total volume from the Spring was 6.7 million gallons per day (MGD). Comparison is then made with the period from 1999 through 2002 in which average volume was 5.5 MGD. Appleton adds to a picture of urgency by noting that on several occasions during late 2001 and winter 2002, no amount of overflow was measured at the weir. Appleton does not assert, however, that operations at the quarry caused the noted decrease in average volume.

Noting its reliance on Roaring Spring water for the uninterrupted operation of its paper

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[3] Shortly before the supersedeas petitions were filed, RSACC filed a motion on July 24, 2003 requesting that a site view be conducted prior to a hearing being held in this matter. Appleton and the Borough joined in the request for a site view; DEP and New Enterprise opposed. Having determined that a site view would facilitate comprehension and expedite presentation of the evidence at a supersedeas hearing, I granted the motion. A site view was scheduled for August 29, 2003 and conducted on that date in accordance with parameters agreed upon by counsel for all parties. A supersedeas hearing was originally scheduled for early September, but to accommodate trial schedules of counsel and the availability of expert witnesses, the hearing was rescheduled for October 14-15, 2003.

[4] Since at least the early 1990s, as part of its permit review process and through the imposition of permit conditions DEP has required extensive monitoring of the area's hydrologic regime in part through a network of groundwater monitoring wells and stream flow measuring methods. New Enterprise has been preparing an annual hydrologic monitoring report for the quarry since at least 1995. *See* Exh. S-20; Exh. S-13. Total estimated volume from the Roaring Spring has been measured bimonthly since at least January 1995 and daily since December 2001. The estimated total volume is calculated by adding the volumes measured and reported by each of the spring's users with the amount of "excess" water measured flowing over the spring weir and ultimately into Halter Creek. *Id.*

mill, Appleton alleged that it will be irreparably harmed by "even a partial loss" of flow from the Spring. To support its assertion that quarrying to 950 ft msl will reduce the Spring's flow, Appleton picks out material from reports prepared by New Enterprise hydrogeology consultants. Two items in particular are singled out: (1) data concerning possible effects—during periods of drought—on a groundwater mound situated between the quarry and the Roaring Spring; and, (2) certain results from a groundwater flow model used by New Enterprise consultants, in part, to assess the predicted hydrologic consequences of deepening the quarry to 950 ft msl.[5]

Appleton relies on the groundwater mound issue to try to demonstrate a hydrogeologic connection, however tenuous or intermittent, between the quarry and the Spring.[6] Pointing out that the 2002 groundwater flow model predicted that deepening the quarry to 950 ft msl would result in a total reduction in flow volume of 40,000 gallons per day (gpd) from the 1998 base case of 6.5 MGD, the petition relies heavily on this data to support a charge that New Enterprise's own experts have concluded that deepening the quarry to 950 ft msl will cause a reduction in flow from the Roaring Spring. Appleton also takes issue with certain technical points of the groundwater flow model asserting that the defects make it probable that the model

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[5] A special condition in the mining permit requires that New Enterprise submit any request to mine the quarry to a depth lower than 1000 ft msl in the form of a permit revision application which must include a "a prediction of the probable impacts of the proposed additional quarrying on the groundwater regime." *See* Affidavit of John Showalter, exhibit A, at Part B, Special Condition 10(e). As part of its application for the Permit Revision, New Enterprise's hydrogeology consultants, Meiser & Earl, Inc. and aquaFUSION, Inc., prepared an initial report, dated June 2002. *See* Exh. S-30. A mathematical groundwater flow model was included with the report. *See* Exh. S-21.

[6] Prior iterations of New Enterprise's permit have entailed hydrological predicted-impact analyses similar to that prepared for the Permit Revision application. *See* Exhs. S-5, S-6, S-7. Appleton's attack relies heavily on statements selected from an assessment prepared by New Enterprise's consultants in the early 1990s and a 2002 annual monitoring report. *See* Affidavit of Burt A Waite, at ¶ 7and exhibits E and F. A 1993 report discusses the absence of a local groundwater divide in the fold-axis defined by monitoring wells M-25 and M-26 during a period of severe drought conditions in 1991-92, and the creation of a shallow hydraulic gradient from the Roaring Spring within this linear fold-axis zone across the topographic ridge to the quarry. The 1993 report states that under severe drought conditions some portion of the water normally discharging from the Spring might flow along the fold-axis conduit zone into the quarry watershed. *See* Exh. S-7, at p. 29. The 2002 annual monitoring report holds out a similar theoretical possibility that "ground water discharging to the Roaring Spring at elevation 1198 feet [msl] could flow toward these wells [M-25 and M-6] and the quarry" during periods of extreme drought. *See* Exh. S-8, at p. 10.

is underpredicting the effect of mining on the Spring.[7] Finally, Appleton alleges that New Enterprise will not be harmed by a supersedeas because there is substantial acreage yet to mine at the 1000 ft msl level which could sustain the permittee during pendency of this appeal.

