Environmental Hearing Board

Adjudications and Opinions

2002 Volume III

COMMONWEALTH OF PENNSYLVANIA

George J. Miller, Chairman

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

2002

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2002.

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

2002 DECISIONS

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

BURNSIDE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2002-143-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 12, 2002**

OPINION AND ORDER GRANTING A MOTION TO DISMISS

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department's motion to dismiss for lack of jurisdiction is granted where the appeal was untimely filed.

OPINION

This matter involves an appeal from an administrative order issued by the Department of Environmental Protection (DEP) to Appellant Burnside Township (Burnside) requiring it to take actions to abate existing violations of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §§ 750.1 *et seq.* (Sewage Facilities Act). Presently before the Board is DEP's motion to dismiss the appeal. The motion is supported by the affidavit of Gary L. Metzger, Chief of the Planning and Finance Section of the Bureau of Water Management in DEP's Northcentral Regional Office, as well as various exhibits accompanying the Metzger Affidavit. DEP contends that the Board lacks jurisdiction over this appeal because Burnside's Notice of Appeal was untimely filed. Burnside did not file any response whatsoever to the motion.

I. Factual Background

The material facts relevant to the motion have not been disputed, Burnside having filed no answer to DEP's motion. Accordingly, we will deem all properly–pleaded facts admitted for purposes of deciding the motion. 25 Pa. Code § 1021.91(f); *Rakoci v. DEP*, EHB Dkt. No. 2001-116-R, slip op. at 1 (Opinion issued June 13, 2002).[1]

Gary Metzger, as Planning and Finance Section Chief, drafted and sent a letter, dated May 10, 2002, to Burnside regarding its failure to address violations of the Sewage Facilities Act occurring within the township. Accompanying the letter was an administrative order directed to Burnside, also dated May 10, 2002, which described the alleged violations and required Burnside to take actions to abate those violations. Metzger Affidavit, at ¶¶ 1-3, exhs. B and C. Mr. Metzger's letter and the enclosed administrative order were sent by certified mail to Burnside Township on May 10, 2002, and were delivered to Burnside's correct address—"Burnside Township c/o Roger G. Young, Secretary, RR 1, Westover, PA 16692"—on May 13, 2002. *Id.* at ¶¶ 4-5 and exh. D (signed certified mail return receipt card showing date of delivery as May 13, 2002); Notice of Appeal, at 1 (address provided by Appellant same as that on certified mail return receipt).

The May 10, 2002 administrative order issued to Burnside includes standard notice language concerning the recipient's right of appeal to the Board and states in bold capital letters that any appeal "must reach the Board within 30 days" of receipt. *See* Metzger Affidavit, at exh. C, p. 5. Burnside, through counsel, filed an appeal of the administrative order with the Board. Burnside's Notice of Appeal was not received by the Board until June 13, 2002, *thirty-one* days

[1] Section 1021.91(f) states: "Except in the case of motions for summary judgment or partial summary judgment, for purposes of the relief sought by a motion, the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion." 25 Pa. Code 1021.91(f).

after Burnside received notice of the administrative order being appealed.[2]

II. Discussion

The Board will grant a motion to dismiss where there are no material facts in dispute and the moving party is clearly entitled to judgment as a matter of law. *See, e.g., Smedley v. DEP*, 1998 EHB 1281, 1282. "Where there are no facts at issue that touch jurisdiction, a motion to quash [the appeal] may be decided on the facts of record without a hearing." *Grimaud v. DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994).

Pursuant to the Board's Rules of Practice and Procedure, "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." 25 Pa. Code § 1021.52(a). The failure to timely appeal an administrative agency's action is a jurisdictional defect which mandates dismissal of the appeal. *Falcon Oil Company v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992); *Weaver v. DEP,* EHB Dkt. No. 2002-242-C, slip op. at 5 (Opinion issued March 14, 2002); *Dellinger v. DEP*, 2000 EHB 976, 980; *see also West Caln Tp.* v. DER, 595 A.2d 702, 705-06 (Pa. Cmwlth. 1991) (the Board cannot simply disregard the jurisdictional defect and grant an extension of time "in the interests of justice"); *Bass v. Commonwealth*, 485 Pa. 256, 259 (1979) (the time for taking an appeal cannot be extended "as a matter of grace or mere indulgence"); 25 Pa. Code § 1021.12(a).

Pursuant to the applicable Board Rule, Burnside was required to file its appeal with the Board within thirty days after receiving notice of DEP's administrative order. 25 Pa. Code § 1021.52(a)(1). "An appeal must be received by the Board within the thirty-day limitation period, and not merely mailed within that time frame." *Weaver*, EHB Dkt. No. 2000-242-C, slip op. at 6: *see also, e.g., Milford Township Board of Supervisors v. DER*, 644 A.2d 217, 219 (Pa.

[2] In its Notice of Appeal, in response to the questions of on what date, and how, it received notice of the administrative order, Burnside stated: "Exact date unknown—believed to be May 12-14, 2002; Certified Mail." *See* Notice of Appeal, at page 1.

Cmwlth. 1994) ("it is clear that the date of receipt by the EHB and not the date of deposit in the mail is dispositive when addressing the timeliness of an appeal to the EHB").

Burnside's appeal was not timely filed. By failing to file any response to DEP's Motion, and thereby failing to dispute the facts asserted in DEP's motion, Appellant has admitted that it received notice of the administrative order on May 13, 2002. The signed certified mail return receipt indicating delivery to Burnside on May 13, 2002, at the same address as that listed in their Notice of Appeal, confirms the notice date. Nor does Burnside's Notice of Appeal contain any evidence controverting the May 13, 2002 notice date. There is also no dispute that the Notice of Appeal was not received by the Board until June 13, 2002; thus, the appeal was not filed with the Board until thirty-one days after Burnside received notice of the action under appeal. Under these circumstances, the Board lacks jurisdiction over this appeal. *See Milford Tp. Bd. of Supervisors*, 644 A.2d at 219 (affirming Board's dismissal of appeal filed by township thirty-one days after delivery of order to township's correct address); *McClure v. DER*, 1992 EHB 212 (dismissing appeal filed thirty-three days after appellant received notice); *Taylor v. DER*, 1992 EHB 257 (dismissing appeal filed thirty-one days after appellant received notice).

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

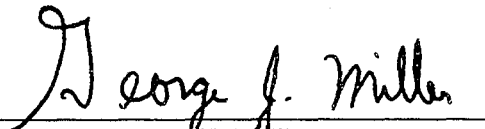
BURNSIDE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2002-143-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 12th day of August, 2002, it is hereby ORDERED as follows:

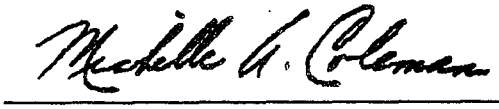
1. The Department of Environmental Protection's Motion to Dismiss is granted, the appeal at EHB Docket No. 2002-143-C is dismissed, and the docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

EHB Docket No. 2002-143-C

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

Dated: August 12, 2002

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

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Northcentral Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

GREENWOOD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2002-144-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 12, 2002**

OPINION AND ORDER GRANTING A MOTION TO DISMISS

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants the Department's motion to dismiss for lack of jurisdiction where the appeal was untimely filed.

OPINION

This matter involves an appeal from an administrative order issued by the Department of Environmental Protection (DEP) to Greenwood Township requiring it to take actions to abate existing violations of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §§ 750.1 *et seq.* (Sewage Facilities Act). Presently before the Board is DEP's motion to dismiss the appeal; the motion is supported by the affidavit of Gary L. Metzger, Chief of the Planning and Finance Section of the Bureau of Water Management in DEP's Northcentral Regional Office, as well as various exhibits accompanying the Metzger Affidavit. DEP contends that the Board lacks jurisdiction over this appeal because the township's Notice of Appeal was untimely filed. Appellant filed a one-page response to the motion which

does not dispute any of the factual assertions in DEP's motion papers. Appellant also did not request leave to file the appeal *nunc pro tunc*. Greenwood Township's opposition is limited to an argument that the Board's jurisdictional prerequisites do not apply when an appellant raises a substantive objection that the agency has acted without authority.

I. Factual Background

The material facts relevant to the motion have not been disputed. Accordingly, we may deem all such facts admitted for purposes of deciding the motion. 25 Pa. Code § 1021.91(e).

Gary Metzger, as Planning and Finance Section Chief, drafted and sent a letter, dated May 10, 2002, to Appellant regarding its continued failure to address violations of the Sewage Facilities Act occurring within the township. Accompanying the letter was an administrative order directed to Appellant, also dated May 10, 2002, which described the alleged violations and required the township to take certain actions to abate those violations. Metzger Affidavit, at ¶¶ 1-3, exhs. B and C. Mr. Metzger's letter and the enclosed administrative order were sent by certified mail to the Greenwood Township Supervisors on May 10, 2002, and were delivered to Appellant's correct address on May 13, 2002. *Id.* at ¶¶ 4-5 and exh. D (signed certified mail return receipt card showing date of delivery as May 13, 2002); Amended Notice of Appeal, at 1 (address provided by Appellant same as that on certified mail receipt).

The May 10, 2002 administrative order issued to Greenwood Township includes standard notice language concerning the recipient's right of appeal to the Board and states in bold capital letters that any appeal "must reach the Board within 30 days" of receipt. *See* Metzger Affidavit, at exh. C, p. 5. Greenwood Township, through counsel, filed an appeal of the administrative order with the Board. In its Notice of Appeal, Appellant specifically states that it received notice of the administrative order on May 13, 2002. *See* Notice of Appeal, at 1. Appellant's Notice of

Appeal was not received by the Board until June 13, 2002, *thirty-one* days after Appellant received notice of the administrative order being appealed.

II. Discussion

The Board will grant a motion to dismiss where there are no material facts in dispute and the moving party is clearly entitled to judgment as a matter of law. *See, e.g., Smedley v. DEP*, 1998 EHB 1281, 1282. "Where there are no facts at issue that touch jurisdiction, a motion to quash [the appeal] may be decided on the facts of record without a hearing." *Grimaud v. DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994).

Pursuant to the Board's Rules of Practice and Procedure, "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." 25 Pa. Code § 1021.52(a). The failure to timely appeal an administrative agency's action is a jurisdictional defect which mandates dismissal of the appeal. *Falcon Oil Company v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992); *Weaver v. DEP*, EHB Dkt. No. 2002-242-C, slip op. at 5 (Opinion issued March 14, 2002); *Dellinger v. DEP*, 2000 EHB 976, 980; *see also West Caln Tp.* v. DER, 595 A.2d 702, 705-06 (Pa. Cmwlth. 1991) (the Board cannot simply disregard the jurisdictional defect and grant an extension of time "in the interests of justice"); *Bass v. Commonwealth*, 485 Pa. 256, 259 (1979) (the time for taking an appeal cannot be extended "as a matter of grace or mere indulgence"); 25 Pa. Code § 1021.12(a).

Pursuant to the applicable Board Rule, Greenwood Township was required to file its appeal with the Board within thirty days after receiving notice of DEP's administrative order. 25 Pa. Code § 1021.52(a)(1). "An appeal must be received by the Board within the thirty-day limitation period, and not merely mailed within that time frame." *Weaver*, EHB Dkt. No. 2000-242-C, slip op. at 6: *see also, e.g., Milford Township Board of Supervisors v. DER*, 644 A.2d 217, 219 (Pa. Cmwlth. 1994) ("it is clear that the date of receipt by the EHB and not the date of

deposit in the mail is dispositive when addressing the timeliness of an appeal to the EHB"); *Taylor v. DER*, 1992 EHB 257, 259 (same).

Greenwood Township's appeal was not timely filed. Appellant has admitted, both in its Notice of Appeal, and by failing to dispute the facts asserted in DEP's motion, that it received notice of the administrative order on May 13, 2002. Confirmation of that fact is found in the signed certified mail return receipt indicating delivery to the Greenwood Township Supervisors on May 13, 2002, at the same address listed in their Amended Notice of Appeal. There is also no dispute that the Notice of Appeal was not received by the Board until June 13, 2002, thirty-one days after Appellant received notice of the action under appeal. Under these circumstances, the Board lacks jurisdiction over this appeal.[1]

In its response to the motion, Appellant does not dispute that the appeal was untimely filed. The township argues only that, because it objected to the administrative order on the

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[1] Notably, in *Milford Tp.* the Commonwealth Court affirmed the Board's dismissal of an appeal filed thirty-one days after the township received notice of the Department action. 644 A.2d at 220. In that case, the Department similarly sent the order by certified mail to the township supervisors at their correct address. The certified mail receipt was signed for by the township's Earned Income Officer who did not deliver the order to the individual supervisors until eight days later. *Id.* at 218-19. Milford Township argued that, although its appeal was not filed within thirty days of delivery of the order to the township's address, their appeal was nevertheless timely because the Earned Income Officer did not have authority to receive service of the Department's action, and the appeal was filed within thirty days of the township supervisors' personal receipt of the order. *Id.* at 219. The *Milford* court rejected that argument:

> Constitutionally adequate notice of administrative action is notice which is reasonably calculated to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . This requirement is satisfied when notice of the action is mailed to the interested party's last known address . . . . In addition, this court has previously held that personal receipt of the notice is not required when the notice was mailed to the party's last known address. . . .
>
> In the present action, it is undisputed that notice of DER's action was mailed to the correct address . . . . Thus, DER satisfied the constitutional requirement of adequate notice regardless of whether Wagner, as the Township Earned Income Officer, had been given authority to receive such notice on the Supervisors' behalf. The responsibility for the fact that the order was not forwarded to the Supervisors individually until eight days later cannot be placed on DER. Any prejudice which may have been created was a direct result of the Township's actions, not those of DER.

Milford Tp. Bd. of Supervisors, 644 A.2d at 219 (citations omitted).

ground that DEP "lacks any power or authority to make a legal finding that a municipality has committed a violation" of the Sewage Facilities Act, the issue raised by the township is "jurisdictional" and "as a matter of law can be raised at any time." (App. Response, at 1). Appellant cites no authority for this proposition.

We reject this argument. The substantive challenge to DEP's authority to issue the administrative order is irrelevant to our determination of the question presented by the motion; the issue is not DEP's "jurisdiction" but whether Appellant has met this Board's jurisdictional prerequisite of filing within the time limit set by Board Rule. Moreover, to accept Appellant's argument—that the Board must take jurisdiction over an appeal so long as the appellant has raised a challenge to DEP's authority to act—not only is contrary to the applicable caselaw but would render meaningless the Board Rule specifying the time limit for filing an appeal.

Finally, under certain exceptional circumstances an appeal may be filed *nunc pro tunc*. *See* 25 Pa. Code § 1021.53(f) ("The Board upon written request and for good cause shown may grant leave for the filing of 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."). Here, however, Appellant has not requested leave to file the appeal *nunc pro tunc* and has not offered any grounds for doing so. Thus, we are compelled to dismiss this appeal for lack of jurisdiction.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREENWOOD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2002-144-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 12thday of August, 2002, it is hereby ORDERED as follows:

1. The Department of Environmental Protection's Motion to Dismiss is granted, the appeal at EHB Docket No. 2002-144-C is dismissed, and the docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

EHB Docket No. 2002-144-C

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

Dated: August 12, 2002

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

For the Commonwealth, DEP:
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Northcentral Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SMITHTOWN CREEK WATERSHED ASSOCIATION	:	
v.	:	**EHB Docket No. 2002-100-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 15, 2002**

OPINION AND ORDER
ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis

The Board grants a motion to dismiss an appeal of a decision by the Environmental Quality Board rejecting a petition to upgrade the designation of a waterway. It is well-settled that this Board has no jurisdiction to review rulemaking decisions of the Environmental Quality Board outside the context of an action by the Department of Environmental Protection applying or otherwise implementing the regulation.

OPINION

Before the Board is a motion to dismiss an appeal by the Smithtown Creek Watershed Association (Appellant) from a decision by the Environmental Quality Board (EQB) which declined to change the stream designation for Smithtown Creek. As this

appeal seeks pre-enforcement review of an EQB rulemaking, we must grant the motion to dismiss because we lack the jurisdiction to render a decision.

The facts, for the purposes of this motion, are as follows. On July 3, 1995, the Appellant submitted a petition to the EQB seeking redesignation of Smithtown Creek in Tinicum Township, Bucks County, from its current designation as a "trout stocked fishery", to the most protected level of "exceptional value water."[1] After accepting the Appellant's petition, the EQB directed the Department to complete an evaluation in October, 1996. A draft evaluation was completed and provided to the Appellant for review and comment in September 1997. While the EQB's review was pending, it also finalized antidegradation regulations, therefore the Department performed additional surveys of Smithtown Creek. A final report was provided for the Appellant's review and comment in May, 2000. On March 20, 2001, the EQB approved a proposed rule-making and indicated that no change would be made to the Smithtown Creek stream designation. After considering the comments received during the public comment period, the EQB approved its decision to not change the stream designation as a final regulation on February 19, 2002. The Appellant was notified by letter dated March 28, 2002, that its petition had been rejected by the EQB. This decision became effective by publication in the *Pennsylvania Bulletin* on June 1, 2002.[2] The Appellant filed its appeal with the Board on April 29, 2002.

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[1] *See* 25 Pa. Code § 93.3.
[2] 32 Pa. Bull. 2691.

The Department and the EQB move to dismiss this appeal on the grounds that this Board does not have jurisdiction to review a rulemaking decision by the EQB. This point has been well-settled by the courts and we will therefore grant the motion.[3]

In Pennsylvania, the administrative functions in the area of environmental regulation are delegated among several agencies. The Department of Environmental Protection exercises the executive functions.[4] The EQB is a rule-making board which is organizationally within the Department. However, when the EQB acts pursuant to its unique powers and duties, it functions independently.[5] The mission of the EQB is to, among other things, "formulate, adopt and promulgate such rules and regulations as may be determined by the board for the proper performance of the work of the department...."[6] It may also receive and consider petitions for the adoption or repeal of a rule or regulation.[7]

The Environmental Hearing Board is the adjudicative arm of environmental regulation. Although at one time it was similar to the EQB inasmuch as it was organizationally a part of the Department, in 1989 it was established as a wholly

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[3] The Board will grant a motion to dismiss when there are no material factual disputes and the moving party is entitled to relief as a matter of law. *Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409.

[4] Some specific functions relating to the management of the state's park system and state forests are vested in the Department of Conservation and Natural Resources. *See* Conservation and Natural Resources Act, Act of June 28, 1995, P.L. 89, 71 P.S. §§ 1340.101-1340.1103.

[5] *United States Steel Corp. v. Department of Environmental Resources,* 442 A. 2d 7 (Pa. Cmwlth. 1982).

[6] 71. P.S. § 510-20(b).

[7] 71 P.S. § 510-20(h); *Plumstead Township Civic Ass'n v. DEP*, 1995 EHB 1120, *affirmed,* 684 A.2d 667 (Pa. Cmwlth. 1996).

independent, quasi-judicial agency under the governor's jurisdiction.[8] The Board has the power to hold hearings and issue adjudications on "orders, permits, licenses or decisions of the department."[9] For the purposes of the Environmental Hearing Board Act, an order of the EQB promulgating or amending a regulation does not constitute an order of the Department.[10] There is nothing in our enabling legislation which suggests that we have any authority to directly review the legislative and policymaking activities of the EQB. Although the Board has ancillary authority to rule on the validity of regulations in the context of our review of a departmental enforcement or permitting action, the courts have many times held that our jurisdiction is expressly limited to post-enforcement review.[11] Stream designations and redesignations are accomplished by the adoption by the EQB through the regulatory process;[12] we can only pass on the validity of the regulation in the context of an action by the Department applying or otherwise implementing the regulation.

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[8] Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7516. Accordingly, 2 P.S. § 510-21, which detailed the duties of the Board was repealed by the Act of July 13, 1988, P.L. 530.

[9] 35 P.S. § 7514(a).

[10] *United States Steel Corp. v. Department of Environmental Resources,* 442 A.2d 7 (Pa. Cmwlth. 1982).

[11] *E.g., Concerned Citizens of Chestnuthill Township v. Department of Environmental Resources,* 632 A.2d 1 (Pa. Cmwlth. 1993), *petition for allowance of appeal denied,* 642 A.2d 488 (Pa. 1994). *See also Arsenal Coal Company v. Department of Environmental Resources,* 477 A.2d 1333, 1339 (Pa. 1984)("Pre-enforcement review, however, is clearly not within the authority of the Environmental Hearing Board and any suggestion to the contrary can only be founded upon a strained and unrealistic construction of the language of the Code."); *United States Steel Corp. v. Department of Environmental Resources,* 442 A.2d 7 (Pa. Cmwlth. 1982)(affirming dismissal by the Board of a challenge to an order of the EQB adopting amendments to regulations establishing water quality standards).

[12] *See* 25 Pa. Code §§ 23.1-23.9.

The Appellant argues that the anti-degradation regulations change the holdings of the courts concerning pre-enforcement review of stream redesignations.[13] We fail to see how this is so. It is true, as the Appellant points out, that the regulations create a specific framework under which the Department evaluates a stream and reports its findings and recommendations to the EQB.[14] However, the report by itself, is not an action of the Department which is appealable to the Board. The Board's conclusion in *Trainer v. DER,*[15] is instructive on this point. In that case the Board dismissed an appeal from similar reports prepared by the Department for the EQB regarding petitions to declare land unsuitable for mining:

> While this process is not completely analogous to the evaluation of a permit application by the Department, it is analogous to the extent that there are many steps along the way where the Department makes "decisions." In concluding that such "decisions" were not reviewable, we observed in *Phoenix Resources, Inc. v. DER*, 1991 EHB 1682, 1684, that:
>
> > This definition is necessarily expansive because of the many types of action DER can take under the numerous statutes it administers. Yet, it was never intended that the Board would have jurisdiction to review the many provisional, interlocutory "decisions" made by DER during the processing of an application. It is not that these "decisions" can have no effect on personal or property rights, privileges, immunities, duties, liabilities or obligations; it is that they are transitory in nature, often undefined, frequently unwritten. Board review of these matters would open the door to a proliferation of appeals challenging every step of DER's permit process before final action has been taken. Such appeals would bring inevitable delay to the system and involve the Board in piecemeal adjudication of complex, integrated issues. We have refused to enter that quagmire in the past, . . . and see no sound reason for entering it now.

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[13] 25 Pa. Code § 93.4a-93.9z.
[14] 25 Pa. Code § 93.4d.
[15] 1994 EHB 749.

> Our exercise of jurisdiction to review the Department's conclusions and recommendations concerning this petition would needlessly draw us into this controversy, complicating and delaying the ultimate decision by the EQB on the petition.[16]

We find this analysis to be dispositive as there is no reason to distinguish between a study and recommendation concerning the redesignation of a stream and one relating to land unsuitable for mining.

The regulatory history, if read carefully does not support a contrary view. Instead it acknowledges what has long been the rule of law: stream redesignations are only reviewable by the Board in the context of an enforcement or permitting action by the Department. Specifically, the passage referenced by the Appellant from the *Pennsylvania Bulletin* is as follows:

> Finally, subsection [93.4c] (a)(1)(iv) provides that the Department will make a final determination of the existing use of a surface water at the time it takes an action on the request for a permit or other Department approval; persons aggrieved by the final permit or approval action of the Department can generally challenge the action, including the existing use determination of the surface water, by filing an appeal with the Environmental Hearing Board (EHB).[17]

This discussion explains the implementation of the anti-degradation requirements by the Department *acting in its enforcement capacity* when it reviews permit applications and requests for approvals. Although the Department considers data that it may have submitted to the EQB in its permit review process, it applies the EQB's designated use

---

[16] 1994 EHB at 752-53 (footnote omitted.) *See also United Refining v. DEP*, 2000 EHB 132.

[17] 29 Pa. Bulletin 3720, 3724.

decisions as codified in the regulations.[18] It does not imply that the evaluation itself creates an action justiciable by the Board or that the Board may review information submitted to the EQB independent of the permit decision by the Department.

The Appellant finally contends that it is so significantly harmed by the action of the EQB that the Board should hear its appeal, based on language in *Rouse & Associates v. Environmental Quality Board.*[19] In *Rouse* the Commonwealth Court found that the petitioner was adequately harmed by the redesignation of Valley Creek from "Cold Water Fishes" to "Exceptional Value" to survive preliminary objections challenging the court's jurisdiction. Specifically, the change in designation made it impossible for Rouse, a land developer, to get approval for a sewage package plant for a planned subdivision. Without approval for the package plant he was unable to get other local approvals that were necessary in order to move forward with the project. The significant difference between that case and the present appeal is that it was filed in the Commonwealth Court's original jurisdiction and not its appellate jurisdiction. Therefore the analysis centered on the propriety of the court's jurisdiction and not the Board's. Although the court acknowledged that review by the Board would be available "when the DER performs a specific action *involving the application* ***and*** *enforcement* of an allegedly invalid or illegal regulation"[20] it went on to hold that in the pre-enforcement context, there was no adequate administrative remedy available to the petitioner.[21]

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[18] *See* 25 Pa. Code §§ 93.9a-93.9z.
[19] 642 A.2d 642 (Pa. Cmwlth. 1994).
[20] 642 A.2d at 647 (emphasis added).
[21] *Id.*

This case is governed by the Supreme Court's decision in *Neshaminy Water Resources Authority v. Department of Environmental Resources.*[22] In that case, a municipal water authority challenged regulations governing the method of determining acceptable phosphorus levels in water which had been promulgated but not implemented. The Court held that the appellant was not harmed by the regulation because the regulation itself did not adversely affect water quality. The appellant's claim that it had no adequate remedy against this regulatory change was rejected because any resulting pollution to the waters could be remedied by challenging the regulation in a later permitting proceedings or a nuisance suit.[23] The Court also specifically held that the Environmental Hearing Board had no "jurisdiction to conduct pre-enforcement review of regulations issued by the Department."[24]

Accordingly, this Board can offer no relief absent an action by the Department applying or otherwise implementing a regulation in the context of a specific enforcement or permitting decision.