The Borough's petition adds concerns about a stable supply of water from the Roaring Spring to meets its public water supply needs. The Borough currently uses an average of only 330,000 gpd, but it is concerned about future development in the Borough and potentially having to connect new units to the Borough's public water supply system; additional customers would lead to increased use of the Spring by the Borough. The Authority also asserts that there currently is no backup water supply for the Borough thus adding to its reliance on the Spring.[8]

Calling attention to the model's predicted decrease in the flow of Halter and Plum Creeks, RSACC generally focuses on the merits factor, alleging two main objections in the supersedeas context. First, RSACC contends that the permit revision application should have contained information concerning effects on benthic macroinvertebrate communities and fish populations in Halter and Plum Creeks from an alleged decrease in flow volume. Second, RSACC contends that New Enterprise's permit revision application itself contains presumptive evidence of potential pollution to Commonwealth waters, specifically in the form of the groundwater flow model data.

New Enterprise and DEP filed timely opposition, countering Appellants' petitions first by questioning the assertion that Appellants will suffer irreparable harm in the absence of a supersedeas of the Permit Revision. New Enterprise points out that, in describing average flow from the Roaring Spring, Appellants omitted several key facts. First, Appleton omitted any

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[7] *See* Affidavit of William L. Miller, *passim.*

[8] *See* Affidavit of Dane Noel, at ¶¶ 5-6, 8-12. Notably, the Borough is apparently the only user of Roaring Spring water that actually has a water allocation permit; the Authority's permit grants it water rights in the Spring of 500,000 gpd for fifty years commencing in 1987. *Id.* at exhibit A.

information about severe drought conditions, failing to mention that the years from 1999-2002 included two lengthy periods of drought emergency status in the relevant geographic area. According to New Enterprise, the drought conditions account for the decrease in average flow volume described by Appleton.[9] Second, average Roaring Spring volume during the period from January 2003 through July 2003 was in excess of 6.4 MGD.[10] As the 2001-2002 drought came to a close at the end of 2002, the Spring's average daily volume has steadily increased from approximately 6.0 MGD in January/February 2003 to a rate of over 6.6 MGD in July/August 2003. (Exh. S-18, at Table 3.2.1). New Enterprise and DEP argue that, given the current flow from the Spring, Appellants cannot demonstrate any present irreparable harm because there is substantially more than enough water flowing from the Spring to supply all the users' needs.[11]

With respect to Appellants' claim of a hydrogeological connection between the quarry and the Spring, New Enterprise asserts that the groundwater mound is currently intact and no such connection exists. New Enterprise generally contends that there is no basis in the

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[9] *See* Affidavit of Edgar W. Meiser, Ph.D., at ¶¶ 6-7 and attached exhibits 1 and 2. New Enterprise notes that during the period from January 1995 through December 2001 the average flow from the Roaring Spring was 6.3 MGD. But a Drought Watch was issued for Blair County in August 2001, a Drought Emergency was declared by the Governor for Bedford County in February 2002, and the drought restrictions were not lifted for Blair County until November 2002. During the August 2001 to November 2002 period when drought restrictions were in effect for the relevant area, the average estimated flow from Roaring Spring decreased to 5.3 MGD. Appleton also noted a marked decrease in average flow volume from the Spring in the second half of 1999. But New Enterprise points out that drought conditions obtained in Blair County during that period as well—a Drought Warning having been issued in June 1999 and upgraded to a Drought Emergency in July 1999. Meiser Affidavit, at ¶ 10 and attached exhibit 3. Thus, as is often the case with statistics, the picture depends on how the data is presented. New Enterprise argues that Appleton's comparison of a 1995-98 average with a 1999-2002 average distorts the monitoring data by comparing a four-year period of no drought conditions with a four-year period containing at least two years of drought conditions—without any mention of the key differential factor. In addition, the Meiser affidavit specifically avers that there is no correlation between quarry sump pumping and low-flow conditions occurring at the Spring during the 2001-2002 drought. *See* Meiser Affidavit, at ¶¶ 5-9.

[10] *See* Meiser Affidavit, at ¶ 8 and attached exhibit 2.

[11] Based on its own measurements, Appleton uses about 4.3 MGD from the Roaring Spring; the Borough/Authority consumes around 330,000 gpd. Thus, the needs of these two petitioners do not currently exceed 4.7 MGD and, indeed, during the January to July 2003 period an average of over 1.5 MGD of excess water has been flowing over the Roaring Spring weir. *See* Meiser Affidavit, at ¶¶ 8, 11 and exhibits 2 and 4; Exh. S-18, at Table 3.2.1. The other two direct users of the Roaring Spring—the Roaring Spring Bottling Company and the Blank Book Company—use a only small average daily total of approximately 75,000 gpd. (Exh. S-18, at Table 3.2.1). Thus, the total average amount consumed daily by the Spring's users does not exceed 4.8 MGD—far short of the approximately 6.6 MGD currently flowing from the Spring.

accumulated geologic and hydrologic data to support the claim of a hydrogeologic connection between the quarry and the Spring running along a narrow conduit described by monitoring wells M-36, M-26, and M-6. The permittee supplied groundwater contour maps from November 2001 and May 2002 (during the 2001-2002 drought period), and monitoring well measurements from 2003, to specifically support its assertions that the groundwater mound separating the quarry and the Roaring Spring has not disappeared, the mound is currently intact, and there is no groundwater flow from the Spring to the quarry.[12]

With respect to Appellants' reliance on the results from 2002 MODFLOW groundwater flow model, New Enterprise makes two main points. First, the mathematical prediction from the model actually shows that "no measurable impact" to the Spring is likely from deepening the quarry to 950 ft msl. The model calculated a reduction of 40,000 gpd when the mining completely advances to the 950 ft msl level.[13] But, the prediction of a 40,000 gpd decrease out of a total volume of 6.5 MGD, (a percentage decrease of approximately 0.6 %), is statistically insignificant. The model is simply not capable of predicting to the degree of accuracy focused on by Appellants; thus, when taking into account the model's calibration, the 6.51 MGD figure for the 1998 base case and 6.47 MGD figure for the 950 ft msl scenario are statistically equivalent.[14]

Second, New Enterprise asserts that the groundwater flow model is useful as a predictive tool and provides significant information, but it is only one piece of the data and analyses submitted by New Enterprise and considered by DEP in support of the conclusion that deepening

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[12] *See* Meiser Affidavit, at ¶ 15 and attached exhibit 6; *see also* Exh. S-36, at Fig. 2-5b and Fig. 2-5c; Exh. S-18, at Table 3.5 (water levels for wells M-6, M-19, M-25, M-26, M-34, M-35, M-36 and Roaring Spring), Fig. 3.10 (static water levels in M-6), Fig. 3.22 (M-19); Fig. 3.26 (M-25), Fig. 3.27 (M-26).

[13] *See* New Enterprise Response, Affidavit of David R. Buss, Ph.D., at ¶¶ 3-9. The model actually predicted a 30,000 gpd decrease from the 1998 Base Case when mining is completed in Phase I at the 1,000 ft msl level, and another 10,000 gpd decrease from the deepening of Phase I from 1,000 ft msl to the 950 ft msl level. *See* Exh. S-36 at Table GWM-1; Exh. S-21 at Table 8-1.

[14] *See* Buss Affidavit, at ¶¶ 3-9; Exh. S-35, at p. 5-6; Exh. S-21, at p. 26-35; New Enterprise Exh. 5, at p. 1-2.

the quarry to 950 ft msl will not adversely impact the Roaring Spring.[15] An impressive array of geological and hydrogeological data has been compiled over the years for the quarry and surrounding area, and technical analyses have been periodically performed to assess the quarry's potential impact on area water resources.[16] New Enterprise argues that Appellants' heavy reliance on the model results as a means of supporting a charge that the quarry will detrimentally impact the Spring is both misplaced and fails to confront the other supporting data and analysis.

New Enterprise and DEP also argue that Appellants have not demonstrated a likelihood of success on the merits. New Enterprise defends the integrity of the model as a reasonable predictive tool.[17] Although New Enterprise admits that the model predicts a decrease in the flow of Plum and Halter Creeks, the permittee counters that no diminution in flow will occur in actuality because measures for replenishing any water loss to the creeks were designed as part of the application process and implemented upon approval. New Enterprise/DEP argue that the permit revision application did not need to include a detailed evaluation of effects on benthic macroinvertebrate communities and fish populations in Halter and Plum Creeks from diminished flows because the Permit Revision requires that critical flow levels be maintained in those streams through use of replenishment measures if necessary.

Finally, New Enterprise asserts that the disruption to its operations from a supersedeas would have a significant, but unquantified, negative economic impact on its business. The company maintains that ramping to the lower level must be done concurrently with completion of the 1,000-ft bench for the company to provide an uninterrupted supply of aggregate to its adjacent pre-stressed concrete plant and to fulfill existing contractual commitments.

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[15] *See* Buss Affidavit, at ¶ 8; Exh. S-35, at p. 5-6; New Enterprise Exh. 5, at p. 2-3.

[16] *See, e.g.*, Exh. S-5; Exh. S-7; Exh. S-13; Exh. S-18; Exh. S-19; Exh. S-20; Exh. 21.

[17] Buss Affidavit, at ¶¶ 3, 8; The permittee also notes that the calibration and parameters of the model were agreed upon by Appleton as part of a settlement of a prior appeal from the 2000 permit revision. *See* Exh. S-25.

DISCUSSION

A two-day supersedeas hearing was held on October 14-15, 2003 where the parties presented evidence amplifying the contentions in their petition papers. The appellants presented testimony from five fact witnesses and four expert witnesses; DEP and New Enterprise offered testimony from one expert and a fact witness. Substantial documentary evidence was presented, and post-hearing briefs have also been filed.[18] Having thoroughly reviewed the evidence and carefully considered the parties' arguments, I conclude that Appellants have not satisfied the criteria for a supersedeas and I will accordingly deny the three supersedeas petitions.

The Board may grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1). However, a supersedeas is "an extraordinary remedy" which will not be granted absent a clear demonstration of need, and the petitioner bears the burden of demonstrating that the criteria for a supersedeas have been met. *Oley Township v. DEP*, 1996 EHB 1359, 1361-62. The factors the Board considers when determining whether to issue a supersedeas are: (1) irreparable harm to the petitioner; (2) likelihood of the petitioner prevailing on the merits; and, (3) likelihood of injury to the public or other parties, such as the permittee in third party appeals. *Id.* Where the mandatory prohibition of § 1021.63(b) does not apply, the Board "ordinarily requires that all three statutory criteria must be satisfied." *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 649, 651.