Accordingly, we enter the following:[25]

---

[22] 513 A.2d 979 (Pa. 1986).
[23] *Id.* at 982.
[24] *Id.* at 980.
[25] The Department and the EQB also filed a motion to stay proceedings. Due to our disposition of the motion to dismiss we need not rule on that motion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SMITHTOWN CREEK WATERSHED ASSOCIATION	:	
v.	:	EHB Docket No. 2002-100-MG
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of August, 2002, the motion to dismiss the appeal of the Smithtown Creek Watershed Association by the Department of Environmental Protection in the above-captioned matter is hereby **GRANTED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: August 15, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

MILCO INDUSTRIES, INC., and MUNICIPAL AUTHORITY of the TOWN of BLOOMSBURG	:	
	:	**EHB Docket No. 2001-179-L**
v.	:	**(consolidated with 2001-188-L and 2001-194-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 20, 2002**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

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

Synopsis:

Where a motion for summary judgment seeks to sustain an appeal from an enforcement order because the Department cannot make out a *prima facie* case that it has the legal authority to issue the order, the motion must be denied where, as here, the Department can show a *prima facie* case that it had the requisite authority under any one provision of any one statute or regulation.

OPINION

The Department of Environmental Protection (the "Department") issued orders to Milco Industries, Inc. ("Milco") and the Municipal Authority of the Town of Bloomsburg (the "Municipal Authority"). The orders were issued because odors allegedly associated with Milco's wastewater discharge to the Municipal Authority's sewer system were alleged to be escaping a sewer line and causing citizen complaints.

The sewer line has since been repaired, and the parties have agreed to a supersedeas of the order. Nevertheless, Milco has filed a motion for summary judgment, which asks us to sustain its appeal because the Department lacked the legal authority to issue the order. The Municipal Authority has asked us in its motion for partial summary judgment to rule that the Department lacked legal authority to issue the order under a few, but not all, of the statutory and regulatory provisions cited in the order. The Department opposes both motions.

The essence of both Milco's and the Authority's attack is that the Department did not have the legal authority to issue the orders. Therefore, we may put to the side for the time being any consideration of the other prerequisites for an order, such as whether the order and the action it demands are reasonable, appropriate, or necessary.

When the only question at hand is whether the Department had the authority to issue an order, logic suggests that the order is sustainable so long as any one provision of any one statute or regulation provides the necessary authority. Moreover, because Milco raises its challenge in a summary judgment motion premised upon a failure of proof, the Department's does not need to demonstrate that it will eventually win the argument. *See* Pa.R.C.P. 1035.3(a)(2) (showing of *prima facie* case necessary to defeat summary judgment motion). The Department simply needs to point to enough record evidence to show that it can make out a *prima facie* case that it had the legal authority to issue the order under at least one provision of one statute or regulation. Under the circumstances presented here, once the Department has made that relatively minimal showing, it is clear that the appeal must proceed to full Board consideration based upon post-hearing briefs following a hearing on the merits.

The Municipal Authority in its motion for partial summary judgment invites us to issue a ruling that the Department lacked the authority to issue the order under three of the several

statutory and one of the regulatory provisions cited by the Department. Even if we were to give the Authority the ruling that it seeks, there would be still be other legal bases for the order that the Authority does not question. The Authority does not explain why it would have us engage in an academic exercise with no apparent practical consequence. Therefore, we will decline, at least for now, the Authority's invitation to express our opinion on the various legal provisions at issue.

The Department has the authority to issue an order to a person if it finds that that person's activity creates a danger of pollution of the waters of the Commonwealth. 35 P.S. § 691.402(a). The Department has the authority to issue an order requiring a person to cease operations if a condition existing in or on the operation is creating a danger of pollution of the waters of the Commonwealth. 35 P.S. § 691.610.

Neither party has referred us to any case law elaborating upon exactly what constitutes a "danger" of water pollution. Milco argues convincingly that the term should not include every conceivable circumstance in which a creative mind can conjure up a set of circumstances that could theoretically cause pollution. At the other extreme, a "danger" is obviously something less than actual, proven pollution. The appropriate definition doubtless lies somewhere between these two extremes, and whether a "danger" exists sufficient to support an order will undoubtedly require a case-by-case analysis. Beyond these truisms, a more refined analysis will need to await an adjudication by the full Board following the hearing on the merits.

For current purposes, it is our judgment that the Department has pointed to enough evidence in defense of Milco's motion for summary judgment to show that it can make a *prima facie* case that it had the authority under 35 P.S. §§ 601.402(a) and 601.610 to issue the order. The Department has pointed to record evidence of the following: Milco's effluent contains a number of volatile and semivolatile organic chemicals. Milco discharges that effluent to the

Bloomsburg Authority's sewer lines. The groundwater in the area of the sewer line most directly at issue is 10 to 13 feet below the surface of the ground. The evidence suggesting that the line was cracked and/or otherwise permeable at the time the order was issued includes a television investigation, a smoke test, and at least some correlation between compounds sampled inside and outside of the line.[1] The precise location of the observed cracks in the line vis-à-vis typical flow levels is not critical at this juncture in assessing whether the Department has a *prima facie* case.

Milco contends that the alleged threat to the groundwater was not a driving impetus for the issuance of the order; the Department issued the order because of odor complaints. The record certainly support's Milco's contention, but the Department's motivation is beside the point of whether the Department can make a case under Sections 691.402(a) and 691.610. The Department's legal authority is not somehow circumscribed by the citizen complaints that quite frequently impel the Department to take an enforcement action in the first place.

We would add that the Department also relied upon Section 1917-A of the Administrative Code, 71 P.S. § 510-17, in combination with 25 Pa. Code § 243.13, as providing legal authority for the order. Section 1917-A gives the Department the authority to abate nuisances, and Section 243.13 states that "[a] person maintaining a...dye works...may not allow any of the following: [n]oxious gases, which are deleterious or detrimental to public health, to escape into the air."

Milco neglected to include these provisions in its otherwise comprehensive attack on the Department's authority. Milco argues in its reply brief that the provisions are not an integral part of the order. It primarily argues that the factual averments in the order only relate to Milco's alleged violations under the Clean Streams Law and the Air Pollution Control Act. Those very same averments, however, appear to us to relate to Sections 1917-A and 243.13 as well. Under

[1] The Department has also pointed to the fact that the Authority spent a considerable amount of money to repair the line. Such evidence, however, may not be admissible under the subsequent repairs rule. Pa. R.Ev. 407.

those provisions, we must decide in this appeal whether Milco has allowed (1) "noxious gases" (2) "which are deleterious or detrimental to public health" (3) "to escape into the air." Those determinations are nearly identical to the determinations we may need to make under the other statutes at issue. Sections 1917-A and 243.13 cannot be discounted, and Milco's failure to attack them in its motion is another reason we are not in a position to grant its motion.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MILCO INDUSTRIES, INC., and MUNICIPAL AUTHORITY of the TOWN of BLOOMSBURG	:	
	:	**EHB Docket No. 2001-179-L**
v.	:	**(consolidated with 2001-188-L**
	:	**and 2001-194-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 20th day of August, 2002, Milco's motion for summary judgment and the Municipal Authority's motion for partial summary judgment are **DENIED**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: August 20, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAF

MARYANNE GOHEEN	:	
	:	
v.	:	**EHB Docket No. 2002-077-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW MORGAN LANDFILL COMPANY, INC., Permittee	:	**Issued: August 22, 2002**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

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

Synopsis:

In an appeal from the renewal of a landfill's permit, a third-party appellant may not challenge the legality of a host municipality's incorporation because the Pennsylvania Supreme Court has already determined that the incorporation was legal. The appellant, however, is not necessarily precluded solely as a result of the Supreme Court's holding from arguing that the fees being paid to the host municipality should not be considered as adequate mitigation for harms being suffered by parties other than that municipality.

OPINION

The Department of Environmental Protection (the "Department") issued a solid waste permit to the New Morgan Landfill Company, Inc. ("New Morgan Landfill") in 1992. The permit authorizes the operation of a municipal waste landfill, which is located in New Morgan Borough, Berks County. The Department extended New Morgan's permit for five years by a permit renewal issued on February 11, 2002.

Maryanne Goheen ("Goheen") filed this appeal from the permit renewal. Goheen's substantive challenges to the permit renewal are set forth in her notice of appeal as follows:

> 1. Applicant has failed to comply with the rules and regulations and terms of its permit, as set forth in the action denying permit expansion by the department, dated in or about February 2002.
>
> 2. Applicant does not serve any public benefit for the area and the locality, and the permit renewal fails to take into account that the applicant is a detriment to the area.
>
> 3. The applicant has not compensated for the detriment to the area by paying [h]ost community fees as required by the statute; what are denominated [h]ost community fees are in reality a pay off to the real party in interest of New Morgan Borough, Morgantown Properties, Inc. and or its owner, Raymond Carr.
>
> 4. Adverse effects on clean air, community peace and quiet, roadway access and safety, community economic conditions, and natural resources, are excessive and inequitable.

New Morgan Landfill has filed a motion for partial summary judgment. The Department concurs with the arguments raised by New Morgan Landfill, but stops short of joining in the motion. Goheen opposes the motion.[1]

New Morgan Landfill's arguments relate to the third paragraph in Goheen's notice of appeal. New Morgan Landfill argues that the Pennsylvania Supreme Court upheld New Morgan Borough's incorporation in *In re Incorporation of Borough of New Morgan*, 590 A.2d 274 (Pa. 1991). New Morgan Landfill also notes that, in the course of dismissing constitutional challenges relating to the affairs of New Morgan Borough, the U.S. District Court found that "[t]he propriety of the incorporation of New Morgan Borough is now well settled and beyond dispute." *Tri-County Concerned Citizens Association v. Carr*, 2001 U.S. Dist. LEXIS 14933*4 (E.D. Pa. September 18, 2001). Based upon these holdings, New Morgan Landfill asks us to

[1] Summary judgment may be entered where a party is entitled to judgment in its favor as a matter of law based upon the undisputed record facts, or where a party who will bear the burden of proof has failed to produce evidence of essential facts sufficient to make out a *prima facie* cause of action or defense. Pa.R.C.P. 1035.2

issue an order "dismissing the portion of Mary Ann Goheem's Appeal that addresses issues surrounding the formation of, and payment of host benefit fees to, New Morgan Borough."

Goheen responds that her appeal does not raise the issue of whether the incorporation was legal. Goheen does, however, characterize the incorporation as "malignant," and suggests that the Department should have considered the "circumstances of the incorporation." Specifically, Goheen argues the following:

> The current case deals with whether, in light of the circumstances of the incorporation and the impacts of the landfill on neighboring property owners, the DEP should have declined the application for renewal of the landfill's general permit. This is more important when the host municipality receives municipality fees in order to insure that the Borough incorporators obtain all of the benefits from the [h]ost community fees while the burden of the landfill is disproportionately spread among its neighbors. Moreover, the DEP has a duty to abate nuisances and here the neighbors were intentionally excluded from the borough so they would have no recourse through the political system and denied the statutory mechanism by which the legislature seeks to mitigate the burden a landfill places upon the community it is located in. The appeal concerns the DEP's duty to regulate Landfills whether or not the host municipality was legally incorporated. This appeal, therefore, has nothing to do with the incorporation case.

(Answer ¶ 21.) Given this language, we can understand New Morgan Landfill's concern that Goheen is attempting to challenge, at least indirectly, the legality of the Borough's incorporation.

Be that as it may, the parties appear to agree, as they must, that the legality of the Borough's incorporation cannot be made an issue in this appeal. Furthermore, Goheen is advised that the Board is likely to exclude any arguments or evidence delving into "the circumstances of the [Borough's] incorporation" as irrelevant. Because the debate over whether the Borough is a sham has been decided by the Pennsylvania Supreme Court, there is no need to delve into such facts as the identity and roles of the Borough's principals or the Borough's use of the host fees. We will not admit evidence that someone other than the Borough is the "real party in interest." It should also be beyond dispute that the Borough is entitled to receive the fees.

On the other hand, New Morgan Landfill's request for relief in its motion for partial summary judgment goes somewhat too far. New Morgan Landfill stopped short of asking us to render judgment on Paragraph 3 of Goheen's notice of appeal. Perhaps this acknowledges that Paragraph 3 is capable of being interpreted as something other than an attack on the legality of the Borough's incorporation. At this stage, we must interpret the language in the light most favorable to the nonmoving party.

New Morgan Landfill has pointed out that it pays a higher host fee to New Morgan Borough than it is legally required to pay. (Motion ¶ 30.) It also argues in its reply brief that it pays a fee to Berks County for each ton of waste disposed at the landfill. If it is appropriate for the Department (and this Board) to consider these extra payments, it could be that it is equally appropriate to consider the lack of any payments to neighboring municipalities. Just as the operative statute does not *require* extra payments to the host municipality, the statute does not *require* that any payments be made to neighboring municipalities. What the statute requires, however, is a question apart from what the Department could or should have considered in the exercise of its discretion considering all of the relevant facts. Goheen's argument, particularly when read in the context of the entire notice of appeal, seems to be that the Department should have given greater consideration to the harms and benefits suffered and enjoyed by neighboring municipalities, their residents, and Goheen. In Goheen's view, the permit renewal should have been denied because, although the neighbors are suffering harms (Notice of Appeal ¶ 4), they are not receiving any benefits (Notice of Appeal ¶¶ 2, 3). In her view, the payment of fees to New Morgan Borough cannot be considered to be benefiting anybody other than New Morgan Borough.

We are obviously not in a position at this point to address this claim. Indeed, we are not suggesting that the claim is an appropriate question to ask in this appeal from a permit *renewal.* We simply conclude that the argument (assuming we are interpreting it correctly) is not precluded by prior court holdings finding that the Borough's incorporation was legal.

In sum, Goheen in this appeal may not challenge the legality of New Morgan Borough. She may not argue that the Borough is a sham. In other words, she may not argue that persons other than the Borough are the true recipients of the fees. It follows that she may not challenge the Borough's right to receive host municipality benefit fees. She may not challenge New Morgan Landfill's obligation to pay those fees to New Morgan Borough. She is unlikely to be permitted to challenge the Borough's use of the host fees or assert that the fees cannot be considered to be a benefit because of the manner in which they are used. Assuming that the argument is properly raised with respect to the renewal of a permit, however, the Pennsylvania Supreme Court's ruling does not preclude her from arguing that the fees being paid to New Morgan Borough should not be considered to be a benefit to anyone else, and that those fees should not be considered as adequate mitigation for the harms being suffered by other parties. Because this last argument might be viewed as "surrounding the. . .payment of. . .fees to New Morgan Borough," we deny New Morgan Landfill's motion for partial summary judgment.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARYANNE GOHEEN	:	
	:	
v.	:	**EHB Docket No. 2002-077-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW MORGAN LANDFILL COMPANY, INC., Permittee	:	

ORDER

AND NOW, this 22nd day of August, 2002, the Permittee's motion for partial summary judgment is **DENIED**, but the Appellant's proof will be limited in accordance with the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: August 22, 2002

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

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JAMES KLEISSLER AND RYAN D. TALBOTT	:	
v.	:	**EHB Docket No. 2001-295-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA GENERAL ENERGY CORPORATION, Permittee	:	**Issued: September 6, 2002**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

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

Synopsis:

The Board denies motions for summary judgment in a third-party appeal from the issuance of storm water and oil and gas permits for a well field in the Allegheny National Forest due to genuine issues of disputed fact regarding every issue. Disputed factual issues and incomplete legal arguments prevent the issuance of summary judgment on such issues as whether the oil wells should have been permitted due to their alleged impact on the forest, the habitats of sensitive wildlife, and receiving streams. The record is also disputed and incomplete on such questions as which wells should have been covered by which permits, whether the Department should have considered the cumulative impact of multiple permitted segments, and the significance of alleged deficiencies in the processing of the permit applications.

OPINION

James Kleissler and Ryan Talbott (hereinafter for purposes of readability collectively

referred to as "Kleissler") filed this appeal from the Department of Environmental Protection's (the "Department's") issuance of three NPDES permits and ten oil well permits to Pennsylvania General Energy Corporation ("PGE") for drilling activity in Kingsley and Jenks Townships, Forest County. Kleissler has filed a comprehensive motion for summary judgment. PGE has filed two motions for summary judgment. One motion seeks dismissal of every claim in Kleissler's notice of appeal. The second motion asks us to enter summary judgment in PGE's favor because Kleissler failed to file a timely response to PGE's first motion. The Department has remained silent. We deny the motions.

Procedural Issues

PGE's first procedural argument is that Kleissler's motion must be denied because he has attached his exhibits to his memorandum of law in support of the motion rather than the motion itself. As a result, PGE contends that the exhibits may not be considered, and there is, therefore, no basis for granting Kleissler's motion.

We will not deny Kleissler's motion on this basis. First, it is not clear that Kleissler did in fact fail to attach his exhibits to the motion. The cover sheet for the exhibits reads "Motion for Summary Judgment Attachments." The motion refers to the "Administrative Record," which Kleissler apparently intended as a description of the exhibits. Many of the exhibits that Kleissler attempts to rely upon were admitted as part of the supersedeas proceeding that was previously held in this matter. PGE concedes that those exhibits are properly part of the record for purposes of considering the summary judgment motions.

If we assume for purposes of argument that Kleissler improperly "attached" his exhibits to the memorandum, we would still not deny his motion on that basis. Kleissler's "memorandum" is in content, style, presentation, and everything but its caption what we would

typically consider a motion. It contains numbered paragraphs that are predominantly factual statements. Kleissler has, in effect and reality, attached his exhibits to his motion. We note in passing, not by way of excuse but in an effort to keep this alleged procedural irregularity in perspective, that the Board is in the process of changing its rules to allow for the federal-style motions that Kleissler's filings arguably resemble. *See* 32 Pa. Bulletin 1980 (April 20, 2002) (proposed rules). Finally, the Board's preference is to decide motions based upon the merits rather than procedural technicalities, so long as the substantial rights of the parties are unaffected. 25 Pa. Code § 1021.4. We do not discern any prejudice to PGE as a result of the mechanics of Kleissler's presentation.

Before turning to PGE's second procedural argument, we note that Kleissler's defense to PGE's first argument included a request that we give him some leeway because (a) this case involves important issues, and (b) he is appearing *pro se*. Kleissler has repeated these arguments at other times during the course of the proceedings. We reject both of these arguments and wish to make it clear that we are not rejecting PGE's first procedural argument on either of these bases. Every case that comes before the Board involves important issues, at least to the parties in that case. The Board has no intention of treating the instant appeal any differently than any other appeal based upon its purported "importance." Secondly, Kleissler has not and will not receive any special consideration because he has made the ill-advised decision to proceed *pro se*. *See Green v. Harmony House North 15 Street Housing Association, Inc.* 684 A.2d 1112 (Pa. Cmwlth. 1996). He proceeds without proper representation at his own risk. *Van Tassel v. DEP*, EHB Docket No. 2001-110-R, slip op. at 3-4 (Opinion issued July 18, 2002) (discussing risks of *pro se* appearance).

PGE's second and closely related procedural argument is that many of the exhibits that

Kleissler included in his materials are not properly part of the "record" that may be considered in resolving motions for summary judgment. PGE, however, concedes that many of the exhibits *are* part of the record. We will consider PGE's generic criticism, but only as it relates to specific exhibits.

Finally, PGE has argued that we should disregard Kleissler's response to PGE's motion. PGE has asked us to strike Kleissler's response as untimely, and to enter summary judgment in PGE's favor.

We granted PGE's request to strike Kleissler's inexcusably late response by Order dated August 19, 2002. It does not follow, however, that PGE's motion for summary judgment must be granted as a result. Although we do not consider Kleissler's response to PGE's motion, we will consider Kleissler's own motion for summary judgment. Kleissler's and PGE's motions for summary judgment argue the opposite sides of exactly the same questions. Although Pa.R.C.P. 1035.3(d) allows us to enter summary judgment against a party who does not respond, that rule is discretionary. *Stilp v. Hafer*, 701 A.2d 1387, 1390 (Pa. Cmwlth. 1997), *aff'd*, 718 A.2d 290 (Pa. 1998). It is most appropriately used when it is apparent from the course of the docket that the party who has failed to respond is no longer interested in litigating the case. *Kochems v. DEP*, 701 A.2d 281, 282-83 (Pa. Cmwlth. 1997). That is hardly the situation here. Finally, even if we were to separate completely our analysis of PGE's motion from our consideration of Kleissler's motion, for the reasons discussed below, PGE's motion standing alone does not support summary judgment in PGE's favor. For these reasons, we deny PGE's request that we enter summary judgment in its favor on this basis.

As to the substantive contents of the motions, summary judgment may be entered when a party is entitled to a ruling in its favor as a matter of law based upon the genuinely undisputed

material facts or when the party who will bear the burden of proof has failed to produce enough essential evidence to make out a *prima facie* case. Pa.R.C.P. 1035.1; *Davailus v. DEP*, 2001 EHB 607, 610. With that standard in mind, we turn to the parties' arguments.

Impact on the Forest

Section 205(c) of the Pennsylvania Oil and Gas Act provides that "[t]he Department shall, on making a determination on a well permit, consider the impact of the proposed well on public resources...." 58 P.S. § 601.205(c). Those public resources are to include, but not be limited to, "[p]ublicly owned parks, forests, gamelands and wildlife areas." 58 P.S. § 601.205(c)(1).

One of the bases for Kleissler's appeal is that the Department violated Section 205(c) by failing to consider the impact that PGE's wells would have on the Allegheny National Forest in general, and certain features unique to the area at issue in particular. He argues that the impact has, in fact, been severe, and that the impact was predictable and should not have been permitted.

PGE responds that Section 205(c) only requires the Department "to consider" the impact of the wells. So long as the Department "considers" the impact, the permits may be issued regardless of the severity of the impact. PGE is correct to question the precise nature of the Department's obligation, but we seriously doubt that its proposed interpretation will prevail. *See, e.g.,* Sections 101-105 of NEPA, 42 U.S.C. §§ 4331-4335 (duty to "consider" environmental factors involves extensive analysis). The important task of defining the Department's duty under Section 205(c) will require further analysis after development of a factual record.

PGE goes on to claim that the undisputed facts demonstrate that the Department did consider the project's impacts on public resources. In our view, the limited record, if anything, actually suggests the opposite. All of the evidence cited by PGE supports a conclusion that the

U.S. Forest Service gave the project a thorough review. The object of that review was to fulfill the Service's responsibility to ensure that the oil drilling would be consistent with the Service's Land and Resource Management Plan and related federal requirements. By negative implication, PGE's citations very nearly suggest that the Department did not fulfill its statutory obligation to conduct an independent evaluation. The record, which includes affidavits from Departmental personnel, leaves one with the distinct impression that the Department simply deferred to the federal authorities on this issue.

The interests, perspectives, and duties of the federal authorities are separate and distinct from the interests, perspectives, and duties of the Department. The Oil and Gas Act assigns responsibility to the Department, not the Forest Service, to protect the interests of the citizens of the Commonwealth in "publicly owned forests." *See Eagle Environmental v. DEP*, 1998 EHB 896, 923, *aff'd*, No. 2704 C.D. 1998 (Pa. Cmwlth. 2000) (although Department may rely upon expertise of other agencies, it may not blindly defer to those agencies and must reserve for itself the final decision); *T.R.A.S.H. Ltd. v. DER*, 1989 EHB 487 (same).

If nothing else, Section 205(c) clearly evidences the Legislature's intent that oil wells on "publicly owned forests" are entitled to special consideration. PGE has not cited any evidence, let alone undisputed evidence, that the Department gave the subject wells that consideration. By the same token, Kleissler has not conclusively demonstrated that the Department failed to conduct a proper review. This question will require further factual development.

Aside from what the Department did or did not do, the fundamental underlying question remains: Should these oil permits have been issued in light of the impact that the project is having on public resources? As previously noted, Kleissler cites to evidence that the project is destroying the value of the forest to recreational users. PGE counters that the project is perfectly

consistent with responsible multi-use management of public lands. The question is obviously the subject of genuine dispute.

Finally, assuming *arguendo* that we find that the Department committed an error, we would need to develop a factual record to assist us in fashioning an appropriate order. Should the permits be revoked? Should they be suspended? Should the permits be left in place, but remanded to the Department for further consideration pursuant to Section 205(c)? Should the Board step into the shoes of the Department and simply decide the question? *See, e.g., Eagle, supra* (Board substituted its discretion for that of the Department after Department placed too much reliance on another agency). Under the circumstances of this appeal, it would be rash to attempt to address any of these important questions in the context of the motions for summary judgment. We hope that the Department will not maintain the silence that it has observed to date given the programmatic significance of the issues presented.

Impact on Sensitive Species' Habitats

Section 205(c) also requires the Department to consider the impact that a proposed well will have on "[h]abitats of rare and endangered flora and fauna and other critical communities." 58 P.S. § 601.205(c)(4). We do not know what "other critical communities" are. The parties have also not provided us with definitions of "rare and endangered flora and fauna" or their "habitats."

Kleissler attacks the Department's evaluation of protected-species habitats along the same lines as he challenges the Department's analysis of the project's impact on the forest itself. Aside from undue deference to the federal authorities, he criticizes the Department's allegedly exclusive reliance on a database known as the Pennsylvania Natural Diversity Inventory ("PNDI"). He alleges that the PNDI is inadequate and incomplete. He claims that the presence

of "some rare species" is indisputable. He refers to a number of inadmissible hearsay exhibits that are not part of the record.

PGE's position is that the Department conducted an adequate review and that the review correctly found that there would be no adverse impact. PGE primarily argues that there are no applicable habitats present, so it does not reach the question of whether--assuming habitats are present--PGE's activities are having an intolerably adverse impact upon those habitats. It points out that Kleissler cannot prevail on this issue without expert testimony that he admittedly does not have.

While the record is somewhat more complete on this question than it is on the forest issue, it is still not developed to a point that enables us to grant summary judgment to either party. As a start, the precise nature of the Department's obligation under Section 205(c)(4) must be defined. We do not know, for example, what standard the Department employed. We do not know what standard should be applied. It may be that the Department never addressed the issue because it concluded that the project would not affect any sensitive habitats, or if it would, that there would be *no* adverse impact on those habitats.

The record seems to show that the Department limited its review to checking the PNDI. (*See, e.g.*, PGE Ex. 6, ¶ 7-8.) Kleissler cites this as a fatal flaw. The precise extent of the Department's review, however, is not clear as a matter of undisputed fact. Among other things, it is not clear whether the Department conducted any site-specific analysis. It is not clear whether the PNDI covers all of the habitats that should be considered under Section 205(c)(4).

Once we determine what the Department actually did, we will need to decide whether it satisfied its yet-to-be defined duty under Section 205(c)(4). We acknowledge PGE's point that Kleissler has no expert opinion attacking the use of the PNDI. On the other hand, that data base

on its face states as follows:

> An absence of recorded information does not necessarily imply actual conditions on-site. A field site survey may reveal previously unreported populations.

(Kleissler Ex. 9.) There was also some debate at the supersedeas hearing whether the Department itself has confidence in the PNDI. We also note that, perhaps unlike similar federal laws, the Pennsylvania statute focuses on the impact upon the sensitive species' habitats, as opposed to the sensitive species themselves.

As with the forest-impact issue, when we get past what the Department did or did not do, we are still left with the fundamental underlying question: Should the permits stand in light of the impact (if any) of the project on habitats of concern? Again, this question is subject to genuine dispute at this point. Among other things, PGE refers us to a Forest Service document that reads as follows:

> While the bald eagle does roost and nest in the area, the District Biologist's biological evaluation determined that PGE's activities may affect but would not likely adversely affect beyond the effects stated in the United States Fish and Wildlife Service's (USFWS) June 1999 Biological Opinion on the impacts of forest management and other activities. Similarly, with regard to the Indiana bat, the District Biologist determined through his biological evaluation that while there may be 50 acres of direct impact, this was within the threshold established in the USFWS Biological Opinion for oil and gas developments. The well development project does not adversely impact threatened, endangered or rare flora and fauna within the ANF.

(PGE Brief, p. 27.) This report acknowledges that PGE's activities are in fact occurring within the habitat of protected species. Further, it suggests that the activities may have an effect, or a "direct impact," albeit not enough of an effect or impact to exceed the levels tolerated by the federal government. It remains to be seen whether the apparent adverse impact (if there really is one) that the federal government is willing to live with is sufficient to pass muster under Section

205(c)(4) of the Oil and Gas Act.

Finally, as with the forest-impact question, if we ultimately determine that the Department erred, the equally important task of defining what action we should include in our order will remain. We require the development of a factual record and presentation of legal argument on that question as well.

Impact on Water Quality

Kleissler claims that the Department did not ensure that PGE's activities will protect the water quality of the receiving streams. He argues that subsequent events have shown that the project cannot be implemented without degrading the streams. PGE counters that these arguments require expert testimony and Kleissler by his own admission has no experts. PGE refers to its own expert report, which concludes that the oil drilling has not adversely impacted the benthic community in the streams. (The report concedes, however, that there are "minor differences" in the benthic community metrics between the upstream and downstream sampling stations, but surmises that those differences are "likely" attributable to differences in physical habitat rather than water quality impairment.)

Kleissler relies in part on anecdotal reports of water quality impacts. It is unlikely, but not out of the question, that such reports would satisfy Kleissler's burden of proving an adverse impact, particularly in the face of contrary expert testimony. *See, e.g., Ainjar Trust v. DEP*, 2001 EHB 927, 976-77, *aff'd*, 2583 C.D. 2001 (Pa. Cmwlth. July 10, 2002) (weighing anecdotal reports of sewer overflows against other, more credible, relevant testimony).

Kleissler also relies, however, on an expert report prepared by a Departmental employee. It is not clear as a matter of evidence that Kleissler will be permitted to call or rely upon the testimony of another party's expert over the objection of that party. *Columbia Gas Transmission*

Corp. v. Piper, 615 A.2d 979, 982 (Pa. Cmwlth. 1992) (expert opinion generally cannot be compelled); *Spino v. Tilley Ladder Co.*, 671 A.2d 726 (Pa. Super. 1996) (same). Of course, Department employees can be called as fact witnesses, or to explain the basis for their actions and decisions. At this point in the proceedings, we must accept the possibility that the employee might be permitted to testify. The employee's report concludes that sedimentation related to PGE's activities--particularly the dirt roads that are built to provide access to the wells--may indeed be having an adverse impact on the benthic communities in one or more of the receiving streams. This report falls well short of justifying the grant of summary judgment in favor of Kleissler, but it shows that these questions are not ripe for resolution on summary judgment.

Aside from what appear to be contradictory reports, other aspects of the water-quality issue remain the subject of genuine factual dispute. Even if the project is having an adverse impact on water quality, the scope, severity, and legality of the as yet undefined impact will need to be assessed. The impact (if any) may or may not be related to compliance, as opposed to permitting problems. And as with all of the other claims in this case, a finding of an error raises the equally difficult question of the appropriate scope of our order. Obviously, the claim of water impairment is not ripe for resolution at this juncture.

Common Plan of Development, Unpermitted Wells, and Cumulative Impacts

A major component of Kleissler's case is that the Department never considered the cumulative impact that PGE's activities were having and would continue to have on water quality. PGE has not referred us to any evidence that the Department did consider the cumulative impact of all or parts of the well field. PGE, instead, primarily argues that such an analysis is not legally required. It also argues that Kleissler has not, in fact, demonstrated an adverse cumulative impact.

It is difficult to imagine how PGE's argument will prevail after reading Judge Miller's opinion in *Valley Creek Coalition v. DEP*, 1999 EHB 935, which stated:

> Similarly, where the Department has issued a series of similar permits which will allow similar discharges into the same watershed, it is logical to take those other permits into consideration in order to assure that water quality will not suffer. While one or two permits may not degrade the water quality of receiving streams, the addition of the discharges related to a third permit might. *Cf.* 25 Pa. Code § 92-81(a)(7)(a general permit may only be issued for a group of discharges which "individually and *cumulatively* do not have the potential to cause significant adverse environmental impact." (emphasis added)).

1999 EHB at 951. *See also Davailus v. DEP*, 1991 EHB 1191, 1196 (in evaluating the environmental impact of a project, the cumulative impact of piecemeal habitat losses must be considered). We would also note that both the Department and PGE's experts appear to analyze the impacts of oil well development as it extends beyond the areas covered by the permits under appeal.

Kleissler is also not entitled to summary judgment on this point. It is not perfectly clear that the Department ignored cumulative effects. It also may be that it makes no difference whether this particular project is considered in whole or in part. Exactly what areas should have been considered and/or permitted is a matter that is open to legitimate dispute (*e.g.* Well #1406). If the Department erred, it is far from clear that the error in the scope of its analysis and/or its permit coverage was anything more than harmless error. There is no record indication that suspending or revoking the permits would be appropriate, even if further analysis and/or permit amendments are required.

PGE correctly points out that only three storm water and ten oil and gas permits are directly at issue in this appeal. The Board's order in this appeal may only relate to those permits. Kleissler cannot collaterally attack any previously issued permits. Kleissler is also precluded

from challenging before this Board the Department's decision not to require permits for wells that are remote in distance or time. That is not to say, however, that Kleissler is precluded from arguing that additional wells should have been included in the permits in question. The doctrine of administrative finality also does not prevent Kleissler from arguing that the Department erred by failing to consider other nearby wells (and support activities) when it issued the permits that are under appeal. Of course, whether Kleissler's arguments on these points will prevail remains to be seen.

The Permit Applications

Kleissler's criticisms regarding PGE's permit applications and the Department's review process are grounded in his concern that the public was deprived of a meaningful opportunity to provide input. He contends that the public was deprived of its rightful opportunity because the Department published notice of the permit applications while the applications were still incomplete. He contends that the applications did not identify related environmental permits, and that the applications were imprecise, inaccurate, and did not contain runoff calculations. He contends that PGE changed the applications in material ways after the close of public comments and without follow-up notice to the public. He states that, even after all the changes were made, the applications were never complete and never accurately reflected the scope of the project. Kleissler does not articulate a charge that these alleged deficiencies in and of themselves prevented the Department from making an informed decision in the final analysis. Nor does he articulate an argument that, had the Department been in possession of the necessary information and/or input from the public, it would have or should have on that basis alone made a different decision. He does not explain why the deficiencies should conduce this Board to suspend or revoke the permits. Rather, he simply argues that rules and regulations are there for a reason,

and every applicant must follow them to the letter, or else the public will be deprived of its opportunity to provide input.

Myriad facts material to Kleissler's claim are genuinely disputed, thereby precluding entry of summary judgment. The scope and timing of the various iterations of the evolving permit applications are not clear. Kleissler's spin is that the final applications bear little or no resemblance to the applications that were provided to the public. PGE characterizes the permit amendments and modifications as insubstantial. Exactly when these changes occurred in relation to public notice is also disputed. While multiple public notices and comment periods for a given application are far from the norm, the Board must be wary of any attempt to shield the public from what the regulations intend to be an open review process.

The significance of the alleged deficiencies, if they existed, is unclear. Kleissler is particularly offended by a pipeline across Salmon Creek that was not adequately identified, and which he alleges has caused environmental damage. In addition, Kleissler asserts that runoff calculations were not performed, but PGE disputes that contention. On this point, it may be that the real dispute is over whether the Department's methodology for calculating runoff was sufficiently site-specific and otherwise regulatorily and scientifically adequate. It appears that the Department relied in large part on standardized tables, which may or may not have been appropriate under the circumstances and for a project of this nature.

This is only a sample of the many factual disputes that need to be resolved on the question of the permit applications. Once we resolve those questions, assuming we find that any deficiencies occurred, we will still be left to decide what relief is appropriate.

Given Kleissler's approach, it would seem that the appropriate remedy, in the event he prevails in proving the claim, would be to leave the permits in place, but require the Department

to readvertise the permits, accept new comments, and consider those comments in deciding whether *it* wishes to suspend or revoke the permits or require PGE to provide additional information. *See Fontaine v. DEP*, 1996 EHB 1333, 1356. Other than vindicating the principle of public involvement, we question whether such relief would have any practical value at this stage, but we look forward to receiving evidence and argument on the question.

Finally, we remind the parties that it makes no sense to dwell inordinately on the permit application review process if any alleged defects are immaterial in the final analysis. As we stated in *O'Reilly v. DEP*, 2001 EHB 19:

> The goal of Board proceedings is not to go back through the entire course of permit application procedures to pick out errors that may have been made along the way. Indeed, the very purpose of a deliberative, interactive permit review process is to correct errors and ensure that, in the end, everything has been done correctly. The Board's objective is to determine whether any action needs to be taken regarding the final permit. There will be errors in virtually any permit application review of even modest complexity. If the errors have been corrected, there is no need to dwell upon them. Errors may have been rendered immaterial or moot by subsequent events or even the passage of time. A party who would challenge a permit must show us that errors committed during the application process have some continuing relevance.

2001 EHB at 51. Similarly, in *Stevens v. DEP*, EHB Docket No. 2000-030-L (Adjudication issued March 7, 2002), we stated:

> The difficulty with all of the Stevenses' arguments along these lines is that the Stevenses do not explain how or why the arguments should make a difference in this case. They do not explain why – even if they are correct on all of the points – they are entitled to any relief in their favor. It is not independently apparent to us that resolution of any of these issues in the Stevenses' favor would justify any action on our part regarding the use of [the site]. Even if we assume for purposes of discussion that the Department erred in any of these respects, the errors are meaningless, immaterial, and harmless in the context of this appeal.

2000 EHB at 11. *See also Kwalwasser v. DEP*, 1986 EHB 24, 55 (even where there is error, Board will not interfere with permit where Department's errors were "purely procedural, easily

correctable and environmentally inconsequential.") *Accord, Ainjar Trust v. DEP*, Docket No. 2583 C.D. 2001, slip op. at 11 (Pa. Cmwlth. July 10, 2002) (criticism based upon lack of public notice rejected where party failed to describe how he was actually prejudiced in properly commenting); *Hopewell Township v. DEP*, 1996 EHB 956, 975 (no harm shown from lack of proper notice).

Kleissler accuses PGE of having disdain for the law when PGE argues that application processing errors must be material. We believe that Kleissler misunderstands PGE's point. Whether errors occurred is only half the question. If an error occurred, the effect and consequences of the error must be weighed when the Board fashions its order. An inconsequential error or an error that this Board can do little to correct given the realities of a situation is not likely to result in a permit suspension or revocation, and even a remand may be a waste of time and effort. A party that advances these points does not exhibit disdain for the law.

Compliance History

Kleissler asserts that PGE's compliance history demonstrates that it is unwilling or unable to comply with the law. Therefore, he asserts that the permits should not have been issued. The claim appears to be limited to the NPDES permits.

The extent of PGE's history of compliance with the law is the subject of genuine factual dispute. The thoroughness of the Department's analysis is an open question. Kleissler has pointed to a long list of alleged violations, but whether it is appropriate to consider those alleged violations, if they occurred and are otherwise relevant, is debatable.

As we did at the supersedeas hearing, we caution Kleissler that this Board is unlikely to suspend or revoke permits absent some clear manifestation of a compliance history of serious concern. *O'Reilly*, 2001 EHB at 45. If Kleissler merely proves that the Department did not

conduct a thorough review, but fails to prove that an effective review would have been likely to uncover significant concerns, *the most* that he would be likely to receive would be an order instructing the Department to conduct a new review, but leaving the permits in place pending the results of the Department's reinvestigation.

Finally, in this and other contexts, PGE reminds us repeatedly that it holds property rights that give it the lawful right to drill for oil in the National Forest. It notes that the federal forest managers have accepted and acknowledged that property right. Kleissler, however, has never questioned that fact. There is no indication that the Department ever raised a concern regarding PGE's property rights. The case at hand addresses the entirely different question of whether PGE should have received the permits required by environmental laws. At the risk of stating the obvious, a party's property right to extract a natural resource, or use his property in other ways that are potentially harmful to others or the environment, is subject to compliance with applicable statutes and regulations. *See Machipongo Land and Coal Co. v. Com., DEP*, No. 112 MAP 2000, slip op. at 1 (Pa. May 30, 2002). Thus, for example, if Kleissler were able to prove that PGE is unable or unwilling to comply with the law and "cannot be trusted with a permit," *Belitskus v. DEP*, 1998 EHB 846, 867, its permits would need to be revoked regardless of whether PGE has the necessary property rights.

Article I, Section 27

The Board's resolution of Kleissler's constitutional challenge is likely to depend in large part, if not exclusively, upon its resolution of his statutory and regulatory claims. For example, it may be that Section 205 of the Oil and Gas Act, 58 P.S. § 601.205, as discussed above, achieves the consideration mandated by Article I, Section 27, and no independent constitutional analysis is required. *See National Solid Waste Management Association v. Casey*, 600 A.2d 260, 265 (Pa.

Cmwlth. 1991) (Solid Waste Management Act implements Article I, Section 27). In that none of the other claims presented in the parties' motions are ripe, summary judgment on the constitutional question is also not ready for resolution.

In conclusion, after having examined each and every argument set forth in the parties' filings, we are convinced that the standard for granting summary judgment has not been met. Accordingly, we look forward to the parties' presentation of evidence at the forthcoming hearing on the merits, and issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES KLEISSLER AND RYAN D. TALBOTT	:	
	:	
v.	:	**EHB Docket No. 2001-295-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA GENERAL ENERGY CORPORATION, Permittee	:	

ORDER

AND NOW, this 6th day of September, 2002, it is hereby ordered that the motions for summary judgment are **DENIED.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: September 6, 2002

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

COLT RESOURCES, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-090-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 12, 2002**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Pursuant to Section 18.4 of the Surface Mining Act and the Commonwealth Court's holding in *Kent Coal Mining Co. v. Department of Environmental Resources,* a party who appeals a civil penalty assessment issued under Section 18.4 may challenge both the amount of the penalty as well as the fact of the underlying violation, even where that party has not appealed the compliance order giving rise to the civil penalty.

OPINION

Colt Resources, Inc. (Colt Resources) is the permittee of a surface mine located in Perry Township, Jefferson County, known as the Valier Mine. On December 14, 2001, the Department of Environmental Protection (Department) issued a compliance order to Colt Resources for mine drainage discharges at the Valier Mine. Colt Resources did not appeal the compliance order. Subsequently, on March 19, 2002, the Department imposed a civil penalty of $500 for alleged

violations of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001; the Surface Mining Conservation and Reclamation Act (Surface Mining Act), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.1 – 1396.31; and the regulations thereunder. Colt Resources appealed the civil penalty assessment, and, in doing so, challenged the violations cited in the earlier compliance order.

On July 1, 2002, the Department filed a motion for partial summary judgment, in which the Department asserted that Colt Resources may not challenge the facts or legality of the violations cited in the compliance order since the order was not appealed. In other words, the Department contends that Colt Resources may not dispute the mine drainage discharges cited in the compliance order. Colt Resources filed a response in opposition to the motion, and the Board issued an opinion and order on July 31, 2002 denying the motion based on the Commonwealth Court's holding in *Kent Coal Mining Co. v. Department of Environmental Resources*, 550 A.2d 279 (Pa. Cmwlth. 1988). On August 20, 2002, the Board issued an order vacating the July 31, 2002 opinion and order and granting the Department an opportunity to file a reply to Colt Resources' response to its motion. The Department did so on September 3, 2002.

Section 18.4 of the Surface Mining Act, dealing with civil penalties, states in relevant part as follows:

> The person or municipality charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full or, if the person or municipality wishes to contest either the amount of the penalty *or the fact of the violation,* forward the proposed amount to the secretary for placement in an escrow account with the State Treasurer or any Pennsylvania bank, or post an appeal bond in the amount of the proposed penalty....

52 P.S. § 1396.18d (emphasis added).

In *Kent Coal Mining Co. v. Department of Environmental Resources*, 550 A.2d 279 (Pa.

Cmwlth. 1988), the Commonwealth Court held that, based on the aforesaid language in the Surface Mining Act, a party could challenge the fact of the violation as well as the amount of the fine in an appeal of a civil penalty assessment, even though the party did not appeal the earlier compliance order arising from the same violation. The Court recognized that a civil penalty assessment may not be made until months after a compliance order has been issued and would thereby force a person charged with a violation to take a cautionary appeal of any compliance order in the event that a large civil penalty were to ensue. The Court noted as follows:

> The statute recognizes that, where DER issues a compliance order charging a particular violation and then later assesses a civil penalty based on the same alleged violation, the two actions together constitute a single "order" in terms of their effect on the alleged violator. Therefore, the statute permits the alleged violator to challenge "the fact of the violation" when he or she challenges "the amount of the penalty" – that is, when the full order has been issued.

Id. at 281.

As Judge Krancer explained in *Carl L. Kresge & Sons, Inc. v. DEP*, 2000 EHB 30, the effect of the language of Section 18.4 of the Surface Mining Act is to statutorily alter the doctrine of administrative finality.[1] *See Black Rock Exploration Co. v. DER*, 1995 EHB 551, 561 (Although the appellant-surface mining company did not challenge the Department's issuance of a compliance order, it was not precluded from challenging a subsequent civil penalty assessment based on the earlier order, pursuant to *Kent Coal*.) *See also, F.R. & S., Inc. v. DEP*, 1998 EHB 336; *Berwick Township. v. DEP*, 1998 EHB 487; and *Booher v. DER*, 1990 EHB 285 (applying the *Kent Coal* doctrine under other statutes containing similar language).

The Department's motion and supporting memorandum are silent as to the *Kent Coal* decision. The Department addressed *Kent Coal* only after the Board's earlier opinion and order

relied on it in denying the Department's motion.

The Department now takes the position that *Kent Coal* was wrongly decided. Even if we were to agree with the Department's argument, the Board does not have the authority to reverse an appellate court decision. Moreover, we disagree with the Department's assessment of *Kent Coal* as it relates to the issuance of compliance orders in the area of surface mining. The Commonwealth Court's analysis was based on the premise that recipients of surface mining related compliance orders were without notice of the full impact of their violation until such time as a civil penalty was issued. According to the Department's reply, this premise is factually and legally wrong because the regulations put recipients of compliance orders on full notice of their exposure to civil penalty liability. While the regulations certainly make an alleged violator aware that he may be subject to a civil penalty, they do not specify the extent of liability other than to set forth a maximum penalty amount. The Department admits in its reply brief that the exact amount of the civil penalty is outstanding at the time the compliance order is issued. This is exactly the situation the Commonwealth Court recognized when it decided *Kent Coal*. As the court stated:

> If a penalty were small, a company or other alleged violator might reasonably decide to pay it, rather than go to the time and expense of pursuing a challenge to the charge of the violation, even if the company believed that it had not committed a violation. Of course, if the penalty were large, the company would have every motive to contest the fact of the violation if it believed that it had an adequate defense. However, because DER does not assess a civil penalty when it issues the compliance order, the alleged violator does not have this possibly crucial information when deciding whether to appeal. Kent Coal correctly perceives that the only prudent response for a person charged with a violation, under EHB's interpretation of the statute, would be to file a cautionary appeal to *any* compliance order that DER issues.

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[1] For a thorough discussion of the *Kent Coal* analysis see *Kresge, supra* at 53 – 65.

> Rather than creating an absurd situation, section 18.4 [of the Surface Mining Act] and 25 Pa. Code § 86.202,[2] which implements the statute, appear to be designed to avoid the problem just described. The statute recognizes that, where DER issues a compliance order charging a particular violation and then later assesses a civil penalty based on the same alleged violation, the two actions together constitute a single "order" in terms of their effect on the alleged violator. Therefore, the statute permits the alleged violator to challenge "the fact of the violation" when he or she challenges "the amount of the penalty" – that is, when the full order has been issued. . . .
>
> If DER wished to avoid the effective lengthening of the appeal period accomplished by section 18.4, the department could assess a civil penalty at the same time that it issued a compliance order. Otherwise, EHB is bound by the express language of the statute to permit an alleged violator to challenge the fact of the violation at the time when the full impact of the charge of violation first became known – when the civil penalty is assessed.

Kent Coal, 550 A.2d at 281-82 (emphasis in original).

The Department also advances the rather dubious argument that *Kent Coal* is no longer good law since the Department's regulations have been revised at 25 Pa. Code § 86.202(a) and (d) so that this section no longer parallels the language of Section 18.4 of the Surface Mining Act, on which *Kent Coal* was based. According to the Department, the regulations were revised as a direct result of the Commonwealth Court's holding in *Kent Coal*. However, while the regulations may have been revised, the language of the controlling statute has not been amended. The language of the statute is still the same as that relied upon by the Commonwealth Court in *Kent Coal*. To the extent that 25 Pa. Code § 86.202(a) and (d) are inconsistent with Section 18.4 of the Surface Mining Act, the statute must prevail.[3] *Pysh v. Security Pacific Housing Service*,

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[2] 25 Pa. Code § 86.202 has since been revised.

[3] In *Pennsylvania Coal Assn. v. Babbitt*, 63 F.3d 231 (3d Cir. 1995), the Court of Appeals for the Third Circuit was faced with the issue of whether the amendments to 25 Pa. Code § 86.202 were inconsistent with state law. The court declined to answer that question and, instead, considered only the question of whether the Secretary of the Interior had the duty or authority to ensure that

610 A.2d 973 (Pa. Super. 1992), *appeal denied*, 620 A.2d 491 (Pa. 1993) (Regulations are to be disregarded only where they are clearly inconsistent with the statute being construed.)

The Department also focuses on the fact that in its response Colt Resources stated that it did not dispute the factual and legal averments made in the Department's motion but, rather, relied on the Board's equitable powers. Based on this, the Department asserts that the Board must grant the motion for partial summary judgment. However, simply because Colt Resources may have admitted certain averments made in the Department's motion, that does not mean that summary judgment is warranted. In order to be granted summary judgment, the Department must be entitled to it as a matter of law based upon the undisputed facts. Pa.R.C.P. 1035.2; *Kleissler v. DEP*, EHB Docket No. 2001-295-L (Opinion and Order on Motions for Summary Judgment issued September 6, 2002), p. 4-5. This Board is not merely a referee, keeping track of which side has scored the most points. It is our duty to decide each case in accordance with the law. Where the moving party does not cite an appellate decision interpreting the controlling statute in this area, we cannot simply ignore the law and put on legal blinders in reaching our decision. This is true regardless of the fact that the opposing party also did not advise us of this controlling precedent.

Therefore, based on the *Kent Coal* holding interpreting the language of the controlling statute, we find that Colt Resources may challenge both the amount of the civil penalty as well as the underlying violations set forth in the earlier compliance order. Accordingly, we enter the following order:

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all elements of a state's surface mining program are consistent with state law. The court held that the Secretary did not have such an obligation.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COLT RESOURCES, INC.	:	
	:	
v.	:	EHB Docket No. 2002-090-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 12th day of September, 2002, the Department of Environmental Protection's Motion for Partial Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: September 12, 2002

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

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Gail Guenther, Esq.
Southwest Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARI

PERKASIE BOROUGH AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2001-267-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND HILLTOWN TOWNSHIP WATER AND SEWER AUTHORITY, PERMITTEE	:	**Issued: September 17, 2002**

OPINION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board grants a joint motion for partial summary judgment filed by Hilltown Township Water and Sewer Authority and the Department of Environmental Protection. The Appellant, Perkasie Borough Authority, is precluded by the doctrine of administrative finality from asserting in an appeal of a facility's Part II/Water Quality Management Permit, that the facility is not needed and that, instead, sewage should be directed to the existing treatment plant where the prior unappealed Act 537 Sewage Facilities Plan provided for construction of the new plant and the prior Part I/NPDES permit had been granted and was not appealed. The Appellant's cross-motion for summary judgment asserting that the contemplated plant would not be able to meet its permitted effluent limitations is denied as there are disputed issues of fact, including expert opinion, and the Board will not grant summary judgment on the papers.

Introduction

This appeal involves Perkasie Borough Authority's (PBA) attempt to stop construction of the 150,000 gallon per day (GPD) Highland Park Wastewater Treatment Facility (Highland Park Wastewater Treatment Facility or HPWTF). The appeal is from the Department of Environmental Protection's (the Department's) issuance of a Part II Water Quality Management Permit (Part II Permit) to the prospective facility's owner, the Hilltown Township Water and Sewer Authority (HTWSA). At issue in this case is whether the Department properly issued the Part II Permit which covers the construction and operation of the HPWTF.