A. Irreparable Harm

Appellants must demonstrate by a preponderance of the evidence that they will suffer irreparable harm unless the Permit Revision is superseded; they have not met this burden. Initially, it is clear that Appellants are not suffering any immediate harm from quarry operations.

[18] At the close of the hearing, Appellants requested an opportunity to file post-hearing briefs; DEP and New Enterprise joined in that request, which was granted. The parties stipulated that in 2003 average flows from the Roaring Spring were in excess of 6.4 MGD (Jt. Stip. at ¶ 16), undisputed evidence indicated a current average of more than 1.5 MGD of excess water flowing over the Spring weir (*see, e.g.*, Exh. S-18, at Table 3.2.1.), and New Enterprise's witness, Mr. Van Horn, testified that the quarry has a shutdown period in which it ceases mining from Thanksgiving until April 1st. (Su. Tr. 591). Thus, an urgent decision on the petitions was not necessary.

New Enterprise has completed mining the access ramp to the 950 ft msl level, lowered the depth of the quarry sump to 930 ft msl, and is currently operating the sump at that level. (Affidavit of Keith Van Horn, at ¶ 3). There is no dispute as to the current flow from the Roaring Spring or the average amounts used by Appleton, the Authority and the other Spring users. (Exh. S-14; Exh. S-18, at Table 3.2.1; Su. Tr. 20-21, 134-42, 377). The volume flowing from the Roaring Spring—running about 6.5 MGD as of August 2003—far exceeds the approximately 4.8 MGD used on average by Appellants and others. Consequently, more than 1.5 million gallons of excess water is presently flowing over the Roaring Spring weir each day.[19]

Moreover, Appellants' experts did not opine that quarry operations are currently having any impact on the Roaring Spring. (Su. Tr. 119-20, 154-56). Nor was any evidence presented that the flow of Plum and Halter Creeks, or Springs Nos. 1 and 2, has diminished as a result of quarry operations and thereby affected uses of those water resources. Thus, it cannot be reasonably argued that Appellants are suffering any *immediate* irreparable harm.

The question then is whether Appellants will suffer irreparable harm from the permitted mining pending a final adjudication of these appeals.[20] Appellants argue that they will certainly

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[19] In fact, Appellants' hydrogeology expert admitted that under current hydrologic conditions there is enough water to meet the needs of all Roaring Spring users with more than 1.5 MGD of excess water; he also conceded that, at present, there is no harm being suffered by Appellants from quarry operations impacting the Spring. (Su. Tr. 141).

[20] New Enterprise initially argued that Appellants must prove they will suffer *immediate* irreparable harm from the activity they seek to supersede, citing *Smith v. DER*, 1993 EHB 732 and the common law test for a preliminary injunction, *see, e.g., Singzon v. Department of Public Welfare*, 496 Pa. 8, 10-11 (1981). In *Smith*, the Board stated: "It is not enough that a petitioner show that he may suffer irreparable harm at some distant point in the future, but that such harm is imminent, in order to justify superseding the complained of action prior to a final ruling on the merits." 1993 EHB at 735. However, there the Board noted that the supersedeas petitioner did not show that it would definitely suffer harm at any point in the future. *Id.* at 736. So the question of immediacy was not actually decided.

I am not persuaded that a supersedeas petitioner must demonstrate that it will suffer *immediate* irreparable harm in order to prevail. The factor is whether the petitioner has shown by a preponderance of the evidence that it *will* suffer irreparable harm prior to an adjudication on the merits. *See* 35 P.S. § 7514(d)(1)(i); *Citizens Alert Regarding the Environment v. DEP*, 2003 Pa. Envirn. LEXIS 13; *Tinicum Township v. DEP*, 2002 EHB 822; *Global Eco-Logical Services, Inc.*, 1999 EHB 649; *see also Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 502 Pa. 545, 552-54 (1983) (establishing criteria for stay of a government order). The relevant quality is definiteness, *i.e.*, has the petitioner shown that it will definitely suffer irreparable harm pending final disposition of the appeal, or is it a likely possibility, or only mere speculation.

suffer irreparable harm if New Enterprise is permitted to deepen the quarry to the 950 ft msl level. Appellants' position can be summarized as follows.