This is the second round of motion practice in this case. We previously denied HTWSA's and DEP's Motion to Dimiss PBA's appeal. *Perkasie Borough Authority v. DEP*, EHB Docket No. 2001-267-K (Opinion and Order February 6, 2002). Before us now are HTWSA and the Department's Joint Motion for Partial Summary Judgment, or in the alternative, a Joint Motion to Limit Issues, and PBA's Cross-motion for Summary Judgment. This round of motion practice commenced on June 3, 2002 when HTWSA and the Department filed joint motions with a supporting memorandum of law.[1] PBA filed a response to the Motion for Partial Summary Judgment and a Cross-Motion for Summary Judgment with a supporting memorandum of law. HTWSA and the Department filed replies to their joint motion and responses to PBA's cross-motion with supporting memoranda. The pleadings on these motions were closed on August 20, 2002 with PBA's reply to HTWSA and the Department's responses.[2]

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[1] In the meantime, between the issuance of the undersigned's Opinion and Order on the Motion to Dismiss and the start of this second round of motion practice, there were several discovery disputes resulting in motion practice. HTWSA filed objections to various third-party subpoenas which had been served by PBA. Also, Appellant filed a motion to compel answers to its discovery. The discovery disputes were resolved with intervention by the Board.

[2] During the pendency of the second round of motion practice PBA filed an injunction

Factual and Procedural Background.

The Factual and Procedural background of this case was described in our previous opinion and order on HTWSA's Motion to Dismiss. *Perkasie Borough Authority v. DEP*, EHB Docket No. 2001-267-K (Opinion and Order issued February 6, 2002). There is not much difference with respect to the general factual background of this case for purposes of analyzing this second round of motion practice from that which we described in our Opinion and Order on the Motion to Dismiss. For the convenience of the reader, however, we will restate here, in part, much of what we said about the factual background in the previous decision. [3]

Both PBA and HTWSA are municipal authorities responsible for providing potable water and wastewater treatment services to customers within their respective defined service areas, which are in Bucks County, Pennsylvania. Neither PBA nor HTWSA currently own or operate any wastewater treatment facilities. Instead, both are among the six constituent members, through an inter-municipal agreement, of the Pennridge Wastewater Treatment Authority (PWTA or Pennridge Wastewater Treatment Authority). The Pennridge Wastewater Treatment Authority operates a regional sewage treatment facility into which PBA and HTWSA, pursuant

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and mandamus action in Commonwealth Court seeking that Court to enjoin the construction of the permitted facility which is the subject of this litigation over its Part II Permit. *Perkasie Borough Authority and Pennridge Wastewater Treatment Authority v. Hilltown Township Water and Sewer Authority and DEP*, Docket No. 435 M.D. 2002. By Opinion and Order dated August 5, 2002 Judge Flaherty denied PBA's application for the injunction. *Id.* (Opinion and Order issued August 5, 2002).

[3] Of course we add the various new motions and the respective responses thereto to the "record" for analysis of the competing summary judgment motions. The "record" for purposes of motions for summary judgment, consists of the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, if any. Pa. R.C.P. 1035.01. Thus, the record for summary judgment review in this case is derived from PBA's NOA, and the parties' respective summary judgment motions and exhibits and the responses thereto.

to the terms of the inter-municipal agreement, connect and discharge sewage for treatment for a fee.

HTWSA, however, has planned for some time to develop its own wastewater treatment facilities. HTWSA's Sewage Facilities Planning Act (Act 537) Plan update, which was approved by the Department on October 10, 2000, provided for construction of the new 150,000 GPD (gallons per day) Highland Park Wastewater Treatment Facility (HPWTF). PBA did not appeal the Department's approval of HTWSA's Act 537 Plan update. HTWSA then submitted to the Department a NPDES/Part I permit application for the Highland Park Wastewater Treatment Facility. On June 20, 2001 the Department approved that NPDES/Part I Permit application. No appeal of that action was taken by PBA. Finally, on October 22, 2001, the Department issued the Part II Permit for the Highland Park Wastewater Treatment Facility. PBA's appeal of that action is the subject of this case.

The substantive challenges to the Department's action are raised in Paragraphs 3-1 through 3-5 in the NOA. The Paragraphs are arranged in statutory and regulatory topical order. Paragraph 3-1, which contains subparagraphs 3-1(a)-(g), is entitled "Sewage Facilities Act and Administrative Code Bases For Appeal." Paragraph 3-2, which contains subparagraphs 3-2(a)-(i), is entitled Clean Streams Law Bases For Appeal." Paragraph 3-3, which stands alone with no subparagraphs, is entitled "Act 537 In Combination With Chapter 94 Bases For Appeal."[4] Paragraph 3-4, which contains subparagraphs 3-4(a)-(c), is entitled "Nuisance As A Basis For Appeal." Finally, Paragraph 3-5, which stands alone without subparagraphs, is entitled "Illegal Permit Condition As A Basis For Appeal."

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[4] Chapter 94 refers to 25 Pa. Code Chapter 94 which are the Municipal Wasteload Management regulations. An explanation of the background, substance and operation of this set of regulations can be found in *Ainjar Trust v. DEP*, 2001 EHB 927, 963-965, *aff'd Ainjar Trust v. DEP*, __ A.2d __ (No. 2583 C.D. 2001, Pa. Cmwlth. filed August 28, 2002).

As we read the NOA in concert with PBA's motion papers, we see that the essence of the various separate contentions of the NOA can be summarized as follows: (1) the Department erred because the decision to utilize the new HPSTF rather than the existing Pennridge facility is in violation of the Sewage Facilities Act (Paragraph 3-1); (2) the Department erred because the decision to utilize the new HPSTF rather than the existing Pennridge facility is in violation of the Clean Streams Law (Paragraph 3-2); (3) the Department erred because issuance of the Part II permit is inconsistent with the approved 537 Plan update and Chapter 94 Reports for the affected area (Paragraph 3-3); (4) issuance of the Part II permit is a public nuisance because: (a) it represents bad sewage facilities planning; and (b) it is in derogation of public health, safety and welfare of the residents of the affected municipalities (Paragraph 3-4); and (5) the terms of Special Condition II of the Permit, which provides that the permit is granted subject to the permittee's submission of a revised Act 537 Plan for the Hillcrest Road pump station, is illegal (Paragraph 3-5).

HTWSA and the Department seek through their motion to exclude from consideration paragraphs 3-1, 3-2, 3-3 and 3-4 of PBA's NOA.[5] HTWSA and the Department allege that the doctrine of administrative finality precludes from consideration at this stage issues that could have been raised in challenges to the HTWSA's Act 537 plan approvals or the Part I permit approval. For example, they argue that whether the HPWTF is "needed" and whether there are other alternatives to its construction, including continued use of the Pennridge Authority facility, are planning issues and are now foreclosed from this appeal by PBA's failure to appeal the previous Act 537 Plan Approvals and/or the Part I Permit. PBA responds that the issues raised in

[5] The Department tells us that it is not challenging paragraph 3-1(g) of PBA's NOA, which relates to Special Condition II of the Part II permit. HTWSA has, however, included this subparagraph in its request that we grant summary judgment.

its NOA are not barred by the doctrine of administrative finality. PBA takes a very expansive view of what is included in a Part II permit appeal. In its view, DEP is supposed to consider other alternatives, general watershed water quality and whether the particular plant is necessary as part of the Part II permitting process.

Standard of Review

The joint motion in this case is labeled as a motion for partial summary judgment, or in the alternative, a joint motion to limit issues. As Judge Coleman commented in *Smedley v. DEP*, 1998 EHB 1281, "[a] motion to limit issues generally seeks to exclude a particular issue's consideration because of a procedural or evidentiary defect in its assertion." *Id.* (*citing Tinicum Township v. DEP*, 1996 EHB 816; *Koretsky v. DER*, 1994 EHB 905). Our review of the joint motion and the relief it requests leads us to conclude that the relief HTWSA and the Department are seeking is tantamount to a dispositive treatment in their favor and against PBA of the administrative finality issue which they raise. As Judge Ehmann noted in *Florence Mining Company v. DER*, 1991 EHB 1301, in which the Department filed a motion to limit issues but he treated as a motion for summary judgment:

> Our review of DER's motion leads us to conclude that what DER is seeking here is a *de facto* partial summary judgment rather than the barring of certain evidence at the hearing on the merits. We did not articulate the difference between a motion for summary judgment and a motion to limit issues in *Richards*, where we denied summary judgment and then examined the evidence in ruling on the motion to limit issues. Our granting of a party's motion *in limine* requires the decision of only one Board Member, whereas for us to grant a motion which finally disposes of an issue, such as a motion for summary judgment or for judgment on the pleadings, at least a majority of the Board's Members must agree to grant judgment. In the present motion, DER is not seeking to preclude a piece or type of evidence's admission while allowing other evidence on that issue to come in, but, rather, is requesting that we find in its favor on most of the issues raised by Florence's notice of appeal, with such a finding precluding further consideration of those issues. In such a circumstance, it would be inappropriate for us to disregard the dispositive effect which our granting of DER's motion

> would have merely because it is called a motion to limit issues as opposed to a motion for summary judgment. We thus must look beyond the title DER has chosen to give its motion and treat it as a motion for at least partial summary judgment.

Florence Mining Company, *supra*, at 1306. (footnote omitted). Likewise in this case, the Department and HTWSA are not seeking to preclude a piece of evidence on a certain topic, they are seeking a ruling which would in all respects be dipositive on an issue or issues raised by PBA. Thus, we will consider this as a summary judgment motion.[6]

As for the standard of review of a summary judgment motion, we recently said the following on that subject in W*heelabrator Falls Inc. v. DEP*, EHB Docket No. 2001-100-K (Opinion and Order issued May 16, 2002),

> Our standard for review of motions for summary judgment has been set forth many times before. We will only grant summary judgment when the record, which is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, show that there is no genuine issue of material fact *and* the moving party is entitled to judgment as a matter of law. *Holbert v. DEP*, 2000 EHB 796, 807-09 *citing County of Adams v. DEP*, 687 A.2d 1222, 1224 n. 4. (Pa. Cmwlth. 1997). *See* Pa. R.C.P. 1035.1. Also, when evaluating a motion for summary judgment, the Board views the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Holbert*, 2000 EHB at 808 (citations omitted).

Wheelabrator, *supra*, slip op. at 7.

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[6] We note that on the other side of the coin we have not been hesitant recently to decline to allow the use of a motion *in limine* as a device to secure what is, in essence, dispositive relief. *See Clearview Land Development Co. v. DEP*, EHB Docket No. 2001-191-K (Consolidated with 2001-192-K)(Opinion and Order issued May 16, 2002); *Dauphin Meadows v. DEP*, EHB Docket No. 2000-212-L (Opinion and Order issued March 5, 2002). Thus, the use of the motion which seeks, in the alternative, an order *in limine* or summary judgment is completely appropriate and sets the stage, procedurally, for granting dispositive relief if appropriate.

Discussion

HTWSA's And The Department's Motion For Summary Judgment.

The joint motion is based on the doctrine of administrative finality and the seminal decision on administrative finality is *DEP 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 Board has very recently observed as follows about administrative finality and the *Wheeling-Pittsburgh Steel* case,

> The purpose of the doctrine of administrative finality is to preclude a collateral attack where a party could have appealed an administrative action, but chose not to do so. The Commonwealth Court in *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, explained the policy underlying the doctrine:
>
> > We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealed order. To conclude otherwise, would postpone indefinitely the vitality of administrative orders and frustrate the orderly operations of administrative law. n15

Moosic Lakes Club v. DEP, EHB Docket No. 200-183-MG slip. op. at 11 (Opinion issued April 9, 2002)(footnote omitted) *citing Wheeling Pittsburgh*, 348 A.2d at 767.

The parties have explained to us in great detail their respective versions of the "continuum" of the three interrelated, and sometimes, under certain circumstances, overlapping, steps of Act 537 planning, NPDES/Part I permitting and Water Quality Management/Part II permitting. 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 Section 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. §6981.202. The focal point of the NPDES or Part I permit is that it establishes the location(s) of the discharge point(s) and sets the 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 § 207 of the Clean Streams Law. 35 P.S. §691.207. The essence of the Part II permit is that it authorizes construction and operation of the proposed treatment permit pursuant to construction plans which are submitted for review by the Department. In this case, as we have mentioned, Hilltown Township had already received approval of its 537 Plan update which included the HPWTF and its NPDES/Part I permit for the plant. No appeals were filed from those actions. It is only the Part II Permit which is under appeal.

Because the HPWTF has been subject to this three part process, which has been described as a "continuum", but, more importantly, because only the third step in the process has been appealed, the doctrine of administrative finality is the central point of analysis in determining what is part of this appeal and what is not. The parties have provided us with copious discussion of case law which, as for HTWSA, supports its more compartmentalized, discreet and several version of the three step planning and permitting continuum, and, as for PBA, its more overlapping, interrelated view of the steps of planning and permitting. HTWSA points us to cases such as *Fuller v. DER*, 1990 EHB 1726, *aff'd* 599 A.2d 248 (Pa. Cmwlth. 1991); *Munoz v. DER*, 1995 EHB 284; *Patterson v. DER*, 1995 EHB 389; *Martin v. DEP*, 1996 EHB 1076. PBA points us to cases such as *Peters v. DER*, 1992 EHB 358; *Montgomery Township v. DER*, 1995 EHB 483; *Lehigh Township v. DEP*, 1995 EHB 1098; *Thornhurst*

Township v. DEP, 1996 EHB 258; *Ainjar Trust v. DEP*, 2001 EHB 927, *aff'd Ainjar Trust v. DEP*, __ A.2d __ (No. 2583 C.D. 2001, Pa. Cmwlth. filed August 28, 2002).

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.

The HPWTF Versus the Existing Pennridge Sewage Facilities.

The very essence of PBA's complaint in this case is that the HPWTF should not be built and that, instead, sewage should be directed to the existing Pennridge facility. This is an attack on the very premise of the underlying decision to build the HPWTF rather than utilizing the already existing Pennridge facility. To us this seems to be a quintessential planning decision and not part of the Part II permitting decision.

An examination of PBA's argument and its support demonstrates that its argument in this regard is directed at the now closed planning stage and not to the Part II permitting stage. A prominent theme in support of PBA's argument which is evident from its NOA, and is expanded upon in its motion papers and responsive papers, is that the HPWTF should not be built because

the *1993* conclusion of PWTA and DEP that the PTWA system was hydraulically overloaded was incorrect. As stated by PBA in its papers,

> HTWSA's decision to construct and operate the Highland Park Plant is based on the erroneous conclusion, which DEP approved, that the PWTA system is hydraulically overloaded and therefore unable to accept the sewage flows from the developments in the Central Development District. In short, both HTWSA and DEP failed to see that the PWTA Plant has the capacity to treat the sewage from the four proposed developments.

PBA Memorandum of Law filed July 1, 2002 at 6. The "erroneous conclusion" referred to was determined in 1993 as set forth in a July 28, 1993 letter from the Department to the Chairman of the Pennridge Wastewater Treatment Authority. Exhibit A, Hilltown Township Response filed July 25, 2002. PBA submitted the expert report of Dr. Hugh Archer as part of its motion package the salient feature of which is Dr. Archer's analysis of and disagreement with the *July 28, 1993* DEP conclusion, which he says is erroneous, that the PWTA system was hydraulically overloaded. Dr. Archer says that this error is the single most important factor in the October 10, 2000 DEP approval of Hilltown Township's Act 537 Plan approval and the subsequent permits authorizing the construction and operation of the HPWTF. As PBA further asserts, "the failure to understand that capacity was available at the PWTA plant is evident from the sewage facilities plan submitted by Hilltown Township to DEP in 1999." PBA Memorandum of Law filed July 1, 2002 at 7.

Viewed in this light, it is obvious that PBA's arguments along these lines are barred now. Not only was no appeal filed in 1993, by anyone, of the Department's determination then, no appeal that we have been told of by PBA has been filed since then by anyone of any action taken by the Authority, or anyone else, under the impetus of that 1993 determination. The proof of this point is actually made by PBA itself. PBA states that "[t]he failure to understand that capacity was available at the PWTA Plant is evident from the sewage facilities plan submitted by

Hilltown Township to DEP in 1999." PBA Memorandum of Law filed July 1, 2002 at 7. That is the Plan which called for the HPWTF to be built, which was approved by the Department and, most importantly, the approval of which was not appealed by PBA. If, as PBA says, there was failure to understand that point in that Plan it was incumbent upon PBA to appeal then.

For the same reason, this appeal does not involve analysis of or review of Chapter 94 Reports *for the Pennridge* facility. For the reasons we just stated, the issue of whether the existing Pennridge facility is or is not in hydraulic overload is not an issue in this case. This is just another spin on PBA's theory that the HPWTF plant should not be built because the supposed impetus for its construction is the erroneous conclusion that the existing Pennridge facilities are hydraulically overloaded. PBA's citation to *Ainjar* v. DEP, 2001 EHB 927, *aff'd Ainjar Trust v. DEP*, __ A.2d __ (No. 2583 C.D. 2001, Pa. Cmwlth. filed August 28, 2002), as supporting its position in this regard is misplaced on several levels. PBA appears to be arguing that our conclusion in *Ainjar* that a previously unappealed Chapter 94 determination of projected hydraulic overload was not subject to administrative finality in a later Act 537 Plan Approval makes the 1993 determination in this case likewise not subject to administrative finality. *Ainjar*, however, involved an Act 537 Plan Approval, not a Part II permit approval. The Act 537 regulations specifically provide that "no official plan, official plan revision or supplement will be approved by the Department...that is inconsistent with this chapter." 25 Pa. Code § 94.14. Therefore, as we concluded there, "[a] Chapter 94 consistency determination is thus, by regulation, required to be a part of each and every Department review of an Act 537 Module submission." *Id.* at 963. There is no similar provision of the Part II permitting regulations.

Even if there were, however, it would not mean that the Chapter 94 status of plant "A" would have to be a subject of the Part II permitting process for plant "B".[7]

Conversely, we do think that the question of the designed capacity of the HPWTF plant itself is fairly within the ambit of this appeal. PBA raises the argument that the HPWTF, as designed, is already in anticipated hydraulic overload status. In *Fuller v. DEP*, a case cited by HTWSA to support its view of the discreetness of the three step continuum, Judge Woelfling did examine, in the context of a water quality permit appeal the question whether the contemplated plant was adequately sized to account for expected incoming flows. *Fuller*, 1990 EHB 1726, 1750-1754. That issue will be left for trial since we will not grant summary judgment on that factual contention without hearing the competing experts and other witnesses on that subject.

We think that the case law supports our view that much of what PBA attempts to challenge here is properly characterized as a challenge of the underlying, previously made and unappealed, decision to build the HPWTF instead of using the existing Pennridge facilities and, to that extent, such an attack on that ground is precluded and should be dismissed at the summary judgment stage as HTWSA and DEP have asked that we do. In *Toro Development Co. v. DER*, 425 A.2 1163 (Pa Cmwlth. 1981), the Commonwealth Court held that an appeal of the permit for a trunk sewer line was not an occasion to re-review an approved plan to direct sewage in a certain way. In *Toro*, on November 28, 1977 the Department granted approval to a Section 537 Plan which provided that sewage from Toro's Greendale Village development would be sent to

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[7] Also, we do agree with the Department that PBA's argument on this, even if it were not barred by administrative finality, is a perversion of the Chapter 94 program. Chapter 94 is designed to monitor inflows into sewage treatment facilities and prevent and/or ameliorate overloads. *See Ainjar Trust v. DEP*, 2001 EHB 927, 963-965 *aff'd Ainjar Trust v. DEP*, __ A.2d __ (No. 2583 C.D. 2001, Pa. Cmwlth. filed August 28, 2002). It is definitively *not* the purpose of the Chapter 94 program to assure and enforce that every sewage treatment plant is operating at full capacity.

the Garlow Heights Sewage Treatment Plant. No appeal of this Plan Approval was filed. On June 7, 1978, the Department granted a permit for a trunk sewer line to connect the Greendale Development with the Greendale Village Sewage Treatment Plant. An appeal of the trunk sewer line was filed with the Board. In reversing a decision of the Board to re-open the underlying decision to direct the flow to the Garlow plant, the Commonwealth Court held that "the EHB, with no factual basis for overturning the trunk sewer permit, had no legal jurisdiction to re-open by way of appeal the sewage plan revision approval." *Id.* at 1168.

Similar guidance was provided by the Commonwealth Court in *Grimaud v. DEP*, 638 A.2d 299 (Pa. Cmwlth. 1994). In *Grimaud*, the appellants had filed an untimely Notice of Appeal of a facility's Part I/NPDES permit and a timely appeal of its Part II/WQM permit. The Board denied the appellants' petition to file the appeal of the Part I permit nunc pro tunc. On appeal to the Commonwealth Court, the appellants, among other things, alleged that the two permit system itself was unreasonable and had denied them their opportunity to have received notice of and timely appealed the Part I/NPDES permit. The Commonwealth Court rejected that argument and noted that:

> In *Fuller v. Department of Environmental Resources*, [599 A.2d 248 (Pa. Cmwlth. 1991)], we determined that a party's appeal of one permit did not allow it to raise issues related to permits for which it filed no appeals. In addition, the legislature has approved the two-permit process. Under the Commonwealth's Clean Streams Law, one permit regulates discharge, the other construction. 35 P.S. §§ 691.202 and 691.207. Each permit process is a separate departmental action and has separate and distinct issues. *See Fuller* and *Blevins v. Department of Environmental Resources*, 128 Pa. Commonwealth Ct. 533, 563 A.2d 1301 (1989).

Grimaud, supra, at 303 n. 7.[8]

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[8] As we have said, each one of these types of cases involves distinct factual and different legal backdrops which makes each unique but we do note that the Board, in an opinion and order also issued today, has reached the same conclusion on different facts and on slightly

Furthermore, as the Department points out, an examination of the language of Section 207 of the Clean Streams Law supports the notion that an appeal of a Part II permit is not so broad as to cover the overarching planning decision to use plant "A" over plant "B". Section 207 states that

> § 691.207. Approval of plans, designs, and relevant data by the department
> (a) All plans, designs, and relevant data for the construction of any new sewer system, or for the extension of any existing sewer system, except as provided in section (b), by a person or municipality, or for the erection, construction, and location of any treatment works or intercepting sewers by a person or municipality, shall be submitted to the department for its approval before the same are constructed or erected or acquired. Any such construction or erection which has not been approved by the department by written permit, or any treatment works not operated or maintained in accordance with the rules and regulations of the department, is hereby also declared to be a nuisance and abatable as herein provided.

35 P.S. § 691.207. This language requires that the applicant submit to the Department its plans, designs and data pertaining to construction of the subject facility and calls for the Department to review same and approve the plans, designs and data pertaining to the construction. This section does not relate to overall generic planning issues regarding whether the particular plant is

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different grounds as we reach here. In *Winegardner v. DEP*, EHB Docket No. 2002-003-L (Opinion and Order issued September 17, 2002), Winegardner appealed a 2001 sewage facilities plan update. The 2001 update dealt with a few engineering details of the implementation of a centralized public sewerage plan which plan for centralized sewerage had been the subject of a previously approved and unappealed Act 537 Plan. In *Winegardner*, Judge Labuskes, writing for the Board said, "...Winegardner's primary objection is with the fundamental concept of centralized sewerage. He objects that centralized service is unnecessary, not cost effective, and environmentally harmful. The 2001 Update, however, is not where centralized sewerage was selected as the alternative of choice. That decision was made at least seven years ago." *Id.*, slip op. at 5-6. The Board held in *Winegardner* that the fundamental concept of centralized sewerage was not part of the appeal before it. Likewise, in this case, PBA's primary objection is to the fundamental concept of building the new HPWTF and using it instead of directing the sewage to the already existing Pennridge sewage facilities. That decision, however, was made in Hilltown Township's Act 537 Plan Update submitted to the Department in 2000, approved by the Department in 2000, and not appealed by PBA or anyone else. This appeal by PBA of the Part II Permit issued for the HPWTF does not include or involve the fundamental planning concept of building and using the HPWTF instead of using the already existing Pennridge facilities.

necessary or advisable compared to the potential use of another plant. That type of question is as we have said the quintessential planning question and that is what the Sewage Facilities Act planning process is all about. An evaluation of existing facilities is a requirement of official plan preparation under the regulations adopted pursuant to the Sewage Facilities Act. 25 Pa. Code §71.21(a)(2). *See also Fuller*, 1990 EHB 1726, 1764 (evaluation of alternatives is a requirement under the Sewage Facilities Act and that requirement attaches to planning rather than the permitting phase of a project). We are not at the planning phase of this project. The decision whether to utilize an existing facility or construct a new one is purely a planning issue which should have been appealed following approval of the 537 Plan update and, is therefore, beyond the scope of this appeal.

We reject PBA's argument that Section 5 of the Clean Streams Law *mandates* that the Department review as part of the Part II permitting process the factors of the relative desirability, advisability or necessity for the new HPWTF either in general or compared to the use of other existing plants. PBA says that the terms of Section 5 *requires* the Department to consider the following factors whenever it issues a permit, in this case a Part II permit, under the Clean Streams Law: (1) water quality management and pollution control in the watershed as a whole; (2) the present and possible future uses of particular waters; (3) the feasibility of combined or joint treatment facilities; (4) the state of scientific and technological knowledge; and (5) the immediate and long-range economic impact upon the Commonwealth and its citizens. 35 P.S. § 691.5(a). As the Department correctly points out, however, Section 5 specifically says that these five factors are to be considered "*where applicable*" when issuing a permit. *Id.* Thus, far from mandating that these five factors be considered in every permit decision, Section 5 merely begs the question presented which is whether any of those factors PBA contends should be considered

here really should be. In *Fuller*, the Board faced and flatly rejected the argument PBA makes here with respect to the same type of planning matters which PBA says we should now consider. In *Fuller*, the appellant argued that Section 5(a)(1) of the Clean Streams Law and the planning requirements of the Sewage Facilities Act require the Department to examine alternative sites for a treatment plant when reviewing an application for a permit to construct the treatment plant. The Board said "we do not agree with [that] characterization of the Department's responsibilities." *Fuller*, 1990 EHB at 1763. The Board continued,

> Section 5(a)(1) of the Clean Streams Law requires the Department, "*where applicable*", to consider water quality management and pollution control in a watershed in issuing permits. Nowhere in that language is a duty to undertake evaluation of alternatives. Evaluation of alternatives is a requirement under the regulations adopted pursuant to the Sewage Facilities Act, but that requirement attaches at the planning, rather than the permitting, phase of a project

Id. at 1764 (emphasis added).