Appellants argue that they presented sufficient evidence that the quarry and the Roaring Spring are hydrologically connected during periods of drought; they also assert that, through this alleged hydrological connection, the quarry will have a negative impact on the Spring during such periods of drought. As to the alleged hydrological connection, the parties' experts agree that there is a groundwater mound (or a groundwater high) situated between the quarry and the Roaring Spring in the vicinity of wells M-19, M-25, M-26, M-34, M-36 and M-6; they also agree that this groundwater mound is an important feature of the relevant hydrologic regime because it functions as a local groundwater divide between the quarry and the Spring. But Appellants' hydrogeology expert, Mr. Waite, asserted that the groundwater mound, or local groundwater divide, will dissipate during periods of drought. He further opined that, when the groundwater mound dissipates, a gradient tilting in the direction of the quarry is formed in the groundwater table and groundwater which would normally flow toward the Spring would then flow toward the quarry. The alleged hydrological connection is thus constituted by a series of events: disappearance of a local groundwater divide during severe drought conditions; formation of a gradient in the groundwater table tilting from the Spring toward the quarry; *and,* reversal of the natural groundwater flow. Mr. Waite contended that, during periods of drought, the proposed quarry mining will exacerbate any reduction in flow of the Spring caused by drought conditions on account of the creation of this hydrological connection. (Su. Tr. 76, 90-91).

Appellants' expert did not attempt to quantify the alleged impact of mining on the Spring during a drought. Instead, Appellants proffered evidence that there were several days during the 2001-2002 drought emergency when the flow of Roaring Spring diminished to the point that no

excess water was measured flowing over the Spring weir. In other words, the flow of the Spring on those days was barely sufficient to cover users' needs. Appellants contend that a reoccurrence of drought conditions, (presumably of the magnitude of the 2001-02 drought), combined with the asserted hydrological connection and exacerbated reduction of Spring flow, will cause them irreparable harm—even if the amount of the reduction caused by quarry mining is quite low—because the Spring flow will then assuredly diminish below the amount needed by the users.

Appellants' position is not persuasive for two main reasons. First, the argument is premised on a fact—the occurrence of a drought emergency of the magnitude of the 2001-2002 drought—that has not been proven. The question in this context is whether the petitioners will suffer irreparable harm pending a final adjudication on the merits, *i.e.*, over the course of the next six to nine months. Appellants did not provide any evidence, whether from a meteorological expert or otherwise, that any drought condition will occur, or is even likely to occur, during the next six to nine months (let alone evidence of a drought of sufficient magnitude to diminish Roaring Spring flows to approximately 4.9 MGD). In the absence of such evidence, Appellants' contention that they will suffer irreparable harm from quarry mining pending a final adjudication is based on mere speculation. Appellants are therefore requesting issuance of a supersedeas—an extraordinary remedy which would suspend what is presently (and until an adjudication determines otherwise) a valid DEP permit revision—on the hypothetical occurrence of a severe drought during the pendency of these appeals. Petitioners' evidence that they will suffer irreparable harm must be more definite to satisfy the irreparable harm criterion.

Second, based on all the evidence presented at this preliminary stage of the proceedings, I did not find the testimony of Appellants' expert that there is a hydrological connection between the quarry and the Roaring Spring to be credible. Generally, this testimony suffered from

imprecision, inconsistency, and lack of a reliable basis for the conclusions reached. For example, although Mr. Waite testified that he relied on certain reports prepared over the years by New Enterprise consultants, his statements either exaggerated or conflicted with the conclusions in the reports he purportedly relied upon.[21] Indeed, when pressed, Mr. Waite opined that, since 1990 when groundwater monitoring well data was first being recorded, a true gradient was formed between the quarry and the Spring on only two dates: once in November 2001 and once on September 13, 2002. (Su. Tr. 95-96, 181-82). Thus, the alleged hydrological connection between the quarry was apparently created, according to Appellants' expert, on only two days during the past thirteen years. Further, the assertions for these two days were also problematic.

Mr. Waite testified that his conclusions regarding the formation of a gradient tilting from the Spring toward the quarry were based on his review of groundwater elevation data; he also presented a groundwater contour map from November 2001 with the elevation data as support for his conclusions. (Exh. S-9). He first admitted that the contour map he presented was flawed because the groundwater elevations indicated for M-36 were not from the same date as those for M-25 and M-6 and groundwater elevations fluctuate. (Su. Tr. 96-97, 177-82). More importantly, when confronted with a revised November 2001 groundwater contour map (Exh. S-19, Fig. 2-5b), and asked to indicate the direction of the groundwater flow on the map, he agreed that groundwater flows perpendicular to the contours and indicated that the groundwater was actually flowing toward the west, not in the direction of the quarry toward the north. (Su. Tr. 97-106). This analysis conflicted with his critical assertion that groundwater would flow along the path

[21] *Compare* Su. Tr. 54-57, 62 *with* Exh. S-5 at pp. 41, 55; Su. Tr. 63-64 with Exh. S-6 at pp. 5-6, 14, Su. Tr. 63-64 with Exh. S-7 at pp. 7-29; Su. Tr. 70-71 with Exh. S-8 at p. 10. Similarly, Mr. Waite initially testified that the groundwater mound existed only "during some portions of the year," or during the "wet time of the year in non-drought conditions," and that the local divide would "disappear" during "dry times of the year" and return during wet times. (Su. Tr. 55-56, 57, 70-71). However, on cross-examination he indicated, quite differently, that he believed the local groundwater divide disappeared only during severe drought conditions. (Su. Tr. 119-20).

sketched by wells M-36, M-25 and M-6, *i.e.*, the path he opined groundwater would flow when the gradient was formed. He also conceded that for groundwater to flow along the M-36-M-25-M-6 path to the quarry meant it would be flowing across strike through several geological formation contacts in a way groundwater does not generally tend to flow. (Su. Tr. 110-113). In addition, Mr. Waite stated that on both the November 2001 and September 2002 occasions, the gradient toward the quarry traced by wells M-36, M-25 and M-6 tilted only six inches toward the north, in the direction of the quarry. He agreed, however, that the relatively flat groundwater table between wells M-36 and M-6 simultaneously tilted twenty feet in the east-west direction toward Halter Creek. (Su. Tr. 113-115). Insisting that groundwater would flow north toward the quarry along the M-36-M-25-M-6 path, despite all these obstacles, was not persuasive.