PBA's cases are no more convincing than its statutory citation. *Lehigh Township* and *Thornhurst*, which are the same case in that the name of the Township changed during the litigation, deal with a Part I/NPDES permit under a specific and different regulatory regime, namely, the anti-degradation regulations. *Thornhurst*, 1996 EHB 258, 259 n. 4. Under that set of regulations, the Department is specifically required to consider other alternatives to the proposed discharge—in the NPDES permitting process--when high quality waters are receiving the discharge. The regulations require a "Social and Economic Justification" (SEJ), as part of the NPDES permitting process, when a new additional or increased discharge into high quality waters is proposed. *See* 25 Pa. Code § 95.1. Thus, due to that specific regulatory mandate, some degree of social and economic justification analysis is required to take place at the NPDES permitting stage even if it has already occurred to some extent in the planning process. *Id.* at

266-67. As the Board described the effect of the SEJ provisions of the anti-degradation regulations in *Lehigh Township v. DEP*, 1995 EHB 1098,

> [t]he DEP may be required to consider the necessity for a discharge from a sewage treatment plant to high quality waters subject to anti-degradation requirements, as well as the social and economic justification for the discharge, in connection with the issuance of a NPDES permit even though the social and economic justification for the project was considered as part of the feasibility determination in Act 537 planning.

Id. at 1098.

The *Lehigh/Thornhurst* situation is hardly transferable to the situation here which is not an NPDES permit, nor an alleged increased discharge into high quality waters, nor one which PBA has alleged involves the SEJ provisions of the anti-degradation regulations.[9]

Based on our discussion thus far, any argument or challenge that is premised upon an attack of the decision to build the HTWSA facility rather than utilize the existing PWTA facility is precluded as part of this appeal of the Part II Permit. Much of what is contained in the NOA would be precluded from this appeal and ripe for summary judgment in favor of the Department and HTWSA since many of the specific subparagraphs seem focused on the underlying planning decision to choose to build the HPWTF instead of the HTWSA using existing Pennridge facilities.

Paragraph 3-1 of the NOA entitled "Sewage Facilities Act and Administrative Code Bases For Appeal" deals virtually exclusively with planning matters under the Sewage Facilities Act. Based on our reading of this Paragraph and PBA's arguments which appear to be based thereon, DEP and HTWSA are entitled to summary judgment dismissing subparagraphs 3-1(a)-

[9] Likewise, the *Estate of Charles Peters* case cited by PBA involved an NPDES permit, not a Part II/WQM permit. 1992 EHB 358, 359.

(f) from the case. No summary judgment is granted as to Subparagraph 3-1(g) which challenges the specific terms of Special Condition II of the Part II Permit.

Paragraph 3-2 of the NOA is entitled "Clean Streams Law Bases For Appeal". Subparagraphs (a) through (e) of this Paragraph track Section 5(a)(1) through 5(a)(5). PBA's use of Section 5 in this appeal, as we understand it, as we have discussed, is in reality a repackaged attempt to attack the underlying planning decision to build the HPWTF. Thus, DEP and HTWSA are entitled to summary judgment dismissing these subparagraphs. Paragraph 3-2(f), alleges that the Department has violated its duty to issue orders "in the circumstances presented by the instant appeal [which] are necessary to implement the provisions of the CSL." This subparagraph is ambiguous as to its meaning and we cannot discern at this point any specific discreet argument or arguments PBA has made based on that particular subparagraph. Accordingly, we will not grant summary judgment as to that subparagraph. Paragraph 3-2(g) claims the Department has violated its duty to "establish policies for effective water quality control and water quality management...in particular in the affected, adjacent and nearby municipalities." This tracks the language of CSL Section 691.5(b)(2) and, as far as we can see based on the language of the NOA subparagraph and PBA's arguments, is another attempted attack on the underlying planning decision to build the HPWTF instead of providing for use of the existing Pennridge facilities. As such, DEP and HTWSA are entitled to summary judgment dismissing this subparagraph. Subparagraph 3-2(h) alleges that the Department violated its duty in failing to take appropriate action on the Part II permit application in derogation of Section 5(b)(4) of the CSL. That Section requires the Department to report from time to time to the Legislature and the Governor on the Commonwealth's public water supply and water quality control program. We cannot identify any argument PBA has made which would stem from this

particular provision and we cannot fathom how that section of the CSL is implicated with respect to the Department's action in granting this Part II Permit so we will grant DEP and HTWSA summary judgment as to this Subparagraph. Subparagraph 3-2(i) alleges that the Department has violated its duty to act upon complaints of the Appellant in derogation of CSL Section 5(b)(6). That section requires the Department to "receive and act upon complaints." To the extent this is a generic overarching complaint that the Department failed to consider PBA's complaints regarding the pending permit application we will not grant summary judgment. We do, however, note that to the extent PBA's theory is that the Department failed to act upon its complaint that the Part II Permit should not have been issued for the planning reasons we have talked about, that particular complaint could not form the basis for any Department error, nor will that sort of complaint be heard at the trial of this matter.

Paragraph 3-3 of the NOA is entitled "Act 537 In Combination With Chapter 94 Bases For Appeal." DEP and HTWSA are entitled to summary judgment on that Paragraph to the extent it purports to raise the supposed issue that the decision to proceed with the HPWTF was allegedly based on the erroneous conclusion in 1993 that the Pennridge facilities were suffering from hydraulic overload. Based on PBA's papers, we believe that was the primary intent of this Paragraph of the NOA. However, to the extent this paragraph could be interpreted to put into issue the notion that the new plant itself, as designed, is already overloaded, we will allow that claim to be raised and evidence presented thereon at trial because that issue relates to the appropriateness of the Department's approval of the plans and designs for this plant under Section 207 of the CSL. Furthermore, we will not grant summary judgment to the extent that PBA may be contending here that the HPWTF is not actually provided for in approved Act 537 Plans. From what we have seen it does appear, rather clearly, that the permitted plant certainly is

provided for in the approved and unappealed Act 537 Plan. However, since we are granting only partial summary judgment, and we are not sure that we completely comprehend PBA's point on this particular issue, if indeed it is even making one, we will leave it for the adjudication upon hearing and findings of fact to determine whether this plant is provided for in the Act 537 Plan.

Paragraph 3-4 is entitled "Nuisance As A Basis For Appeal." This three subparagraph section of the NOA basically makes two assertions: (1) that the plant will be a nuisance in that it will operate in derogation of public health, safety and welfare of the residents of the affected municipalities; and (2) that the plant will constitute a nuisance because it is contrary to sound sewage facilities planning. We are interpreting the first point to mean that the plant will not operate as designed and/or that the approved design is insufficient to meet the technical effluent and other requirements of the Part I/NPDES permit. Also, this allegation in the NOA could cover PBA's assertion that the plant, as designed, is overloaded already and that the Department should not have approved the design plans under such circumstances. These allegations are within the ambit of this appeal and no summary judgment to DEP and HTWSA is granted. However, as to the second point, that the plant will be a nuisance because it is contrary to sound sewage facilities planning, summary judgment to DEP and HTWSA is warranted.

Paragraph 3-5 which levels a challenge at a specific special condition of the Part II permit is not subject to being dispensed with on the DEP/HTWSA motion and will remain for trial. This would also include PBA's contention that the Part II Permit should have contained a provision, which it labels as Standard Condition 14,[10] which provides that the permit authorizes

[10] We note that the absence of Special Condition 14 as being an error by the Department in drafting this Part II Permit was not raised in the Notice of Appeal. This allegation appeared in PBA's Memorandum of Law in opposition to the Appellee's motion for summary judgment which was dated June 28, 2002 and filed on July 1, 2002. Neither HTWSA nor the Department has yet contended that this allegation should be eliminated from the appeal for failure to raise it

construction and operation of the plant "until such time as facilities for conveyance and treatment at a more suitable location are installed and are capable of receiving and treating the permittee's sewage".[11]

PBA's Cross-Motion For Summary Judgment.

PBA's cross-motion for summary judgment focuses in part on the defunct and unavailable lines of argument that the Department inappropriately approved the Act 537 Plan update providing for construction and operation of the new HPWTF and that better sewage facilities planning calls for use of existing Pennridge facilities. The Department and HTWSA are entitled to summary judgment in their favor and against PBA on those lines of argument so, obviously, PBA's motion for summary judgment based thereon is denied.

The other part of PBA's motion requests summary judgment on its challenge to the terms of Condition II in the Part II Permit, the failure to include "standard condition" 14, and its allegations that the permitted facility, as designed, will not be able to meet its designed

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in the NOA.

[11] PBA contends in its motion papers that HTWSA is obligated pursuant to the 1975 inter-municipal agreement to which both PBA and HTWSA are parties, to not construct the HPWTF and, instead, to use the existing Pennridge facilities. This contention in the context of this appeal is problematic for PBA on many fronts. First, this allegation was not outlined in PBA's Notice of Appeal. Second, there is a dispute as to the meaning of the inter-municipal agreement on this subject as HTWSA alleges that the inter-municipal agreement does not foreclose the construction and use by HTWSA of the HPWTF. Third, PBA has not educated us in its briefs on whether the statutes and regulations governing Part II permits require or even allow the Department to consider that type of complaint in its Part II permit review process and, if they do, how the Department is supposed to consider that information and how it is supposed to act in conformance therewith. Fourth, PBA has not informed us that the Board would be the proper forum to hear such a complaint. Fifth, this argument seems, at least in part, to be a complaint that the inter-municipal agreement, if PBA's interpretation thereof is correct, should have been reason to have denied approval of the Hilltown Township approved and unappealed 2000 Act 537 Plan update which provided for the HPWTF. That nuance on the inter-municipal agreement argument, however, would be barred for all the reasons we have already discussed.

parameters and/or is overloaded. There are numerous affidavits and expert reports and copious technical information submitted on these questions on both sides. Looking only at the issue of whether the new facility is able to meet the requisite effluent limits, there are three separate and competing expert reports and affidavits. That being the case, we will not grant summary judgment. We have said on numerous occasions that we will decline to conduct a trial of technical issues on the papers. In *Lower Paxton v. DEP*, 2001 EHB 753, 775-776 we had this to say on the subject,

> Indeed, both parties' submissions are comprised in large part of dueling affidavits and expert affidavits or reports which conclude either that Actiflo is, in the case of the Township, or Actiflo is not, in the case of the Department, secondary treatment and within the coverage of the secondary treatment percent removal modification rule. As we recently reiterated in *Stern v. DEP*, EHB Docket No. 2000-221-K (Opinion and Order issued June 15, 2001), slip op. at 22-23, we will decline to conduct a trial on the papers. This is especially true where, as here, much of the papers are expert and other competing affidavits. In such cases, the credibility of witnesses is an important subject which needs to be evaluated. *Id.* *See also*, *Defense Logistics Agency v. DEP*, EHB Docket No. 2000-004-MG slip op. at 6 (Opinion and Order issued April 16, 2001)(Chairman Miller writing that where resolution of the case requires the Board to consider disputed facts and to make judgments concerning the credibility of witnesses, summary judgment is inappropriate).

Id. at 775-76. We reiterate that here.

Based on the foregoing, the Board enters the following Order:

PERKASIE BOROUGH AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2001-267-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND HILLTOWN TOWNSHIP WATER AND SEWER AUTHORITY, PERMITTEE	:	

ORDER

AND NOW this 17th day of September, 2002 it is hereby **ORDERED THAT:**

(1) HTWSA and the Department's Joint Motion for Partial Summary Judgment is **GRANTED**. Summary Judgment is entered in favor of the Department and HTWSA as to Notice of Appeal Paragraphs 3-1(a)-(f); 3-2(a)-(e), (g)-(h); 3-3 to the extent that Paragraph purports to raise the complaint that the decision to proceed with the HPWTG was allegedly based on the erroneous conclusion in 1993 that the Pennridge sewage facilities were suffering from overload; and 3-4 to the extent that Paragraph attempts to assert that the plant will constitute a nuisance because it is contrary to "sound sewage facilities planning."

(2) PBA's Cross-Motion for Summary Judgment is **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: September 17, 2002

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

DERRICK S. WINEGARDNER	:	
	:	
v.	:	**EHB Docket No. 2002-003-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DUBLIN TOWNSHIP SUPERVISORS, Permittee	:	**Issued: September 17, 2002**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

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

Synopsis:

An appellant may generally not use an appeal from the latest update to an Act 537 plan as a vehicle for attacking concepts contained in previous updates to the plan. The appellant's appeal is limited to the subject matter of the latest update.

OPINION

As early as 1995, Dublin Township, Fulton County (the "Township"), with the approval of the Department of Environmental Protection (the "Department"), adopted an Act 537 plan update that called for public sewers and centralized treatment in certain areas of the Township. Notice of the plan update was published in the Pennsylvania Bulletin, 25 Pa. Bulletin 3284 (August 12, 1995), and that update was not appealed. In 2001, the Township adopted a further update to the plan (the "2001 Update") that left the concept of public sewerage intact, but changed the engineering solution for part of the system, changed the location of one of the

treatment facilities, and added approximately seven homes to the proposed service area. Derrick S. Winegardner ("Winegardner"), a resident of one of the proposed service areas, filed this appeal from the Department's approval of the 2001 Update.

The Department has filed a motion for partial summary judgment.[1] The Department characterizes Winegardner's appeal as extending impermissibly beyond the changes brought about by the 2001 Update. The Department argues that Winegardner is precluded from attacking the administratively final notion of public sewerage as set forth in prior updates to the plan.

Winegardner, appearing *pro se*, opposes the motion. He seems to suggest that an attack on earlier updates is permissible because those updates have not been fully adopted or implemented in the scheduled time frame. Winegardner goes on to repeat his many objections to the Township's planning efforts.

The Department in its motion for partial summary judgment frames its request for relief in the alternative. It asks that we dismiss certain paragraphs contained in Winegardner's notice of appeal as barred by administrative finality. It also more generally asks that we limit Winegardner's appeal to the issues addressed in the 2001 Update, arguing that many of Winegardner's objections do not go to that update. In its reply brief, the Department adds that the Board lacks jurisdiction in this appeal to adjudicate the changes brought about in the prior updates. We are not entirely certain that the doctrine of administrative finality should be applied here, but we are quite sure that the Department's more general request should be granted.

Administrative finality is essentially the administrative-law version of res judicata. The doctrine operates to preclude a collateral attack on an administrative action where a party could

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[1]The Department's decision to raise these dispositive issues in a motion for partial summary judgment, as opposed to a motion in limine filed on the eve of a hearing, is not only appropriate, it is appreciated. *See Perkasie Borough Authority v. DEP*, EHB Docket No. 2001-267-K, slip op. at 6-7 (September 17, 2002).

have appealed the action, but chose not to do so. *Moosic Lakes Club v. DEP*, EHB Docket No. 2000-183-MG, slip op. at 11 (April 9, 2002), *citing DER v. Wheeling Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). Among other prerequisites, it would appear that the doctrine only applies if a person could have, but did not, appeal the prior Departmental action. *DEP v. Peters Township Sanitary Authority,* 767 A.2d 601, 603 (Pa. Cmwlth. 2001) (doctrine of administrative finality precludes a collateral attack of an administrative action *where the party aggrieved by that action* foregoes his statutory appeal remedy); *Moosic Lakes*, slip op. at 11 ("Clearly the Appellant was aware of the provisions of [the earlier action] and had objections to it.") It is not clear as a matter of undisputed fact that Winegardner was aggrieved by or had the opportunity to appeal the earlier updates to the Township's plan.

Furthermore, administrative finality traditionally applies when the administrative agency takes two or more sequential actions that essentially involve the same thing. *See, e.g., Peters Township*, 767 A.2d at 604 (doctrine applied because Department limited allowable interest award in earlier determination). Thus, in *Perkasie Borough Authority*, *supra*, issued today, we hold that a challenge based upon a planning decision that a sewer facility is needed is foreclosed in a later appeal from the Part II/Water Quality Management Permit issued for that facility. *See also Toro Development Co. v. DER*, 425 A.2d 1163, 1168 (Pa. Cmwlth. 1981) (an appeal of the permit for a trunk sewer line was not an occasion to re-review an approved plan to direct sewage in a certain way). Here, the updates to Dublin Township's plan revised different aspects of the plan.

If we focus on fundamentals, as opposed to administrative finality, which can at times confuse rather than clarify the issue, prescribing the appropriate scope of this appeal is not all

that complicated. Our role is necessarily circumscribed by the Departmental action that has been appealed. 35 P.S. § 7514 (defining Board's jurisdiction). Our responsibility is limited to reviewing the propriety of *that action*. We may not use an appeal from one Departmental action as a vehicle for reviewing the propriety of prior Departmental actions. *See Grimaud v. DEP*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994), *citing Fuller v. DEP*, 599 A.2d 248 (Pa. Cmwlth. 1991) (a party's appeal of one permit does not allow it to raise issues related to permits for which it filed no appeals). It follows that only objections that relate to the propriety of the action under appeal are directly relevant. Objections to a different Departmental action are beside the point of our inquiry. *Accord*, *Perkasie Borough Authority*, slip op. at 18.

Reviewing the propriety of the separate Departmental action is futile because we can only offer relief with respect to the Departmental action under appeal. We cannot, for example, reverse, revise, remand, or do anything regarding the Department's historical actions in approving or disapproving prior sewage plan updates or revisions in an appeal from the latest plan update. We can only take action with regard to that latest update.

It is entirely possible that a planning update may overlap an earlier planning decision to such a degree that it is appropriate to, in effect, revisit that earlier decision in the context of the appeal from the most recent update. That situation, however, is not presented here. The 2001 Update in no way revisits, reevaluates, revises, reconsiders, or in any way affects the notion that portions of Dublin Township require public sewerage. Therefore, it cannot serve as a vehicle for us to reexamine that concept in this appeal. We emphasize that there are no categorical answers to the question of when prior determinations can be reopened. The result of each case "is heavily dependent upon its procedural posture, its specific factual and legal background and the nature of the arguments made by the parties." *Perkasie Borough Authority*, slip op. at 10.

These principles define the permissible boundaries of Winegardner's appeal. Winegardner has appealed from the Department's approval of the 2001 Update to the Township's plan. This appeal only concerns the 2001 Update. Winegardner's objections must relate to that update. Our review relates only to that update. As a result, any objections that Winegardner has that solely concern earlier updates or revisions of the Township's plan are neither properly before us nor relevant. They must be dismissed.

The scope of the 2001 Update is summarized in the update itself as follows:

> The original Plan recommended a septic tank effluent collection system and a subsurface sand filter treatment system with a discharge to the Little Aughwick Creek for the Burnt Cabin Subsection. However, the septic tank effluent collection system and the effluent outfall line were subsequently found not to be the most economical alternatives. A conventional gravity collection system with septic tanks located at the treatment facility was shown to be the most economical collection alternative. A recirculating sand filter treatment system with a subsurface effluent disposal field was found to be more economical than the subsurface sand filter treatment system with an outfall to the Little Aughwick Creek. A subsurface sand filter with a subsurface discharge was not considered because the system is located in the high quality watershed of the South Branch of the Little Aughwick Creek. The scope of this study includes the evaluation of a new wastewater conveyance and treatment alternative for the Burnt Cabins Subsection, a revised Fort Littleton treatment facility location, and modifications to the proposed service area. This amendment is a result of comments received during the USDA Rural Utilities Service funding process.

(DEP Ex. 5 p. 18.) Winegardner's appeal is limited to these modifications; namely, the engineering solution for the public system serving Burnt Cabins, the location of the Ft. Littleton treatment plant, and adding approximately seven houses to the Burnt Cabins service area.

Notwithstanding the limited nature of the 2001 Update, there is little doubt that Winegardner's primary objection is with the fundamental concept of centralized sewerage. He objects that centralized service is unnecessary, not cost-effective, and environmentally harmful. The 2001 Update, however, is not where centralized sewerage was selected as the alternative of

choice. That decision was made at least seven years ago. The 2001 Update changes certain details of how centralized sewerage will be implemented, but it in no way affected the basic concept. Even if we agreed with everything that Winegardner says, we are not in a position to rule on the Department's approval of the basic concept in this appeal, which is limited to the 2001 Update. There is simply no point to addressing those objections here.

Winegardner strongly and repeatedly objects to the well sampling study that the Township conducted in advance of the earlier updates that adopted the concept of centralized sewerage. The Township relied upon that study to support its conclusion that it could no longer allow the use of septic systems in certain areas due to the contamination of water sources that was being caused by those septic systems. The Township did not, however, rely upon the study in formulating the measures set forth in the 2001 Update. The study does not appear to be related to the choice of a different engineering solution for collection or the change in location of a treatment facility, and Winegardner has not cited it as a basis for objecting to the inclusion of seven more homes in one of the service areas. We do not see any legal or factual connection between the Township's well sampling in the early 1990s and the 2001 Update. Unless Winegardner can explain the connection, objections relating to that study are beyond the scope of this appeal.

Winegardner requests that sewage generated by the commercial development in the area of the Turnpike interchange in the Township be handled with "a new modern smaller treatment plant." (Objection 3.C.) Winegardner contends that it would be more cost-effective to serve that area with a "small-flows system." (Response ¶ 5.) Again, however, the 2001 Update did not alter the Township's conceptual approach to the handling of sewage in the area of the interchange. There is no occasion to revisit the issue in the immediate context.

Although it is clear that many of Winegardner's objections are beyond the scope of this appeal, it is also clear that some of the objections are properly before us. For example, Winegardner argues that the Township's decision in the 2001 Update changing the location of one of the treatment facilities jeopardizes a historically significant site. His contention that the Department failed to ensure compliance with regulations applicable to historical preservation by approving the move is properly before us.

It is not necessary for us at this juncture to dissect all of Winegardner's somewhat diffuse objections and decide which parts of which objections are legitimately before us. We believe that it is enough at this point to simply enunciate the limits that will be imposed upon Winegardner's appeal and go from there. To that extent, the Department's motion is granted.[2]

Accordingly, we issue the order that follows.

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[2] Winegardner filed a reply to the Department's reply brief. Putting aside the fact that the filing is not permitted under the Board's rules, we note that the surreply contained a request to file an appeal *nunc pro tunc* from the 1995 update. That request is denied because there has been no showing of fraud, breakdown in the administrative process, or other unique and compelling circumstances explaining a non-negligent failure to file an appeal until six years after the fact. 25 Pa. Code § 1021.53(f); *Falcon Oil v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DERRICK S. WINEGARDNER	:	
	:	
v.	:	**EHB Docket No. 2002-003-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DUBLIN TOWNSHIP SUPERVISORS, Permittee	:	

ORDER

AND NOW, this 17th day of September, 2002, the Department's motion for partial summary judgment is granted to the extent that Winegardner is limited in this appeal to challenging only those changes to the Township's Act 537 plan brought about by the 2001 Update. Winegardner is foreclosed from challenging the basic concept of employing centralized sewerage in the Township. Pursuant to Pa.R.C.P. 1035.5, this appeal will move forward on that basis.

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Member

DATED: September 17, 2002

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

For the Commonwealth, DEP:
Martin R. Siegel, Esquire
Southcentral Regional Counsel

For Appellant:
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For Permittee:
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SECRETARY TO THE BOAI

MAX STARR AND MARTHA STARR	:	
	:	
v.	:	**EHB Docket No. 2002-049-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 18, 2002**
	:	

OPINION AND ORDER DENYING APPELLANTS' PETITIONS FOR RECONSIDERATION AND MOTION FOR LEAVE TO AMEND

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

Appellants' petitions for reconsideration of Board orders issued on discovery motions are denied where Appellants have not shown extraordinary circumstances justifying consideration of the matters anew. Appellants' motion for leave to amend their notice of appeal is denied where the proposed amendments would be futile, they have not satisfied the applicable criteria, and the Department would be prejudiced by amendment at this late stage of the proceedings.

OPINION

The subject of this appeal is an Order, dated January 25, 2002 (the "2002 Order"), issued by the Department of Environmental Protection (DEP) to Appellants Max and Martha Starr pursuant, *inter alia*, to the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101 *et seq.* (SWMA) and Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17. The 2002 Order asserts, in part,

that the Starrs have violated the SWMA, and have created a public nuisance, by their disposal of approximately 5.8 million waste tires on their property in Columbia County (the "Site") in the absence of any permit to dispose of waste at the Site.

I. Background

The Site has an extensive history of enforcement actions, part of which we briefly summarize. DEP issued an administrative order with respect to the Site in 1987; the 1987 Order alleged that approximately six million waste tires were disposed or stored at the Site, that Max Starr was operating a waste tire storage, processing and disposal facility without a permit in violation of the SWMA, and that the Site was a public nuisance. Mr. Starr was directed in part to cease accepting tires at, and to submit a closure plan for, the Site. *See Starr v. DEP*, 1991 EHB 494, 494-97. The Board sustained the 1987 Order, *id.* at 504-05, and the Board's adjudication was subsequently affirmed. *Starr v. DER*, 607 A.2d 321 (Pa. Cmwlth. 1992).

In 1995, DEP issued a second administrative order which required the Starrs to remove, over the course of ten years, the approximately 5.9 million tires accumulated at the Site. *See Starr v. DEP*, 1996 EHB 313, 314. An appeal of the 1995 order was resolved by a Consent Adjudication, approved by the Board, in which the Starrs agreed, *inter alia*, that they were operating a waste tire disposal facility without a permit, and that the disposal of waste tires at the Site constituted unlawful conduct and a public nuisance. *See* Consent Adjudication (Dkt. No. 95-143-C, April 17, 1996). Under the 1996 Consent Adjudication, the Starrs were required to remove and properly dispose at least 72 tons of waste tires from the Site per month, to implement vector controls and fire prevention measures at the Site, and to provide financial assurance mechanisms for securing compliance with the Consent Adjudication. *Id.* at ¶¶ 2-5, 8-9.

The tire removal and nuisance control provisions of the 1996 Consent Adjudication ran from June 1996 through July 1999; after the expiration of those provisions, the parties entered

into a Consent Order and Agreement, dated September 7, 1999 ("1999 COA"). The 1999 COA essentially reasserted the underlying factual premises, and extended the remedial measures, established in the 1996 Consent Adjudication until December 2001. *See* Notice of Appeal, at ¶ 18 and exhibit M.

The tire removal, vector control and fire prevention provisions of the 1999 COA terminated on December 31, 2001. Shortly thereafter, in January 2002, DEP issued the 2002 Order which forms the subject of this appeal. Like the 1996 Consent Adjudication and the 1999 COA, the 2002 Order asserts, in part, that Appellants have violated the SWMA, see 35 P.S. § 6018.610, and have created a public nuisance, 35 P.S. § 6018.601, by their disposal of nearly 5.8 million waste tires at the Site in the absence of any permit to do so. The 2002 Order directs Appellants to remove all waste tires from the Site for recycling, processing or disposal at properly-approved facilities according to an established schedule—200 tons per month during calendar year 2002; 250 tons per month during 2003, 300 tons during 2004, and so forth—until removal of all waste tires has been completed. The 2002 Order again requires Appellants to implement vector controls designed to reduce public health hazards posed by the Site, to perform measures designed to reduce the fire hazard created by the Site's accumulated waste tires, and to provide certain financial instruments intended to assure compliance with the 2002 Order.

A. The Objections in Appellants' Notice of Appeal

The Starrs appealed the 2002 Order. Their Notice of Appeal does not contest DEP's underlying statutory authority to issue the order, does not challenge the order's primary factual basis, particularly the disposal of millions of waste tires at the Site without a permit,[1] and does not controvert the assertion that the Starrs' conduct violates the SWMA. Instead, Appellants'

[1] Indeed, according to the Notice of Appeal, more than ten years after the Board's 1991 Adjudication, the Site still contains approximately 5.8 million waste tires. *See* Notice of Appeal, at ¶¶ 9, 18, 24, 26.

objections are drawn almost entirely from allegations pertaining to an alleged breach of a contract for the purchase of waste tires at the Site purportedly entered into in 1999 by the Starrs and private entities not party to this appeal.

The Starrs allege that, prior to entering into the 1999 COA, they were approached by representatives from Dodge-Regupol, Inc. (DRI), a manufacturer of rubber composition products, and Recycling Technologies, Inc. (RTI), a large processor of rubber materials. DRI and RTI allegedly made a series of representations to the Starrs to the effect that those companies would purchase large volumes of the waste tires deposited at the Site for use in manufacturing recycled-rubber products. The Starrs contend that they reached a binding contractual agreement with DRI/RTI just before signing the 1999 COA; they claim that in early September 1999 DRI/RTI agreed to annually purchase at least 17 million pounds of shredded waste tires from the Site at a cost of $30 per ton. The Starrs would shred the waste tires at the Site and deliver the shredded tires to a processing facility DRI/RTI intended to build in Hanover, Pennsylvania. Appellants assert that they relied on their alleged contract with DRI/RTI when they agreed to enter into the 1999 COA and accepted its provisions for tire removal. However, in March 2001 DRI/RTI disavowed any agreement with the Starrs and refused to purchase waste tires from the Site at the allegedly agreed-upon price. *See* Notice of Appeal, at ¶¶ 1-50, 65-72, 77-78.[2]

The remainder of the Notice of Appeal contains a hodgepodge of vague allegations and charges of wrongdoing or ill-advised actions by "the Commonwealth."[3] Two comprehensible

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[2] The Notice of Appeal reads much like a complaint for breach of contract and related causes of action and, in fact, the Starrs have filed a civil action in the Court of Common Pleas of Columbia County against DRI and RTI (Dkt. No. 2001-CV-1243). An amended complaint filed in that action on January 23, 2002 asserts claims for breach of contract, promissory estoppel and misrepresentation against DRI and RTI and seeks substantial damages. Much of the content of the Notice of Appeal seems to have been copied almost verbatim from the amended complaint.

[3] For example, Appellants assert that "the policies of the Commonwealth with regard to waste tire marketing, disposal and recycling are closely connected to a few key businesses which receive preferential treatment and funding from the state government," Notice of Appeal, at ¶ 80, and "that the market for waste tires in the

purported objections to the 2002 Order can be gleaned from the mix.

First, the Starrs allege that unnamed "key representatives of the Commonwealth, both elected and unelected" told DRI/RTI that the representations made to the Starrs did not constitute an enforceable contract. The Starrs assert that DRI/RTI was thereby induced to breach its alleged contract with them, and they claim that "the Commonwealth" tortiously interfered with their contract by making such statements to DRI/RTI. *Id.* at ¶¶ 94-97.

Second, Appellants allege that certain grant/loan programs related to the development of facilities for recycling waste tires into useable products have not been appropriately administered by the Department of Community and Economic Development (DCED). More specifically, Appellants allege that: (1) DRI/RTI intended to construct a tire processing facility in Hanover, Pennsylvania, if the companies could obtain a grant from DCED to cover construction costs; (2) DRI/RTI lobbied for proposed legislation that would amend the Industrial Sites Environmental Assessment Act, Act of May 19, 1995, *as amended*, P.L. 43, 35 P.S. § 6028.1 *et seq.*, to expand the uses of the Industrial Sites Cleanup Fund; the amendment (House Bill 2057) would authorize DCED to provide performance-based loans for cleanups of brownfields sites, hazardous waste and debris, including waste tire recycling facilities; the loans could be forgiven to the extent that the recipient met performance requirements set forth in the loan agreement; (3) as part of its lobbying efforts, DRI/RTI represented to government officials that they intended to purchase waste tires from the Site if the legislation was passed and DRI/RTI received a loan/grant to build the proposed Hanover facility; (4) the amending legislation was passed and signed into law in mid-March 2000; (5) DRI applied for and received, in late March 2000, a $3.2 million loan/grant from DCED to be used in constructing the Hanover waste tire recycling facility; (6) the loan

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Commonwealth of Pennsylvania is currently not free and is controlled by end users and processors, who rely upon government grants and political influence to subsidize their production of rubber products." *Id.* at ¶ 85.

agreement executed by DRI and DCED did not require DRI to purchase waste tires at the Site for processing at the Hanover facility; and, (7) DRI/RTI is not purchasing shredded tires from the Site, even though the Site is on the Pennsylvania Priority Waste Tire Pile List compiled by DEP. *See* Notice of Appeal, at ¶¶ 29-30, 40, 50-66, 74-79.

From these allegations, the Starrs assert that the DCED loan/grant program administrators should have included a performance requirement in the DRI loan agreement that compelled DRI to purchase shredded waste tires specifically from the Site for processing at the Hanover facility.[4] Indeed, they claim that, because the Starrs possess the largest waste tire pile in Pennsylvania, "the Commonwealth" had a legal duty to favor the Starrs over all other potential sources of shredded tire material by imposing such a requirement on DRI/RTI as part of the loan agreement.[5] They further conclude that, by not compelling DRI to purchase shredded tire material from the Site, DCED has denied the Starrs access to a subsidized market for waste tires which "is not free" and "may be unduly influenced by those who are politically connected." Appellants claim that this alleged denial of access effected an unconstitutional taking of their property and violated their constitutional right to equal protection of the law. *Id.* at ¶¶ 85-93.[6]

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[4] The DRI/DCED loan agreement requires that: "In its acquisition of shredded tire material, [DRI] shall use reasonable efforts to give preference to material sourced from (i) priority tire sites designated by DEP, or (ii) tires collected in tire cleanup programs and initiatives of the Commonwealth of Pennsylvania Department of Conservation and Natural Resources or Pennsylvania Cleanways." Notice of Appeal, at exh. P, ¶ 5.

[5] *Id.* at ¶ 79. In other words, if one violates the SWMA to a sufficient degree (by, say, accumulating and disposing onto the environment the greatest number of waste tires in the Commonwealth without a permit, *see Starr*, 607 A.2d at 322), a legal duty is imposed upon the Commonwealth (*i.e.*, the public and its representative government) to compel third parties to contract with the SWMA-violator in order to assure that the violator is able to profit from its violations. It is not clear, to say the least, from where such a duty would arise.

[6] Aside from requesting that the 2002 Order be vacated, Appellants request several forms of equitable relief in their Notice of Appeal. Appellants ask the Board to: (1) "direct that the Office of the Attorney General and the Office of the Auditor General conduct an investigation of commonwealth funding as it relates to tire remediation"; (2) require DEP "to coordinate any future grants or loans pursuant to the Industrial Sites Environmental Assessment Act to insure [sic] that the funds are used to process tires form the Commonwealth's Priority Tire Pile List in proportion to the tires on that List; (3) direct DEP to issue a waste tire processing permit to the Starrs (though the appeal does not challenge the denial of any processing permit application and does not allege that the Starrs have submitted a permit

II. Discussion

Presently before the Board are Appellants' two Petitions for Reconsideration and a Motion for Leave to Amend the notice of appeal. DEP has opposed the Petitions and the Motion; opposition to the Petition for Reconsideration of the Board's August 19, 2002 Order was also filed by counsel for third-party Fred McKillop. We will deny Appellants' Petitions for Reconsideration and their Motion for Leave to Amend for the reasons that follow.

A. The Board's Order of August 16, 2002

On August 1, 2002, Appellants filed a motion to compel answers to certain interrogatories Appellants had served on DEP. By Order dated August 16, 2002, the Board denied the motion with respect to 36 interrogatories and ordered DEP to supplement its responses to certain interrogatories. The issue presented by Appellants' motion to compel was whether the information sought by Appellants' discovery requests has any relevance to the issues in this appeal. We denied the motion in part because we agreed that Appellants' interrogatories were seeking information that was not relevant or, more precisely, not material to the issues raised by the appeal of the 2002 Order.

As we explained in our August 16, 2002 Order, discovery in proceedings before the Board is generally governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). No discovery shall be permitted which is beyond the scope of discovery set forth in Rules 4003.1 through 4003.6. Pa. R. Civ. P. 4011(c). According to Rule 4003.1, a "party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Pa. R. Civ. P. 4003.1(a).[7] "Evidence is considered relevant if it

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application that is currently before DEP); and, (4) "suspend all enforcement actions against the Starrs by virtue of the Solid Waste Management Act." Notice of Appeal, at pp. 23-24.

[7] It is also "not ground for objection that the information sought will be inadmissible at the trial if the information

logically tends to establish a *material* fact at issue in the case, tends to make the [material] fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a *material* fact." *Commonwealth v. LaCava*, 542 Pa. 160, 174 (1995) (emphases added). Relevancy is the tendency of evidence to establish a material proposition; materiality is the relationship between the proposition on which the evidence is offered and the issues in the case. If evidence is offered to prove a proposition that is not a matter in issue, the evidence is immaterial and by extension irrelevant. *See, e.g.*, MCCORMICK ON EVIDENCE § 185, at 338-39 (4th ed. 1992). In the context of a Board proceeding, the applicable substantive law, the nature of the administrative action being appealed (*e.g.*, permit denial, administrative order or penalty assessment), and the *legitimate* objections raised in the notice of appeal define the range of matters at issue within the appeal proceeding.

The 2002 Order was issued by DEP pursuant, *inter alia*, to the authority granted to the agency by the SWMA and Section 1917-A of the Administrative Code. Pursuant to Section 104 of the SWMA, DEP "shall have the power" to issue orders to implement the purposes and provisions of the SWMA. 35 P.S. § 6018.104(7). Further, DEP "may issue orders to such persons and municipalities as it deems necessary to aid in the enforcement of the provisions" of the SWMA. 35 P.S. § 6018.602(a). Section 1917-A of the Administrative Code expressly grants DEP authority to order nuisances to be "abated and removed." 71 P.S. §§ 510-17(3).[8]

In light of the applicable law and the nature of the agency action being appealed, the question presented in this proceeding is whether the 2002 Order was properly issued—*i.e.*, whether the 2002 Order conforms with applicable law, is supported by a preponderance of the

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sought appears reasonably calculated to lead to the discovery of admissible evidence." Pa. R. Civ. P. 4003.1(b).

[8] This authority includes "any nuisance which is declared to be a nuisance by any law administered by the Department." 71 P.S. §§ 510-17(1). According to the SWMA, a law administered by DEP, any violation of any provision of the SWMA "shall constitute a public nuisance." 35 P.S. § 6018.601.

evidence, and is a reasonable exercise of the agency's discretion. *See, e.g.*, *Starr*, 607 A.2d at 324; *Starr*, 1991 EHB at 498. In short, the issues relevant to this proceeding concern only the validity and content of the 2002 Order. *See Ramey Borough v. DER*, 466 Pa. 45, 49 (1976) (appeal from issuance of an order under Clean Streams Law "serves only to determine the validity and content of the order"); *see also Heidelberg Heights Sewerage Company v. DEP*, 1998 EHB 538.

We noted in our August 16th Order that, to the extent that Appellants are seeking to litigate claims seeking damages for alleged breach of contract or tortious interference with contract, this is not the proper forum. The Board has no jurisdiction over the final adjudication of such common law claims. *See* 35 P.S. §§ 7514(a), (c); 25 Pa. Code § 1021.2(a); *Pond Reclamation Company v. DEP*, 1997 EHB 468, 474. Similarly, the Board has no authority to adjudicate an equal protection claim for injunctive relief that Appellants may be making generally against "the Commonwealth" based on allegations that *DCED* unfairly administered a loan/grant program intended to assist with cleanup of brownfield sites, hazardous waste and debris. *See* 35 P.S. §§ 7514(a) (c) (the Board has the power to hold hearings and issue adjudications on *DEP* orders, permits, licenses, decisions or actions adversely affecting a person); *Westtown Sewer Company v. DER*, 1992 EHB 979, 996-97 (the Board is not a court of general jurisdiction empowered to adjudicate federal law claims under 42 U.S.C. § 1983); *see also Pequea Township v. Herr*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998) (the Board "is not statutorily authorized to exercise judicial powers in equity"). The mere placement into the Notice of Appeal of allegations which may support common law contract or tort claims, or constitutional equal protection claims against another executive department, will not suffice to bring factual issues related to such allegations into the confines of this appeal, and thereby permit

a party to take discovery on those issues. Their relevance having been successfully challenged, Appellants must show how those allegations are material to this proceeding.

1. Appellants' Petition for Reconsideration of the August 16, 2002 Order

Appellants attempt to relate the allegations in the Notice of Appeal to DEP's exercise of discretion. In their Petition for Reconsideration of the August 16th Order, Appellants argue that they are not presently pursuing a tortious interference with contract claim against DEP, but rather are citing DEP's alleged tortious interference "as evidence of DEP's abuse of discretion" regarding the 2002 Order. Appellants also assert that the Board erred because the Board does have jurisdiction over equal protection claims based on allegations that DEP acted with an improper motive and thereby abused its discretion in issuing the 2002 Order.

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). As DEP correctly argues, a reworking of arguments previously presented does not constitute extraordinary circumstances justifying reconsideration of an interlocutory order. *See, e.g., Harriman Coal Corporation v. DEP*, 2001 EHB 1, *Fiore v. DER*, 1995 EHB 634. 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. *Harriman*, 2001 EHB at 5.

In any event, we disagree with the arguments raised by the Petition. With respect to alleged tortious interference, Appellants are simply arguing that DEP abused its discretion by deciding to issue the 2002 Order. They believe DEP should not have issued an administrative order directing them to properly dispose of the waste tires from the Site, but rather should have somehow compelled DRI/RTI to purchase shredded tire material from the Site as the best means

for curing the alleged SWMA violations and abating the public nuisance.

Appellants misconstrue the nature and scope of the Board's review of the reasonableness of DEP's exercise of discretion in issuing the 2002 Order. DEP "may issue orders to such persons and municipalities as it deems necessary to aid in the enforcement of the provisions" of the SWMA. 35 P.S. § 6018.602(a). The agency's decision whether or not to take enforcement action pursuant to the SWMA, and the agency's selection of the type of enforcement action to employ, are within its prosecutorial discretion and are *not* reviewable by the Board. *Montenay Montgomery Limited Partnership v. DEP*, 1998 EHB 302, 307-08; *see Riddle v. DEP*, Dkt. No. 98-142-MG, 2002 Pa. Envirn. LEXIS 19, at *39 n.48 (EHB, March 25, 2002) (DEP's choice of enforcement tool is within its prosecutorial discretion and is not second-guessed by the Board); *see also M.W. Farmer Co. v. DEP*, 1998 EHB 1306, 1315 (DEP decision to suspend storage tank certification, as opposed to issuing notice of violation, was within its prosecutorial discretion and was not reviewable).

The Board's review of the reasonableness of DEP's exercise of discretion primarily concerns the content of the 2002 Order and involves a determination of the reasonableness of the measures prescribed in the 2002 Order in relation to the asserted violations—*i.e.*, are the measures an effective means of resolving the violations, abating the nuisance and remediating the environmental harm. We are not reviewing the reasonableness of DEP's decision to issue an administrative order, as opposed to, say, negotiating a consent agreement with Appellants, or pressuring third parties to contract with them under the aegis of a loan/grant program; such decisions are within the agency's prosecutorial discretion.

Appellants also fail to cogently explain how the allegations pertinent to alleged equal protection violations in the Notice of Appeal (which are directed at *DCED*'s administration of a

loan/grant program and a *DCED* loan/grant to DRI) relate to the allegation in their Petition that DEP acted with improper motive when issuing the 2002 Order and thereby abused its discretion. We can discern no connection between these allegations in the Notice of Appeal and the validity of DEP's enforcement action at issue in this proceeding.

Generally, where DEP actions are in accordance with applicable law, its motives for taking the action are irrelevant; the exception is for an allegation of intentional discriminatory enforcement, or "selective enforcement." *See, e.g., Tinicum Township v. DEP*, 1996 EHB 816, 828. The Equal Protection Clause generally "prohibits differences in treatment of *similarly situated persons* based upon a constitutionally suspect standard" or other classification lacking in rational justification. *Commonwealth v. Stinnet*, 514 A.2d 154, 159 (Pa. Super. 1986) (emphasis added). Notably, the conscious exercise of some selectivity in enforcement is not in itself a constitutional violation. *Oyler v. Boles*, 368 U.S. 448, 456 (1962).[9] The Equal Protection Clause "prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Parker White Metal Co.*, 512 Pa. at 86 n.9 (quoting *Oyler*, 368 U.S. at 456); *see also Barsky v. Department of Public Welfare*, 464 A.2d 590, 594 (Pa. Cmwlth. 1983), *aff'd*, 504 Pa. 508 (1984) ("Mere inequalities in the administration of a law do not give rise to a constitutional violation. Rather, there must be an element of intentional or purposeful discrimination on the basis of an arbitrary classification.").

Thus, to establish a claim of selective enforcement against DEP, an appellant must demonstrate two factors. She must provide evidence that persons similarly situated have not been prosecuted. She must also show that DEP's decision to prosecute was made on the basis of an

[9] The Pennsylvania Supreme Court has adopted the standards and analysis employed by the United States Supreme Court in analyzing the Equal Protection Clause in the United States Constitution, U.S. CONST. amend. XIV, § 1, when interpreting the equal protection provision in the Pennsylvania Constitution, PA. CONST. art. I, § 26. *Commonwealth v. Parker White Metal Co.*, 512 Pa. 74, 83-84 (1986).

unjustifiable standard, such as race, religion or some other arbitrary classification, or that the enforcement action was intended to prevent the exercise of a fundamental right. *See, e.g., United States v. Schoolcraft*, 879 F.2d 64, 68 (3d Cir.), *cert. denied*, 493 U.S. 995 (1989); *United States v. Torquato*, 602 F.2d 564, 568-70 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979); *F.R.&S., Inc. v. DEP*, 1998 EHB 947, 949-51, *aff'd*, 761 A.2d 634 (Pa. Cmwlth. 2000).

Appellants have not alleged the elements of a claim for selective enforcement in their Notice of Appeal. They have not alleged that DEP issued the 2002 Order to the Starrs, but has not taken any enforcement action against other similarly situated persons—specifically, owners of waste tire disposal facilities who accumulated and disposed substantial quantities of waste tires in the absence of a lawful permit to do so. Nor have they alleged that DEP issued the 2002 Order because of the Starr's race, religion or other irrational classification. The Starrs are contending that they have been denied access to state monies loaned to DRI because DCED did not compel DRI, through imposition of a term in the DCED/DRI loan agreement, to purchase shredded tires from the Site. There is clearly no connection whatsoever between the allegations in the Notice of Appeal and a claim for selective enforcement against DEP with respect to issuance of the 2002 Order.

B. The Board's August 19, 2002 Order

As part of the discovery process, Appellants' counsel issued a notice of deposition to counsel for a third party, Mr. Fred McKillop. A dispute arose at the deposition concerning the scope of permissible questioning of the witness by Appellants' counsel, and the Board adjourned the deposition and ordered Mr. McKillop's counsel to file a motion for a protective order.

On August 19, 2002, the Board issued an Order granting Mr. McKillop's motion by limiting the scope of questioning which Appellants could undertake at his deposition to subjects material to this appeal proceeding. Mr. McKillop was registered as a lobbyist for DRI in

December 1999 with respect to House Bill 2057, the amendment to the Industrial Sites Environmental Assessment Act pursuant to which DRI ultimately obtained a loan/grant from DCED. Appellants sought information related to his lobbying efforts for House Bill 2057 and his lobbying and consulting business in general. Appellants also contended that Mr. McKillop has information pertinent to the alleged contract between the Starrs and DRI/RTI and they sought to inquire into matters related to the alleged contract. As we explained in the August 19, 2002 Order, much of the rationale set forth in the Board's August 16th Order was equally applicable to the McKillop motion for protective order. Because we discerned no relation whatsoever between these areas of inquiry and the subject matter of this appeal, the Board issued a protective order prohibiting Appellants from inquiring into the identity of Mr. McKillop's lobbying clients, his lobbying efforts for any proposed legislation, opinions issued by the State Ethics Commission related to his lobbying and business consulting, or information he may have had concerning the alleged contract between DRI/RTI and the Starrs.

1. Appellants' Petition for Reconsideration of the August 19, 2002 Order

Appellants' Petition for Reconsideration of the Board's August 19th Order essentially reiterates the arguments previously made by the Starrs in opposition to the McKillop motion, while adding an argument based on substantive due process. Appellants' petition includes a new, but rather opaque, allegation that DEP was opposed to the inclusion of language in House Bill 2057 that would specifically address the Site—Appellants "believe" that DEP and Mr. McKillop were working together to prevent an unspecified legislative change that would benefit the Starrs. No competent evidentiary support for this allegation is provided, and no cogent explanation is given as to how DEP's alleged lobbying efforts in 1999-2000 with respect to House Bill 2057 relate in any way to the validity and content of the 2002 Order. Appellants simply conclude that they believe the 2002 Order was motivated by partisan political reasons, violated substantive due

process rights, and was therefore an abuse of the agency's discretion.

The rationale set forth above with respect to the Petition for Reconsideration of the August 16th Order applies equally here. The Starrs have not adduced any extraordinary circumstances which would necessitate reconsideration of the August 19th Order.

In addition, we are not persuaded by Appellants' new arguments. Appellant's reliance on *Solomon v. DEP*, 2000 EHB 227 as support for their argument concerning equal protection and substantive due process is misplaced. In *Solomon*, we determined that the appellant had provided evidence, sufficient to withstand summary judgment, that supported *a selective enforcement claim* related to a closure order. 2000 EHB at 243-44. As we discussed above, the Starrs have not alleged the elements of a selective enforcement claim appropriate to this context.

We also determined that the appellant in *Solomon* had provided sufficient evidence to withstand summary judgment on a claim that his solid waste transfer facility *permit renewal application* was denied based on an improper retaliatory motive rather than appellant's compliance history. *Solomon*, 2000 EHB at 241-43. An objection that a land-use permit application was denied on the basis of an improper motive such as personal bias or partisan political reasons, and that the denial was illegal because the agency's conduct rose to the level of a substantive due process violation, may make sense in the context of an appeal from the denial of a permit application.[10] However, an allegation of a substantive due process violation is inapplicable to an agency enforcement action like the 2002 Order at issue here.

This appeal does not involve the denial of a permit renewal application; nor does it

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[10] *See Woodwind Estates, Ltd. v. Gretowski,* 205 F.3d 118, 122-25 (3d Cir. 2000); *Midnight Sessions, Ltd. v. City of Philadelphia,* 945 F.2d 667, 682-86 (3d Cir. 1991), *cert. denied,* 503 U.S. 984 (1992); *but see Nicholas v. Pennsylvania State University,* 227 F.3d 133, 139-44 (3d Cir. 2000) (to prevail on a non-legislative substantive due process claim a plaintiff must establish as a threshold matter that he has a protected property interest to which the Fourteenth Amendment's due process protection applies and that such property interest is constitutionally fundamental) (holding that appellant's tenured public employment, as a wholly state-created contract right, bore little resemblance to other rights and property interests that have been deemed fundamental under the Constitution).

involve a constitutionally-fundamental property interest that may implicate substantive due process. In this context, to allege that an enforcement action was improperly motivated can only be construed as a claim for selective enforcement in violation of equal protection rights; Appellants have not alleged such a claim here.[11]

C. Motion for Leave to Amend the Notice of Appeal

Appellants seek leave to amend their Notice of Appeal in four ways. First, they seek to add factual allegations that DEP had a legislative liaison working on House Bill 2057 prior to its passage in March 2000, that DEP instructed its legislative liaison to work to keep the language of the DRI/DCED loan agreement from identifying any specific waste tire site as a source of tire material for the DRI processing plant, and that DEP's legislative liaison never advised the lobbying firm representing Appellants that DEP was not in favor of including specific language in the DRI/DCED loan agreement concerning purchase of shredded tires from the Site. They also seek to add the new allegation, found in their Petition for Reconsideration, that DEP and Mr. McKillop were working together to prevent an unspecified legislative change in House Bill 2057 beneficial to Appellants. Second, they want to advance alternate legal theories that: DEP committed a substantive due process violation; DEP perpetrated a fraud on the Starrs; and, DEP abused its police power in issuing the 2002 Order. Third, they advance a defense that they are financially unable to comply with the tire removal provisions in the 2002 Order. Finally,

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[11] Appellants' citation to *Pennsylvania Mines Corporation v. DEP*, 1996 EHB 808, as further support for its substantive due process argument is baffling. *Pennsylvania Mines* simply held that a significant economic expense which would be incurred by the recipient of an administrative order, and would not later be recoverable, could be considered irreparable harm for purposes of determining whether to grant a petition for a supersedeas of an administrative order. 1996 EHB at 810-12. The case is clearly inapposite to any issues pertinent here.