Finally, the conclusions of Appellants' hydrogeology expert regarding the alleged impact of quarrying were not well grounded, but rather based on selective data from which far-reaching conclusions were extrapolated. He omitted any discussion, or did not persuasively explain the relationship, of factors such as: the regional groundwater divide, the lithology, the recharge area of the Roaring Spring, the geological features of the Spring itself, the transmissivity characteristics of the relevant geological formations, the groundwater chemistry, and other important factors considered by DEP and the New Enterprise consultants in reaching their conclusions. (Su. Tr. 458-66; Exhs. S-18, S-21, S-35, S-36). Overall, the opinions of Appellants' expert concerning the hydrological connection and alleged impact from quarrying during drought conditions were simply not credible.

B. Likelihood of Success on the Merits

The fundamental legal question in these appeals is whether DEP's decision to issue the Permit Revision is lawful and otherwise reasonable and appropriate. *See, e.g., Jefferson County Commissioners v. DEP*, 2002 EHB 132, 179-80. The Permit Revision was issued pursuant, *inter*

alia, to the Noncoal Surface Mining Conservation and Reclamation Act (NSMCRA),[22] the Clean Streams Law[23] and the regulations implementing those statutes. According to the NSMCRA: "No permit shall be issued under this act unless the applicant affirmatively demonstrates that . . . the operation will not cause pollution to the waters of this Commonwealth." 52 P.S. § 3308(a)(3). Thus, an integral part of DEP's decision to issue the Permit Revision was its determination that the proposed mining to 950 ft msl will not cause pollution of area water resources.

The Clean Streams Law defines pollution in part as:

> contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination *by alteration of the physical*, chemical or biological *properties of such waters* . . . .

35 P.S. § 691.1 (emphasis added). The Commonwealth Court has held that "the Clean Streams Law requires that pollution affect the 'uses' of the water." *People United to Save Homes v. Department of Environmental Protection*, 789 A.2d 319, 329 (Pa. Cmwlth. 2001). Thus, a diminishment of water quantity (*i.e.*, alteration of the water's physical properties) that affects the uses of a water can constitute water pollution. 35 P.S. § 691.1; *PUSH*, 789 A.2d at 329; *Consol Pennsylvania Coal Company v. DEP*, 2002 EHB 1038, 1045-46; *cf. PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 719 (1994) (rejecting argument that federal Clean Water Act does not regulate water quantity and noting that in many cases "water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses").

The regulations detail the manner of complying with the fundamental statutory directive

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[22] Act of December 19, 1984, P.L. 1093, No. 219, as amended, 52 P.S. § 3301 *et seq.*

[23] Act of June 22, 1937, P.L. 1987 No. 394, as amended, 35 P.S. § 691.1 *et seq.*

in the NSMCRA to prevent pollution. An interpretive regulation states that a permit application will not be approved unless the applicant has affirmatively demonstrated "that there is no presumptive evidence of potential pollution of the waters of this Commonwealth." 25 Pa. Code § 77.126(a)(3). Other regulations specify the types of relevant evidence that must be submitted for DEP's evaluation. An application must contain information enabling DEP to evaluate the impacts of a proposed mining operation, 25 Pa. Code § 77.403(a), and DEP may require an applicant to use modeling or other predictive techniques if the proposed mining has the potential to adversely impact waters and their affiliated uses. 25 Pa. Code § 77.403(b). More precisely, the application "shall identify the extent to which the proposed surface mining activities may result in contamination, diminution or interruption of an underground or surface source of water . . . for . . . legitimate use." 25 Pa. Code § 77.407. And the applicant must describe the measures it will take to ensure protection of the quality and quantity of waters from the adverse effects of the proposed noncoal mining activities, *see* 25 Pa. Code §§ 77.457, 77.521.

A noncoal surface mining permit applicant need not prove with absolute certainty that the proposed mining will not cause any pollution whatsoever. *See Birdsboro and Birdsboro Municipal Authority v. DEP*, 795 A.2d 444, 448 (Pa. Cmwlth. 2002). Rather, DEP must assure that the information submitted is accurate and that the analyses, impact assessments and predictions are well-grounded in the principles and methodology of the relevant scientific field. Having ascertained the extent of the impacts of the proposed mining activity with a reasonable degree of certainty, DEP must then assure that remedial measures sufficient to prevent pollution to water resources are designed and implemented by the applicant. *See* 52 P.S. § 3302 (a fundamental purpose of the NSMCRA is to prevent pollution of waters).