The citation to *Gemstar Corporation v. DEP*, 726 A.2d 1120 (Pa. Cmwlth. 1998), is also unpersuasive. That case involved a civil penalty assessment for violation of a solid waste permit; the statute states that in determining the amount of the penalty, DEP shall consider the willfulness of the violation. Commonwealth Court held that evidence that a permittee's efforts to comply with permit conditions were thwarted by another party was relevant to the issue of the willfulness of the violation. *Id.* at 1123. This appeal does not involve a civil penalty assessment, a determination of the willfulness of the violation, nor an examination of a permittee's efforts to comply with its permit. Indeed, the Starrs' compliance with the 2002 Order is not at issue, only the validity and content of that order.

Appellants assert that DEP abused its discretion because the 2002 Order allegedly requires that all tires removed from the Site "must be buried in approved landfills at a cost to the Starrs of not less than $50/ton, when such tires should be sold to [DRI] for $15/ton for recycling." (App. Motion, at ¶ 4(j)).

Pursuant to Rule 1021.53, after the 20-day period for amendment as of right has passed, upon motion the Board "may grant leave for further amendment of the appeal." 25 Pa. Code § 1021.53(b). Leave may be granted if the appellant satisfies one of the following conditions: (1) the amendment is based upon specific facts discovered during discovery of hostile witnesses or Departmental employees; (2) it is based on facts discovered during the preparation of appellant's case that appellant, exercising due diligence, could not have previously discovered; or (3) it includes alternate or supplemental legal issues, the addition of which will cause no prejudice to any other party. 25 Pa. Code §§ 1021.53(b)(1)-(3).[12]

This appeal was filed in February 2002, and the discovery period, which was extended several times, was closed on August 21, 2002. The parties have exchanged interrogatories and document requests, and depositions of both party and non-party witnesses have been taken. Appellants have filed an application for temporary supersedeas and petition for supersedeas, both of which were subsequently withdrawn, and the parties have engaged in substantial motion practice. At this late stage of proceedings, due to the likelihood of prejudice to other parties, we

[12] The Board's rule further states that a motion for leave to amend "shall be verified and supported by affidavit." 25 Pa. Code § 1021.53(d). We note that Appellants filed their Motion for Leave to Amend on August 21, 2002, but the motion was not verified, or supported by affidavit. The Board issued an Order on August 21, 2002 requiring DEP to file any opposition to the Motion by August 26, 2002. On August 23, 2002, Appellants filed an amended Motion for Leave to Amend which still did not contain a verification or supporting affidavits. DEP duly filed its opposition on August 26, 2002. On September 4, 2002, Appellants filed a verification and three affidavits in support of their Motion. The next day DEP filed an affidavit in response to those filed by Appellants.

As DEP points out in its opposition, the Motion could be denied for failure to comply with the requirements of section 1021.53(d). *See, e.g., Township of Paradise v. DEP*, 2001 EHB 920. We will invoke our authority to disregard an error of procedure that does not affect substantive rights, 25 Pa. Code § 1021.4, and will examine the merits of Appellants' Motion. However, counsel are advised to adhere to the requirements in the Board Rules and that further lenience for piecemeal filing practices should not be expected as this appeal proceeds.

will not grant leave to amend unless the appellant can state her new objections with specificity, and has clearly satisfied the criteria in Rule 1021.53. *See, e.g., Bentley v. DEP*, 1999 EHB 71.

DEP objects to Appellants' proposed inclusion of the new factual and legal allegations because, even assuming that such facts are true, the allegations are not material to the matters at issue in this appeal. Consequently, the amendment would be futile and would cause prejudice to DEP by needlessly extending this proceeding. DEP also argues that Appellants have not satisfied the criteria for inclusion of new factual or legal allegations. *See* 25 Pa. Code § 1021.53(b).

We will not exercise our discretion to allow an amendment of the notice of appeal which would be futile. *Cf. Carlino v. Whitpain Investors*, 499 Pa. 498, 505 (1982) (where allowance of an amendment would be a futile exercise the complaint may properly be dismissed without allowance for an amendment); *Wiernik v. PHH US Mortgage Corp.*, 736 A.2d 616, 624 (Pa. Super. 1999), *appeal denied*, 561 Pa. 700 (2000). The proposed factual-allegation amendments concern events that allegedly occurred several years ago in relation to a proposed amendment to the Industrial Sites Environmental Assessment Act, a statute not at issue here, and in relation to a loan agreement between DCED and DRI. We discern no connection between the proposed allegations and the matters at issue in this appeal, which concern only the validity and content of an administrative order issued pursuant to the SWMA and Section 1917-A of the Administrative Code. We are also not persuaded that Appellants have satisfied the criteria for allowance of an amendment. The proposed new factual allegations are based on hearsay and innuendo, are not supported by competent evidence, and are extremely speculative. By this time, Appellants should be able to articulate their objections with greater specificity, *see Bentley*, 1999 EHB at 74, and it would be prejudicial to DEP to allow vague and speculative amendments—either DEP will not have a fair opportunity to respond or it will suffer undue delay in taking further discovery.

We similarly reject Appellants' request to amend their appeal to advance alternate legal theories of fraud, abuse of police power, and violation of substantive due process. Appellants have not articulated the elements of a fraud claim, nor have they explained how the factual allegations in their Notice of Appeal would support a claim of fraud. In any event, to allow an allegation of fraud would be futile; this Board does not have jurisdiction over the adjudication of common law fraud claims. *See* 35 P.S. §§ 7514(a), (c). Appellants have not explained the basis for their allegation of an "abuse of police power," nor have they provided any authority for such a claim. We fail to comprehend this allegation or how it may differ from their assertion that DEP abused its discretion by deciding to issue the 2002 Order, as opposed to taking some other type of enforcement action. As we explained above, the Board does not review such exercises of DEP's prosecutorial discretion. Similarly, the proposed allegation of a substantive due process violation is also flawed. A claim for selective enforcement is the appropriate vehicle for alleging that an enforcement action—an administrative order issued to an alleged violator of SWMA provisions prohibiting unlawful waste disposal—was motivated by an improper rationale. At this point, DEP will be prejudiced by the addition of vague charges of wrongdoing without specific factual or legal support.

We are also persuaded that the Starrs should not be permitted to amend their appeal to allege a defense of financial inability to comply with the 2002 Order. The pertinent information is exclusively within their possession, and their Motion does not contend that the relevant facts could not have previously been discovered.[13] Thus, there is no legitimate reason advanced as to why Appellants, exercising due diligence, could not have previously asserted this defense in their Notice of Appeal. 25 Pa. Code § 1021.53(b)(2). Moreover, the Starrs' financial ability to comply

[13] We note that the Notice of Appeal contains a 25-page recitation of objections and more than twenty attached documentary exhibits.

with the order is irrelevant to this appeal. *See Ramey Borough*, 466 Pa. at 49; *Kidder Township v. DER*, 399 A.2d 799, 801-02 (Pa. Cmwlth. 1979); *Heidelberg Heights*, 1998 EHB at 541-43 (DEP is under no obligation to consider economic impact of its order and financial inability to comply with an order is not a valid objection in context of administrative proceeding challenging issuance of order, as opposed to a subsequent enforcement proceeding in Commonwealth Court); *Agmar Sewer Company, Inc. v. DEP*, 1997 EHB 433, 437-39 (same).

We reject Appellants' fourth proposed amendment that DEP abused its discretion because the 2002 Order allegedly requires that all tires removed from the Site "must be buried in approved landfills at a cost to the Starrs of not less than $50/ton, when such tires should be sold to [DRI] for $15/ton for recycling." This allegation is simply inaccurate. The 2002 Order clearly states that the Starrs "shall remove all waste tires from the Site for *recycling, processing* or disposal to a facility that has been previously permitted or approved by the Department." *See* Notice of Appeal, at exh. V, p. 10, ¶ 1 (emphasis added). Moreover, as with similar allegations in the Notice of Appeal, this allegation implicates DEP's prosecutorial discretion in a manner not reviewable by the Board.

Finally, like much of the Notice of Appeal, this assertion can only be comprehended as a transmogrification of an argument that the waste tires at the Site should not be treated as waste within the meaning of the SWMA because the Starrs believe the tires have economic value. But in sustaining DER's authority to issue the 1987 Order, both the Board and Commonwealth Court rejected the Starr's argument that, because the tires are a valuable marketable commodity, they should not be considered waste as defined by the SWMA. *Starr*, 1991 EHB at 499-500. The Commonwealth Court explained:

> Starr argues that the tires are not waste because they are a marketable commodity capable of being profitably recycled for various further uses. As the Board

> observed, the fact that the discarded tires may have value to Starr does not mean that they are not "waste." Starr's value-based analysis falters in at least two respects. First, it ignores the express legislative policy in the Act to correct "improper and inadequate solid waste practices [which] create public health hazards, environmental pollution . . . ." 35 P.S. § 6018.102. Testimony showed that the tires pose a fire danger and harbor mosquitoes and other insects, thus constituting a public health hazard. Second, the value-based analysis ignores the absurd result that a party could escape environmental regulations by simply declaring his waste has value. Accordingly, the Board properly found that the tires on Starr's property were municipal waste and subject to regulation.

Starr, 607 A.2d at 323-34 (footnotes omitted). We will not exercise our discretion to permit an amendment that merely reformulates the value-based analysis argument submitted to, and rejected by, the Commonwealth Court over ten years ago.

Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAX STARR AND MARTHA STARR	:	
	:	
v.	:	EHB Docket No. 2002-049-C
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 18th day of September, 2002, it is hereby ORDERED as follows:

1. Appellants' Petition for Reconsideration of the Board's Order of August 16, 2002 is hereby denied;

2. Appellants' Petition for Reconsideration of the Board's Order of August 19, 2002 is hereby denied; and

3. Appellants' Motion for Leave to Amend the Notice of Appeal is hereby denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: September 18, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

TINICUM TOWNSHIP AND WALTER SCHNEIDERWIND, Intervenor	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DELAWARE VALLEY CONCRETE CO., INC.	:	**EHB Docket No. 2002-101-L**
	:	**Issued: September 18, 2002**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

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

Synopsis:

A supersedeas of an NPDES permit renewal is granted where the appellant has demonstrated that the permittee will not suffer any injury and the environment will not be harmed if a supersedeas is granted, that local residents and the hydrologic regime are suffering irreparable harm and that the harm may be exacerbated in the absence of a supersedeas, and that the appellant has a substantial likelihood of proving that the Department materially erred by not considering the environmental impact of pumping in accordance with the renewed permit's terms.

OPINION

Delaware Valley Concrete Co., Inc. ("DVCC") owns a quarry that is adjacent to the Delaware River in Tinicum Township, Bucks County (the "Township"). Walter Schneiderwind ("Schneiderwind"), the Intervenor, operates a produce farm immediately to the south of the

quarry. The quarry traditionally consisted of a sand and gravel operation. After it exhausted most of the sand and gravel deposits, DVCC applied for a permit revision that would allow it to mine deeper and to use blasting to mine the shale and argillite beneath the sand and gravel. The Department of Environmental Protection (the "Department") issued the necessary permit revision on October 17, 2001. Several township residents and the Township appealed that permitting action at EHB Docket Nos. 2001-258-L (consolidated) and 2001-263-L, respectively.

On April 29, 2002, the Bucks County Court of Common Pleas issued a preliminary injunction enjoining DVCC from blasting. DVCC may mine shale, but it is not allowed to use blasting to do it. That ruling is up on appeal. In the meantime, DVCC, the Township, and the Department entered into a stipulation for a stay of proceedings and a supersedeas of blasting pending the results of the appeal from the preliminary injunction. The Board approved the supersedeas on May 2, 2002.

Like many surface mines, DVCC's quarry collects water. DVCC has pumped that water out of the pit and into the Delaware River since the late 1970s. DVCC has an NPDES permit that authorizes that discharge up to an average of 3.456 million gallons per day (mgd). The Department renewed that permit on April 10, 2002. The instant appeal is the Township's challenge to that renewal.

On July 26, 2002, the Township filed a petition to supersede the NPDES permit renewal. We held a hearing to address the petition on September 12 and 13. The Township presented the testimony of four experts, two Departmental employees, and several lay witnesses, including Schneiderwind. Neither DVCC nor the Department presented any witnesses.

Preliminary Issues Regarding the Issuance of a Supersedeas

The Department filed a motion to dismiss the Township's petition in advance of the

hearing. The Department argued that the Board is precluded from issuing a supersedeas in this appeal regardless of the merits of the petition for supersedeas because to do so would alter the "last lawful *status quo ante*." Secondly, the Department argued that the Township's goal is to stop the pumping of the quarry, so it is essentially asking for an injunction, and this Board cannot issue injunctions. We denied the motion at the beginning of the hearing, but the Department renewed its arguments as a ground for denying (as opposed to dismissing) the petition.

As we explained at the hearing, the concept of "last lawful *status quo ante*" is easy to state but can be frustratingly difficult to apply in a real-world situation. We do not believe that it can or should operate as the dispositive standard in this appeal. We have no basis in this case for concluding that the situation that obtained prior to the supersedeas petition was "lawful." The mere fact that DVCC had a permit does not necessarily mean that its operation was lawful. If the Township is correct in asserting that the quarry is causing ongoing harm to the environment, it cannot be said that the quarry is operating lawfully.[1] In lieu of searching for the lawful *status quo ante*, we will apply the clear-cut, understandable criteria that are spelled out in our enabling statute and the regulations governing whether a supersedeas should issue. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63.

---

[1] Contrast *Montenay Montgomery Limited Partnership v. DEP*, 1998 EHB 302, where the Board denied a supersedeas from an air quality plan approval. The plan approval and a preexisting, *unchallenged* operating permit contained the same requirement. Regardless of what the Board did with respect to that requirement in the plan approval, the separate operating permit would have been unaffected. Here, there is only one permit, and the continuing validity, i.e. lawfulness, of that permit is at the heart of this appeal. At bottom, it is not extraordinarily productive in many cases to quest for the "last lawful *status quo ante*" grail, particularly where clear, deciding criteria are set forth in the regulations. *See, e.g., Parker Sand and Gravel v. DER*, 1985 EHB 557, and the many decisions trying to explain that holding. In many of the cases where we have cited the precept of preserving the status quo, it would be at least as accurate to say that a supersedeas cannot be used to give the petitioner something that it did not already have prior to the supersedeas of the Department's latest action. Whatever status the petitioner had before the supersedeas of the latest Departmental action is the status to which the petitioner returns. It is not clear why this Board needs to overly concern itself with trying to define what the petitioner's legal status was prior to the supersedeas of the Departmental action under appeal. The Board's focus should be on the Departmental action under appeal.

As to the Department's argument that the Township is seeking an injunction, we do not agree the Township's petition is anything other than what it purports to be: a request that we supersede the permit renewal. This Board does not have the power to enjoin DVCC from pumping. It does have the authority, however, to supersede the renewal of DVCC's NPDES permit. As we stated in *Grove v. DEP*, 2000 EHB 1212, 1214 n.1, *quoting Thomas v. DEP*, 1998 EHB 778, 782-83,

> although an injunction and a supersedeas bear some superficial similarities, they are distinctly different. When a person would like to prevent another from engaging in a particular activity, he must ordinarily secure an injunction, an equitable remedy. A supersedeas, by contrast, is a much narrower remedy: it merely supersedes an action by an agency or tribunal pending a review of challenges to the action.

We are satisfied that the Township is not seeking anything more than an order superseding the permit renewal. Whether the Township's "goal" is to stop the pumping is irrelevant. We offer no opinion regarding the legal and practical effect of a supersedeas of an NPDES permit renewal, except as follows.

DVCC contends that the Board lacks the ability to issue a meaningful supersedeas in this case by virtue of 25 Pa. Code § 92.9. That section provides as follows:

> (b) The terms and conditions of an expired permit are automatically continued when the following conditions are met:
>
> (1) The permittee has submitted a timely application for a new permit in accordance with § 92.13 (relating to reissuance or renewal of permits).
>
> (2) The Department is unable, through no fault of the permittee, to issue or deny a new permit before the expiration date of the previous permit.
>
> (c) Permits continued under subsection (b) shall remain effective and enforceable against the discharger until the Department takes final action on the pending permit application.

DVCC argues that a supersedeas would simply result in an automatic reincarnation of its old permit. We believe that this reading of the regulation is incorrect. The regulation simply states that a permittee who submits a timely renewal application will not be made to suffer a loss of its permitted status if the Department is unable to process its application in a timely manner. Once the Department does act, however, the expired permit cannot be subsequently automatically "continued," regardless of what transpires after the Department's "final action." The regulatory reprieve only applies up until the point of the Department's "final action." 25 Pa. Code § 92.9(b) & (c). As noted above, a supersedeas merely returns a party to the status that it had concerning its permit prior to the supersedeas of the Departmental action. Here, it would appear that DVCC has neither an "automatically continued" permit nor a valid renewal as the result of our order.

DVCC asserted at the hearing that the Department interprets 25 Pa. Code § 92.9(b) the same way that DVCC does. There is no record to support that assertion. Although Departmental counsel presented legal arguments on point, he did not represent that his arguments represented the Department's official position. In any event, whether the Department chooses to apply § 92.9 in the manner proposed by DVCC is beyond our immediate control. Our purpose here in addressing the point is limited to refuting DVCC's argument that a supersedeas should not be issued because it would be a meaningless gesture as a matter of law.

Supersedeas Criteria

As noted above, the circumstances affecting the grant or denial of a supersedeas petition are described at 25 Pa. Code § 1021.63, as follows:

> (a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered:

(1) Irreparable harm to the petitioner.

(2) The likelihood of the petitioner prevailing on the merits.

(3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.

(b) A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.

See also 35 P.S. § 7514(d), to the same effect.

We described some of the general principles regarding supersedeases in *Global Eco-Logical Services v. DEP*, 2000 EHB 829, 831, as follows:

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

The practical effect of issuing a supersedeas in this matter would be to preclude a lawful discharge to the Delaware River. The practical effect of precluding a discharge would be to preclude pumping water out of the quarry. All parties at the supersedeas hearing assumed that precluding pumping will, in turn, mean that the pit fills with water during the pendency of the supersedeas. We have no reason to question that assumption. Therefore, we analyze this case in terms of the consequences and effect of allowing the pit to temporarily fill with water pending a hearing on the merits. The alternative is to allow DVCC to maintain a predominantly dry pit

with unreclaimed highwalls, which would at least give DVCC the opportunity to mine shale so long as it does not use blasting.

Harm to the Permittee

We view the following finding to be critical: There is no record evidence that DVCC would suffer any harm whatsoever if the pit is allowed to fill during the pendency of this litigation.

DVCC's counsel argued that DVCC would like to be able to mine. Two minutes of testimony would have been enough to support that argument. There was no such testimony.

Aside from the lack of any record evidence, counsel's argument is inconsistent with the undisputed, corroborated evidence presented by the Township that the quarry has been dormant for years. Furthermore, the Bucks County Court referenced an agreement between DVCC and the Township providing for the construction of a golf course at the site. The circumstantial evidence contradicts counsel's assertion of a short-term desire to mine.

DVCC argued, but presented no evidence to show, that allowing the pit to fill up and pumping it out later would be more expensive than continuous pumping. The Township presented expert testimony that, over the long run (admittedly undefined), it would likely be less expensive to cease continuous pumping now and empty out the quarry later if necessary.

DVCC argued that allowing the pit to fill up temporarily might violate the law. Tellingly, the Department did not appear to enthusiastically endorse that contention. Neither the Department nor DVCC could convincingly cite a regulation that would prohibit the filling. The permit itself does not appear to require, as opposed to authorize, pumping. Nor do we believe that the temporary filling during the pendency of a Board-issued supersedeas is inconsistent with DVCC's approved operations plan.

DVCC argued that the property would be more marketable without the pit being temporarily filled with water. Again, we have nothing other than counsel's legal argument. Again, a small amount of testimony might have gone a long way on the point. Instead, we have no evidence of a desire to sell in the near term or of comparative property values. We also are not willing to accept DVCC's invitation to take judicial notice of the fact that a dormant quarry wherein blasting is blocked is marginally more valuable than the same quarry wherein pumping is also temporarily blocked.

Harm to the Environment and Public *With* a Supersedeas

Initially, there is no evidence *or* argument that allowing the pit to fill up will harm the environment in any way.

Instead, DVCC focused its arguments on safety concerns. With or without a supersedeas, the pit has unreclaimed highwalls. There is no record evidence of the relative safety risks presented by a water-filled quarry with unreclaimed highwalls versus a dry quarry with the same unreclaimed highwalls. We appreciated the Department's candor in acknowledging in argument that neither condition is particularly safe, and although each condition presents different risks, neither is more or less dangerous than the other. Without discounting the risk of either condition, common sense would suggest that falling off the edge into water gives the victim a greater chance than falling to the bottom of a dry cliff.

Without any evidence to prove its case, DVCC was once again left to fashion legal argument. DVCC posited that a water-filled quarry is more of an attractive nuisance. There is neither fact nor law to support this position. Instinctively, a dry quarry would seem to be at least as likely to attract thrill-seekers as a water-filled quarry.

Irreparable Harm to Petitioner *Without* A Supersedeas

The Township's case may be summarized very briefly as follows. There is challenged, but uncontroverted, opinion testimony from qualified groundwater experts that pumping the quarry is having an ongoing adverse effect on nearby wells. There is uncontroverted expert testimony that pumping is not only causing current water losses, but that digging deeper into the shale (as currently permitted even with the stays on blasting), when combined with DVCC's authorized discharge of up to 3.456 mgd, will have a wide-ranging adverse effect on the hydrologic balance of the area.

A drawing attached to a Departmental report (the report itself was not moved for admission into evidence) finds that pumping has lowered the local groundwater table by about eight to ten feet without taking into consideration the further deepening of the quarry pursuant to the October 2001 permit revision. It is possible, but in our view not demonstrated at this point, that the drawdown is adversely affecting Schneiderwind's crop yields.[2]

Neither DVCC nor the Department put on any case in rebuttal. DVCC relies upon its cross-examination of the Township's witnesses. It argues that there are numerous weaknesses in the Township's case.

We acknowledge DVCC's point that, allowing for the fact that the Board pressures the parties to condense their cases for a supersedeas, there were noticeable weaknesses in the Township's case. One of its experts believed himself to have been personally harmed by the pumping. There is little in the way of empirical testing to back up the expert opinions. The prediction of a far-reaching impact is difficult to accept at face value given the local topography

[2] This question will be the subject of a more thorough investigation in another appeal scheduled for a hearing in the near future. Schneiderwind v. DEP, EHB Docket No. 2000-113-MG. Although the Township presented abbreviated expert opinion at the supersedeas hearing regarding the hydrological connection between the farm and the quarry, the opinion testimony was not presented in a comprehensible manner due to the witness's mannerisms.

and close proximity to the Delaware River. Nevertheless, as effective as it may have been, DVCC's cross-examination was not able to discredit the Township's case enough for us to conclude that the Township failed to meet its burden of proving that irreparable harm is occurring and that further harm is threatened. We may have our suspicions, but we are not hydrogeologists.

By way of illustration, DVCC argued that the adverse effect being seen in the wells is caused by the drought, not pumping the quarry. Although common sense might support this theory, there is no expert opinion to back it up. The Township's expert vigorously disputed the theory and backed up his opinion with the sorts of information reasonably relied upon by experts in his field. There is no record basis here for accepting DVCC's alternate explanation.

The Department was presumably aware of these groundwater concerns when it renewed the NPDES permit and/or revised the mining permit, but it chose not to explain at the hearing why it repudiated those concerns.[3] If nothing else, the existing record unquestionably supports the conclusion that there is more of a threat to the public interest from allowing the pumping to continue than allowing the pit to temporarily fill up.

We are not entirely sure that the Township is required in this particular case to make a separate showing that the harm to its residents and the environment in the vicinity is and/or will be "irreparable." First, there is a coincidence in this case between the first and third of the supersedeas criteria. The Township is acting on behalf of its citizens and its environment. The first criterion is "irreparable harm to the petitioner." 35 P.S. § 7514(d)(1)(i). The third criterion

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[3] Thus, returning for a moment to the Department's *status quo* argument, the uncontradicted evidence at this point is that pumping the quarry is causing an adverse environmental impact that cannot be considered "lawful." We find it difficult to believe that a quarry that is operating in a manner that results in diminution of water supplies is operating "lawfully" and that the Department, if that situation is shown to be the case, would have an interest in preserving that "status quo."

is "likelihood of injury to the public." 35 P.S. § 7514(d)(1)(iii). In this case, both criteria cover the same consideration. Secondly, if a supersedeas may not issue pollution or injury to the public exists or threatened during the period when the supersedeas would be in effect, 35 P.S. § 7514(d)(2), it would seem to follow that a supersedeas should be issued if failure to do so would perpetuate, or fail to eliminate the impending threat of, pollution or injury to the public. It has been shown that the absence of a supersedeas would cause such harm here. Furthermore, where, as here, unlawful activity is occurring or is threatened (e.g., in the form of damage to wells and the hydrological regime), or there is a violation of express statutory or regulatory provisions (e.g., prohibiting water losses and pollution), it has been said that there is irreparable harm per se. *Pleasant Hills Construction Co. v. Public Auditorium Authority of Pittsburgh*, 782 A.2d 68, 79 (Pa. Cmwlth. 2001) (appeal pending); *Harriman Coal Corp. v. DEP*, 2001 EHB 234, 252.

In any event, the concept of irreparable harm includes damage that can be estimated only by conjecture and not by an accurate pecuniary standard. *Carlini v. Highmark*, 756 A.2d 1182, 1188, (Pa. Cmwlth. 2000), *app. denied*, 775 A.2d 809 (Pa. 2001). The water losses and adverse impact upon the hydrological regime that are occurring and will be excaserbated by deepening the quarry and continuing the permitted discharge constitute losses that can only be estimated by conjecture and not by an accurate pecuniary standard. *See Indian Lake Borough v. DEP*, 1996 EHB 1372, 1373-74 (mining that would have dewatered lake, if shown, would have been superseded).[4]

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[4] On this point, we pause to quote from this Board's opinion in *Pennsylvania Mines Corp. v. DEP*, 1996 EHB 808:

> Irreparable harm is essentially an equity concept. The Board precedent is based on equity cases dealing with preliminary injunctions where the test focuses on whether the party has an adequate remedy at law, i.e., money damages. Perhaps because the Board has no equity powers the test has been somewhat strained in its application to cases before the Board.