Appellants argue that they have demonstrated a likelihood of success on the merits

because the application itself contains "presumptive evidence" of potential pollution of the Roaring Spring. The evidence they point to is the 2002 groundwater flow model submitted as part of the hydrologic impact analysis. (Exh. S-21). They contend that because the results of the model predict a total 40,000 gpd decrease in the flow of Roaring Spring, DEP erred by not concluding that pollution of this water will occur as a result of mining the quarry to the 950 ft msl level. This argument is unpersuasive for several reasons.

First, Appellants proffered testimony from two experts in hydrogeological modeling, Mr. William L. Miller, and Mr. Vikas Tandon, Ph.D. Both experts opined that due to defects in the model one could not reasonably rely on it for an accurate prediction of the probable impacts of the proposed quarrying on the groundwater regime. (Su. Tr. 205-08, 240-46). Mr. Tandon specifically opined that the model as calibrated was highly uncertain in its results, the range of error was unacceptable, and consequently no one could rely on the model for an accurate prediction of quarrying impacts without a high degree of uncertainty. (Su. Tr. 239-46). Yet, the assumption of Appellants' argument that the model, in and of itself, constitutes *presumptive* evidence of pollution is that the model is pinpoint accurate and provides incontrovertible evidence of pollution in the form of diminishment of the Spring's flow. These are countervailing positions and Appellants cannot have it both ways without undercutting their own argument.

More importantly, DEP demonstrated that it considered the model as only one type of analysis—only one piece of evidence—when making its determination concerning the potential impacts of the proposed quarrying. According to Mr. Kanai, permits chief in the DEP Cambria District Mining Office and lead reviewer for the Permit Revision, the model is merely one predictive tool amidst a range of relevant data and scientific analyses that should be considered, and DEP accorded the model its appropriate weight in light of its utility and capabilities. (Su. Tr.

540-45; Exh. S-35, at 5-6). Mr. Kanai persuasively testified that the model does not provide a single right answer, or even have the capacity to precisely predict what will happen at any given point within the area modeled. Rather, the model provides a general picture of the potential influence of the quarry. Indeed, Appellants' experts seemed to agree with this description of the model's function, see Su. Tr. 199, 256-66; and, the general tenor of the testimony by Appellants' modeling experts—with its discussion of the model's parameters, calibration, transient or steady state modes, verification and predictive runs, and other highly technical attributes of an abstract mathematical model of a complex hydrologic system—lent credence to Mr. Kanai's testimony regarding the function of the model and the appropriate weight to be accorded its results.

Third, Appellants' modeling experts criticized DEP's use of the model results, and their hydrogeology expert opined that a hydrogeologic connection may be created during an extreme drought condition. But, there was no unequivocal expert testimony from Appellants regarding the fundamental legal question in these appeals—*viz.* no well-grounded expert testimony to the effect that DEP's conclusion that the quarrying will not cause a diminution in Spring flow was untenable in light of all the factors DEP considered when deciding to issue the Permit Revision. On the other hand, Mr. Kanai, who was qualified as a geology/hydrogeology expert, explained a series of factors that supported DEP's decision that the proposed quarrying will not adversely impact the Spring. (Su. Tr. 458-62; Exh. S-35).[24] Ascertaining whether the proposed mining

[24] Factors explained by Mr. Kanai included: (1) geologic mapping and pump test data which show that the Roaring Spring and the quarry are not connected by features likely to transmit large quantities of water, that is, they are separated by rock strata shown to have low hydraulic conductivity; (2) monitoring well data accumulated over many years which show that the quarry has not had a significant influence on groundwater elevations except in the immediate area of the mining; (3) quarry sump monitoring data showing that the groundwater component of the inflow into the quarry is relatively low; (4) the geologic structure of the area, *see* Exh. S-21 at Fig 2-3 ("Bedrock Geology, January 2002"), and the groundwater contour map for the Roaring Spring area, *see* Exh. S-21 at Fig 2-5a, show a regional groundwater divide between the Spring and the quarry; (5) the recharge area for the Spring extends to the south into Bedford County and lies primarily in the Gatesburg Formation; (6) the Bellefonte and Axemann Formations with their lower hydrolic transmissivity tend to confine groundwater within the Gatesburg Formation; and, (7) the groundwater chemistry shows that the quality of the water issuing from the Roaring Spring is chemically

will cause pollution requires an examination and evaluation by DEP of all the evidence presented by the permit applicant and independently gathered by DEP, as well as an evaluation of the adequacy of mitigation or preventive measures. Appellants' narrow focus on the flow model as presumptive evidence does not accord with the nature of the review process.[25]

RSACC made an alternative argument concerning evidence of pollution of Halter and Plum Creeks. The 2002 groundwater flow model predicted a decrease of 136 gallons per minute (gpm) in the flow of Halter Creek, and a total potential decrease of 153 gpm in Plum Creek (including the predicted decrease in two springs tributary to Plum Creek). (Exh. S-12, at 9-11). To remedy this potential capture by the quarry of flow in Halter and Plum Creeks, New Enterprise devised measures for redistributing quarry-captured groundwater into the creeks from equalization ponds, and for replenishing Spring No. 1 using a water distribution system from groundwater well M-4, in the event a quarry-related diminishment of flow in those waters is measured, particularly during low-flow conditions. (Su. Tr. 285-89; Exh. S-35). Those measures were approved by DEP as adequate to ensure the protection of the quality and quantity of waters from the potential adverse effects of the proposed noncoal mining activities.

RSACC presented expert testimony from hydrogeologist James Kilburg, Ph.D. with respect to potential adverse effects on the creeks and tributary springs from the proposed mining. Mr. Kilburg accepted the model results and relied on them for his opinions. (Su. Tr. 301-02). Although Mr. Kilburg effectively conceded on cross-examination that the water replacement plans approved for Halter and Plum Creeks and the tributary springs would replace the quantity

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distinct from groundwater found between the quarry and the Spring. (Su. Tr. 458-62, 474; Exh. S-35, at p. 5).

[25] Even accepting at face value the model's prediction of a 40,000 gpd reduction, without positing the reoccurrence of drought emergency conditions, it is not clear that a 40,000 gpd reduction would affect present uses of the Roaring Spring, thus raising the question whether such a reduction would constitute pollution. Appellants' expert testimony raised an important issue concerning the extent to which DEP took into account, or should have taken into account, past area drought conditions, and potential reoccurrence of such drought conditions, when assessing the probable future impacts of quarry mining to the 950 ft msl level. However, the evidence did not suffice to demonstrate a likelihood of success on the merits.

of water that may be lost in those resources (Su. Tr. 321-27, 329-31, 333-40), he questioned whether discharge of the water from the redistribution systems would have a negative impact on the water quality of the creeks. (Su. Tr. 303-11). Relying on Mr. Kilburg's testimony, RSACC argues that the permit revision application should have analyzed impacts from the redistribution system water on the aquatic life in the potentially affected stream segments. RSACC also argues that DEP erred by not determining potential impacts to water quality and consequent impacts to aquatic life from diminishment of the creeks' water quantity and use of the redistribution measures to remedy the potential diminution. DEP responds that maintaining the stream flow using the redistribution measures is sufficient to assure the protection of the streams, and no specific additional analysis was necessary. (Su. Tr. 288-89; Exh. S-35 at 6-7).

Although RSACC raised a serious question, on the limited evidence presented, RSACC did not meet its burden of proving a likelihood of success on the merits on this issue. RSACC did not present critical expert testimony from a biologist who had performed analyses of the constituents of the redistribution system water, had assessed the water quality and nature of aquatic life in Halter and Plum Creeks, and could then competently testify concerning negative impacts on aquatic life in the creeks from the redistribution water. Nor did RSACC proffer any evidence that discharge of the redistribution water into the creeks would exceed the applicable water quality criteria for these streams. Thus, there was no evidence that use of the redistribution measures would impair the water quality of the creeks or negatively impact the designated or existing uses of these streams (classified as warm water fisheries, *see* 25 Pa. Code § 93.9n). Absent such evidence, RSACC did not demonstrate a likelihood of success on the merits because it did not prove that DEP's review of the application was necessarily inadequate with respect to negative impacts on the uses of Halter and Plum Creeks, or that the remedial measures will fail

to ensure protection of the quality and quantity of waters from the adverse effects of the proposed noncoal mining activities. 25 Pa. Code §§ 77.457, 77.521.[26]

In sum, Appellants did not satisfy the criteria for entry of a supersedeas of the Permit Revision. Accordingly, I will enter the following order.

[26] RSACC's objection that DEP erred when making its required written findings by using a form which does not track the language of the applicable regulation, see Su. Tr. 275-84; Exh. S-27, would seem to fit squarely within the holding of the *PUSH* case, see *PUSH*, 789 A.2d 329-30; *PUSH*, 1999 EHB at 564-65. Therefore, RSACC did not prove a likelihood of success on the merits on this issue.

In addition, New Enterprise proffered evidence concerning an alleged economic harm from supersedeas of the Permit Revision as a result of the disruption of its mining plan and interruption in the supply of aggregate to fulfill existing contracts and supply its pre-stressed concrete plant. (Su. Tr. 582-612). Given the determination that Appellants have failed to satisfy the criteria of irreparable harm and likelihood of success on the merits, there is no need to address the criterion of harm to the permittee from entry of a supersedeas.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

BOROUGH OF ROARING SPRING and ROARING SPRING MUNICIPAL AUTHORITY; APPLETON PAPERS, INC.; and ROARING SPRING AREA CITIZENS COALITION	:	**EHB Docket No. 2003-106-C (Consolidated with EHB Dkt. No. 2003-111-C and EHB Dkt. No. 2003-121-C)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW ENTERPRISE STONE & LIME COMPANY, INC., Permittee	:	

ORDER

And now this 30th day of December 2003, it is hereby ORDERED that the Petition for Supersedeas filed by Appellant Appleton Papers, Inc. is denied; the Petition for Supersedeas filed by Appellant Roaring Spring Area Citizens Coalition is denied, and the Petition for Supersedeas filed by Appellants Borough of Roaring Spring and Roaring Spring Municipal Authority is denied.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: December 30, 2003

c: **DEP Bureau of Litigation**
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