1996 EHB at 810 (citations omitted).

Likelihood of Success

DVCC argues that the Township has no likelihood of success because it lacks standing. The argument is based on the purported absence of harm to the Township itself. The existing record shows harm to Township residents and the environment within the Township, which should be sufficient to establish standing under applicable case law. *Franklin Township v. DER*, 452 A.2d 718, 720 (Pa. 1982); *Giordano v. DEP*, 2000 EHB 1154, 1156-57. The Township is likely to succeed on this issue based on the record currently before us.

The primary thrust of the Department's argument in contraposition to the Township's likelihood of success is that this appeal, as distinct from other appeals pending before this Board regarding DVCC's quarry expansion, only relates to the renewal of the quarry's NPDES permit. Therefore, it is only appropriate to consider whether the permit discharge limits have changed, and if they have, whether the changes are appropriate. In other words, this case must focus on end-of-the-pipe issues. In DVCC's case, the parameters did not change and there has been no record showing of any adverse effect to the receiving waters (i.e. the Delaware River). It follows, in the Department's view, that there is nothing else for either the Department or the Board to consider.

The Department's argument flies in the face of the applicable regulation, 25 Pa. Code § 92.13(b), which reads as follows:

> Upon completing review of the new application [for a permit renewal], the Department may reissue or renew the permit if, based on up-to-date information on the permittee's waste treatment practices and the nature, contents and frequency of the permittee's discharge, the Department determines that the:
>
> > (1) Permittee is in compliance with all existing Department-issued permits, regulations, orders and schedules of compliance, or that any noncompliance with an existing permit has been resolved by an appropriate compliance action or by the terms and conditions

> of the permit (including a compliance schedule set forth in the permit) consistent with § 92.55 (relating to schedules of compliance) and other applicable Department regulations.
>
> (2) Discharge is...consistent with the applicable water quality standards, effluent limitations or standards and other legally applicable requirements established under this title, including revisions or modifications of the standards, limitations and requirements which may have occurred during the term of the existing permit.

With respect to subpart (1), it was undisputed here that DVCC was not in compliance with its mining permit when the NPDES permit was renewed. The mining permit required DVCC to submit regular discharge reports, and it has not done so. This error standing alone was not shown by the Township to be compelling enough to justify a supersedeas. It is entirely noteworthy, however, that the Department renewed the NPDES permit without considering monitoring reports that should have been submitted under existing permits.

The regulation pointedly refers to Title 25, which encompasses all environmental programs, as opposed to Chapter 92, which relates to NPDES permits. Thus, the Township has a substantial likelihood of success in arguing that the Department should have checked whether DVCC's discharge is consistent with the requirements of Chapter 77 of Title 25, which regulates noncoal surface mining activities. Under that chapter, a noncoal operator is required to show in its application a description of how it will ensure the protection of the quality and quantity of surface water and groundwater. 25 Pa. Code § 77.457. Mining activities, which includes the pumping at issue here, must be planned and conducted to minimize disturbances to the prevailing hydrologic balance within the permitted area and adjacent areas. § 77.521(a). The Chapter 77 regulations expressly require that "the discharge of water from areas disturbed by mining activities shall comply with this *title*." 25 Pa. Code § 77.522(b) (emphasis added).

The Department's highly compartmentalized approach is also inconsistent with this

Board's holding in *Oley Township v. DEP*, 1996 EHB 1098, which held that the Department, when reviewing one permit application, should not ignore the effect the project may have on media or conditions typically permitted under other programs.

The Department emphasizes that the Township's appeal involves a permit renewal, not a new permit. We do not doubt that the vast majority of NPDES permit renewals will not be problematic, and relatively minimal review may suffice in most cases. But here, the quarry operation was recently changed in a material way. The expansion was the subject of strong local interest. Legitimate concerns were being raised. The Department's own hydrogeologist found that adverse local effects could not be ruled out.

Even if we assume for purposes of argument that the nature of the quarry operation was not being changed in important ways, 25 Pa. Code § 92.13 reflects the notion that most environmental permits should not be issued with indefinite terms. *See* 25 Pa. Code § 92.9(a) (NPDES permits may not have a term that exceeds 5 years). It makes sense to check the situation from time to time based upon "up-to-date information" to ensure that the activity is still appropriately permitted. The Department's suggestion that it only needs to exercise the slightest examination if a permittee proposes to change its discharge permit limits as part of the renewal does not strike us as consistent with regulatory requirements.

An application for a renewal does not compel the Department to reexamine whether the original permit should have been issued in the first place. It does, however, require the Department to ensure that a *continuation* of the permitted activity is appropriate based upon up-to-date information. Similarly, our review focuses upon the *continuation*, not the historical initiation, of the activity in question. "The doctrine of administrative finality has no application where the issues raised are raised in different proceeding in which new facts are relevant to the

propriety of the Department's action." *Riddle v. DEP*, EHB Docket No. 2000-230-MG, slip op. at 7 (March 25, 2002), *citing Bethlehem Steel Corp. v. DER*, 309 A.2d 1383 (Pa. Cmwlth. 1978). The scope of the pertinent inquiry for a legislatively mandated permit renewal is broader than the scope of the inquiry for, say, a permit modification, 25 Pa. Code § 92.13a (only those permit conditions which are new or are materially changed in the modified permit are reopened), or an update to an Act 537 plan, *Winegardner v. DEP*, EHB Docket No. 2002-003-L (September 17, 2002) (appeal from update generally limited to contents of update). It is not clear, based on the existing record, that the Department gave the renewal request the attention that it deserved.

It also does not appear to be consistent with regulatory requirements for the Department to close its eyes to anything other than the effect of the discharge on receiving waters. Where, as here, other aspects of the permitted discharge are legitimately alleged to be having an adverse effect on the environment, the Department should consider those as well. Here, the permit authorizes a discharge of up to 3.456 million gallons per day. That water must be coming from somewhere. Repeated seasons of drought have heightened awareness that water is not the infinite resource that we once thought it to be. A discharge that proposes to, in effect, draw up to 3.456 million gallons per day out the local hydrological regime is certainly worthy of at least some considered attention.

In fact, there is no evidence here that the Department *ever* considered the relationship between the effluent limit of 3.456 mgd and the local hydrology. That limit goes back several decades and is based upon the rated capacity of the quarry's pumps at the time. There is nothing in the record to suggest that environmental protection was considered in any way. In the recent renewal, the Department simply extended that limit for another five years without any apparent attention to the fact that the quarry is to be expanded, there are legitimate local concerns

regarding the effect of the pumping, and the pumps used to create the original limit no longer exist.

During closing argument, Department's counsel argued that, even if a review of hydrologic concerns was appropriate in considering whether to renew the NPDES permit, such a review did occur here in the context of the review of the *mining* permit revision. Unfortunately, there is little or no record evidence to support that statement. To the extent that there was passing reference to a review, there was no detail whatsoever presented regarding the scope of that review and what conclusions were reached. We are left to wonder if the Department considered the effect of pumping on local wells. If it did, we do not know what it concluded or why it chose to issue the permits in the face of expressed local concerns. We know that the Department qualifiedly discounted the claim of harm to agricultural uses, but beyond that, there is no record of any meaningful consideration of hydrological impact.

We have no intention of elevating form over substance. If the Department revises a mining permit in close temporal proximity to renewing an NPDES permit, it could very well be that the hydrological analysis conducted precedent to revising the mining permit will suffice for renewing the NPDES permit. Here, the separation of about six months between the mining permit revision and the NPDES permit renewal may or may not have been close enough, particularly since there were no operations during that time. We do not know because we cannot refer to any Departmental or expert opinion testimony on the question. In any event, we have no details regarding the details of any review that may have occurred.

Thus, based on the existing record, the Township has a substantial likelihood of success of proving that the Department erred by failing to conduct any meaningful review of the alleged environmental consequences of renewing an NPDES permit that authorizes a daily discharge of

3.456 million gallons. Given the current record, the Township is likely to show that the Department conducted an inadequate investigation. The Township has not at this point, however, shown that it is likely to be successful in proving that an adequate investigation would have necessarily revealed that the permit should not have been renewed. While the latter showing would have bolstered its case even further, we do not believe that it is critical to the issuance of a supersedeas in this appeal.[5] The Township has demonstrated a substantial likelihood of success on at least one of its key arguments. If it realizes that success, a remand to the Department, at a minimum, is a substantial possibility.

DVCC at the hearing suggested that it was not fairly on notice that the Township was challenging the permit renewal on the grounds relied upon herein. We see no merit to this charge. The Township in this appeal incorporated by reference all of the objections that it raised in the appeal docketed at 2001-263-L. That appeal raises numerous issues related to groundwater. For example, the appeal includes the following objections, not necessarily quoted verbatim:

> 4. The permit fails to provide for protection against hydraulic impacts on neighboring properties.
>
> 17. Failure to require monitoring wells.
>
> 19. Ignores permittee's violations, including failure of monitoring.
>
> 23. Failure to identify affected wells, noting that there are 41 residential wells within 100 feet.
>
> 47. Failure to require monitoring of residential wells.

[5] Under Board precedent, the Township was required to make a credible showing that it would suffer irreparable harm, but a strong showing that it has a likelihood of success on the merits. *Pennsylvania Mines Corporation v. DEP*, 1996 EHB 808, 810; *Lower Providence Township v. DER*, 1986 EHB 395, 397.

49. Failure to consider effect on nearby wells and/or water tables as established by prior events due to dewatering in drought of 1999.

50. Failure to take into account effect of past mining activities on flooding, water table, water quality, and the environment.

51. Failure to require historic data on all wells within zone of influence.

59. Inaccurate water survey.

60. Ignoring the past dewatering of Schneiderwind farm.

The petition for supersedeas also contains several allegations regarding the harm being caused by the pumping. (See, e.g., ¶¶ 7, 8, 10.) DVCC's claim of surprise is unfounded.

Conclusion

The Township's residents are suffering and are threatened with additional irreparable harm as a result of the ongoing pumping. DVCC will suffer no injury if the pumping stops for the time being. Allowing the pit to fill presents no environmental threat, and no more of a safety threat than exists at the site right now. The Township has a substantial likelihood of prevailing on its claim that the Department failed to conduct an adequate investigation of the hydrological impact of renewing the permit to discharge up to 3.456 mgd from the quarry. A supersedeas of that permit renewal as set forth in our order of September 17, 2002 is warranted.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: September 18, 2002

c: **DEP Bureau of Litigation**
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WALLACE TOWNSHIP, BRANDYWINE CONSERVANCY, EAST BRANDYWINE TOWNSHIP, DOWNINGTOWN MUNICIPAL WATER AUTHORITY, SIERRA CLUB and DELAWARE RIVERKEEPER, a/k/a MAYA ROSSUM, et al.	:	**: EHB Docket No. 2002-113-MG : (consolidated with 2002-114-MG, : 2002-115-MG, 2002-123-MG, : 2002-124-MG and 2002-126-MG)**
v.	:	
		: Issued: September 20, 2002
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA SUBURBAN WATER COMPANY, Permittee	:	

OPINION ON MOTIONS TO COMPEL AND FOR PROTECTIVE ORDERS

By George J. Miller, Administrative Law Judge

Synopsis

This opinion is issued to further explain rulings made in an earlier order which disposes of some of the discovery disputes related to an appeal from a water allocation permit. The Board granted in part and denied in part motions to compel by the appellants. Many of the interrogatories and document requests related to conditions and water sources in the vicinity of the project were overly broad; the Board therefore limited the permittee's obligation to respond to subjects related to the environmental impact of the project and limited the responses to a specified geographic area around the project.

The Board's order reserved judgment on the extent to which the appellants may explore information which might have remote relevance to alternatives to the project, including past negotiations to acquire the assets of the municipal water authority which is one of the parties in these appeals. The information sought on pricing of water and negotiation strategy with the municipal water authority is said to be confidential business information by the permittee. The permittee further seeks to protect its disclosure to counsel for some of the appellants on the grounds that those counsel represent its competitors. The Board has reserved judgment on these discovery requests pending copies of documents submitted by the permittee to the Department with respect to alternatives to the project so that the Board's ruling on relevance will not be made in a complete vacuum. The Board has also reserved ruling on motions for protective orders by both the appellants and the permittee.

OPINION

The Board has before it discovery motions from nearly all the parties in this appeal from a water allocation permit issued by the Department to the Pennsylvania Suburban Water Authority (Permittee). Wallace Township, the Brandywine Conservancy, and East Brandywine Township (collectively, Wallace Township) moved to compel answers to interrogatories and production of documents. They have also proposed a protective order under which confidential information may be managed for the remainder of the discovery period. Another appellant, the Downingtown Municipal Water Authority (DMWA) has moved to compel the Permittee to designate a representative to testify on matters relating to the pricing of water and the Permittee's past negotiation to acquire some or all of the assets of the DMWA. The DMWA also

proposes a protective order. The Permittee has responded to the motions to compel and has also moved for a protective order.

A conference call was held with all the parties on September 16, 2002, and an order was issued the following day, disposing of the majority of the issues raised by these motions.[1] However, we felt it necessary to explain our rulings in more detail in order to serve as a guide for the parties as they continue this litigation and to preserve our reasoning should any party wish to challenge these rulings on appeal.

The permit under appeal in this matter is a Water Allocation Permit issued on April 18, 2002, pursuant to the authority the 1939 Water Rights Act,[2] which provides a framework under which a public water supply agency may acquire "new water rights, a new source of water supply, or . . . an additional quantity of water or water rights from an existing source of water."[3] The permit authorizes the Permittee to withdraw 27 percent of the stream flow of the East Branch of the Brandywine Creek in Wallace Township, Chester County.[4] This withdrawal is not to exceed 4.0 million gallons of water per day and is subject to other limitations such as the installation of water gauges downstream. This water will be stored in the former Cornog Quarry.[5] The Appellants[6] in this matter have objected to the permit on a variety of grounds, including, among others, damage to natural and recreational resources, negative impact on the municipalities' ability to control urban sprawl, and the Department's failure to properly consider a variety of legal

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[1] That order is incorporated as an appendix to this opinion.
[2] Act of June 24, 1939, P.L. 842, *as amended,* 32 P.S. §§ 631-641.
[3] 32 P.S. § 636.
[4] Notice of Appeal, Ex. A.
[5] Permittee's Response, Luitweiler Affidavit.
[6] The Appellants include not only Wallace Township and the DMWA, but also the Sierra Club and Delaware Riverkeeper.

provisions such as Acts 67 and 68, amending the Municipalities Planning Code,[7] the Clean Streams Law,[8] and Article I, Section 27 of the Pennsylvania Constitution. Significant to these discovery motions, the appealing parties have also objected to the issuance of the permit on the ground that less expensive and less environmentally harmful alternatives exist to meet the Permittee's water supply needs.[9]

The Board's discovery procedure is, for the most part, governed by the Rules of Civil Procedure.[10] Those rules provide that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."[11] The burden is on the party objecting to a discovery request to demonstrate its right to refuse to produce the information.[12]

The Permittee generally objects to the disputed discovery requests on the grounds that they are not relevant to what it characterizes as the rather limited scope of the Water Rights Act. Wallace Township and the DMWA counter that the material they seek is indeed relevant because the permit must comply not only with the provisions of the Water Rights Act, but also must comply with other laws, such as the Clean Streams Law and Article I, Section 27 of the Pennsylvania Constitution. We need not decide the precise parameters of the Water Rights Act in order to resolve the discovery disputes

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[7] Act of July 31, 1968, P.L. 805, *as amended,* 53 P.S. §§ 10101-11107.
[8] Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §§ 691.1- 691.1001.
[9] E.g., Wallace Township Notice of Appeal, Objection 10.
[10] 25 Pa. Code § 1021.102(a).
[11] Pa. R.C.P. No. 4003.1(a)
[12] *Estate of Charles Peters v. DER*, 1991 EHB 653.

here. "Relevancy" for the purposes of discovery is to be broadly construed.[13] This is distinct from the concept of relevancy for the purposes of hearing, which is a much narrower inquiry: It is enough that the evidence *might* be relevant.[14] Further, in determining whether the subject matter of discovery is relevant, we are guided by the objections raised in the notice of appeal. Provided an objection is not completely baseless it is a proper subject of inquiry for discovery purposes.[15] At this point, early in the proceedings, our purpose is not to make judgments whether a party's position ultimately has substantive merit.[16]

With these principles in mind we turn first to Wallace Township's motion to compel answers to interrogatories and production of documents.

Discovery Related to Conditions in the Vicinity of the Project

Interrogatories 32, 33, 34; Document Request 28

These three interrogatories seek the identification of any person who has conducted investigations "related to the general area of the Cornog Quarry site"; the identification of every test that has been made "on the general area of the Cornog Quarry Site"; and all reports or other documents "related to the general area of the Cornog Quarry Site."[17] The phrase "general area of the Cornog Quarry Site" is defined by Wallace Township as "the area within five (5) square miles of the quarry known as the

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[13] *Valley Creek Coalition v.* DEP, 2000 EHB 970; T.*W. Phillips Oil & Gas Co. v. DEP*, 1997 EHB 608; *Starr v. DEP*, 1996 EHB 313; *Harbison-Walker Refractories v. DER*, 1992 EHB 943.

[14] *Khodara v. DEP,* 2001 EHB 855; *City of Harrisburg v. DER*, 1992 EHB 170.

[15] *Valley Creek Coalition v. DEP*, 2000 EHB 970.

[16] *Khodara v. DEP,* 2001 EHB 855; *Valley Creek Coalition v.* DEP, 2000 EHB 970; T.*W. Phillips Oil & Gas Co. v. DEP*, 1997 EHB 608.

[17] Wallace Township Motion to Compel, Ex. C.

Cornog Quarry."[18] The Permittee's primary objection to these interrogatories is that they are overly broad and Wallace Township's definition of the "general area" of the site is ambiguous. The Permittee also argues that these interrogatories are redundant of Interrogatories 11 and 12. Interrogatories 11 and 12 requested the Permittee to identify individuals who conducted investigations, and all reports and other documents "related to the "Permit, the Permit Application and/or the Project."[19]

First, while we agree that investigations, tests and reports and other documents related to the a certain geographic area of the quarry may be relevant, we also believe that Wallace Township's definition is very broad and subject to different interpretations. At the conference call, counsel for the Permittee suggested that the scope of these interrogatories related to water supplies be limited to those hydrologically connected to the Cornog Quarry. The Appellants did not object to this, but counsel for the Sierra Club contended that for the purposes of evaluating the impact of the project on wildlife, a circular area of a five-mile radius of the quarry was most useful. No other party objected to this proposal. Therefore we defined the general area of the quarry to mean, for the purpose of wildlife, "a circle surrounding the center of the Cornog Quarry having a radius of five miles," but limited inquiry to water supplies and environmental conditions to these hydrologically connected to the Cornog Quarry.[20]

Second, these questions are not necessarily redundant of the information sought in Interrogatories 11 and 12, which are directed to information concerning the permit and the permit application. Interrogatories 32-34 are slightly broader in scope. However, it is

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[18] Wallace Township Motion to Compel, Ex. A.
[19] Permittee's Response the Motion to Compel, Ex. A.
[20] Discovery Order, ¶ 1.

burdensome to require the Permittee to identify investigations, tests and reports that are not related to the specific objections raised in the notice of appeal connected to the environmental impact of the project. Therefore, the Permittee need only identify those items related to investigations of wildlife, drinking water sources hydrologically connected to the quarry and any related environmental conditions.[21]

Document Request 28 requests a variety of documentation concerning the Permittee's sources of water in Chester County. The Permittee contends that this request is far too broad and seeks information about systems and facilities that are not connected in any way to the service area for the project, known as the UGS Northern Division.[22] We agree that there is no possible relevance to much of this information. The UGS Northern Division is not physically connected to the other lines that the Permittee maintains within Chester County, other than an emergency interconnection.[23] Moreover, the project will only provide water to the service area of the UGS Northern Division.[24] Therefore, as with the interrogatories discussed above, we will limit this document request to those non-privileged items[25] that relate to water sources that serve the Permittee's UGS Northern Division.

Interrogatories 35-37; 39-53

Interrogatories 35-37 and 39-53 are sets of triplets and seek information concerning (1) communications between the Permittee and various agencies; (2)

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[21] Discovery Order, ¶¶ 1-3.
[22] Permittee's Response, Luitweiler Affidavit, ¶¶7-12.
[23] Permittee's Response ¶ 9.d (citing Luitweiler Affidavit, ¶9).
[24] Permittee's Response, Luitweiler Affidavit, ¶ 7.
[25] Our order did not direct the production of documents that were alleged to be privileged or confidential. Those materials will be reviewed and rulings made in a subsequent order. See Discovery Order, ¶ 15, and the discussion below.

documents sent from the Permittee to those agencies; and (3) documents sent from those agencies to the Permittee. Each of these three questions is asked relative to the Department; the Delaware River Basin Commission (DRBC); the U.S. Fish and Wildlife Service (USFWS); the Army Corps of Engineers (ACE); the Pennsylvania Fish and Boat Commission (PFBC); and the Department of Conservation and Natural Resources (DCNR). The communications and document exchanges are "related to the general area of the Cornog Quarry Site." The Permittee objects to these interrogatories for much the same reason that it objected to the last set. That is, they are overly broad, the area in question is ambiguously defined, and they have provided the information in the answers to other interrogatories or have made the information otherwise available through their files.

We have resolved this dispute in a similar fashion to the first trio of interrogatories. That is, we have provided a definition of the general area of the quarry site and have limited the Permittee's responsibility for answering these questions to the extent they concern existing or potential drinking water sources which are hydrologically connected to the project and environmental conditions related to those sources. Of course, the Permittee is also not obliged to provide information which has already been provided in other interrogatories or has not already been produced from its files.[26]

Interrogatory 38

Interrogatory 38 requests the identification of "all communications by and between your employees related to the general area of the Cornog Quarry Site."[27] In

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[26] Discovery Order, ¶¶ 4, 6-10.
[27] Wallace Township Motion to Compel, Ex. C.

addition to objections similar to those made and discussed above, the Permittee also objected to this interrogatory to the extent that it may require the production of documents subject to the attorney-client privilege. Wallace Township has represented that it does not wish to compel the production of privileged information at this time.[28] Accordingly, we have resolved this dispute by 1) requiring the production of a privilege log and 2) limiting the Permittee's responsibility to communications relating wildlife in a five mile radius of the quarry, and sources of drinking water which are hydrologically connected to the quarry and related environmental conditions. Further, the Permittee may answer this interrogatory by producing documents containing or referring to any such communication.[29]

Interrogatories 86-88

This trio seeks the identification of anyone who has performed investigations, any tests or any reports or other documents related to the presence or lack thereof of bog turtles, bog turtle habitat or wetlands in the general area of the quarry or "downstream of the Cornog Quarry Site." The Permittee objects that the interrogatories are overly broad and ambiguous, for reasons similar to its objections to Interrogatories 32-34. Accordingly, we have resolved this dispute in a similar fashion by limiting the inquiry to involve wetlands "downstream of the proposed intake that may be hydraulically connected to the Brandywine Creek or any of its branches." On the conference call the Permittee represented that there has only been one bog turtle report, and it has therefore been required to produce it.

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[28] Wallace Township Memorandum of Law at 4.
[29] Discovery Order, ¶ 5.

Discovery Related to Alternatives to the Cornog Quarry Project:

Interrogatories 111, 112, and 117; Document Requests 17, 69, 70; Motion to Compel the Designation of a Witness

Wallace Township and the DMWA have argued in their notices of appeal that the Department erred in granting the water allocation permit by failing to adequately consider the existence of less environmentally harmful alternatives to the Cornog Quarry project. They have provided examples of such alternatives including using water from the Marsh Creek Reservoir, purchasing water from the DMWA, and purchasing the assets of the DMWA. Accordingly, they seek to discover and identify documents and communications related to the Permittee's consideration of alternatives, including the purchase of water from the DMWA, the acquisition of some or all of the assets of the DMWA. The DMWA seeks the designation of a witness for deposition to testify concerning efforts made by the Permittee to acquire the DMWA, prices the Permittee pays to other public water suppliers for water, and the prices the Permittee charges other public water suppliers for water.

The Permittee contends that much of the information sought by the Appellants is not relevant and constitutes confidential business information[30] and it will be competitively harmed if forced to produce it, especially documentation and communications related to pricing. It further contends that efforts to acquire some or all of the assets of the DMWA occurred in the early 1990's, before it even acquired the UGS Northern Division service area, and therefore this subject is also irrelevant.

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[30] The Board defines confidential business information as "any compilation of information which is used in a business and which gives that business an opportunity to obtain an advantage over competitors who do not know or use it." Such information must be maintained by the owner in a substantial amount of secrecy. Information which is public knowledge will not be considered confidential. *T.W. Phillips Oil and Gas Co. v. DEP*, 1997 EHB 608, 611 n. 2.

We do not believe that the consideration of alternatives to the Cornog Quarry project is clearly irrelevant. Section 7 of the Water Rights Act requires that the water rights to be acquired be reasonably necessary for the needs of the applicant and requires a determination that the grant of the permit will not, among other things, "jeopardize public safety" or "cause substantial injury to the Commonwealth."[31] The Act further requires the Department to consider other sources of water.[32] Moreover, the issue of alternatives was raised in the notices of appeal.[33]

In addition, the attorneys for the appellants say that at least some information on the topic of alternatives was considered by the Department in the review of the permit application. So that we will not be required to rule on the scope of discovery on alternatives in a vacuum, we ordered the parties to produce the material on alternatives that the Permittee had submitted to the Department.[34] However, the motion to compel Document Request 17, which requests "all data" and a host of other types of documentation "relating to alternatives available" to the Permittee will be denied because it is clearly overly broad and other discovery which we have ordered will answer the question.[35]

We are deeply concerned that much of the material and testimony sought by Wallace Township and the DMWA is sensitive, confidential business information. There is no dispute that the DMWA is a competitor of the Permittee. There also does not seem to be much dispute that some of the material that the Permittee may produce is

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[31] 32 P.S. § 637.
[32] *Id.*
[33] E.g., East Brandywine Township Notice of Appeal, ¶ 10.
[34] Discovery Order, ¶ 12.
[35] Discovery Order, ¶ 17.

confidential or privileged. Therefore, for the time being, we have denied the motion to compel an answer to Interrogatory 117 which seeks communications related to efforts to acquire the assets of the DMWA. That negotiation took place well before the commencement of the permit application process and its questionable relevance is outweighed by the prejudice that might be caused to the Permittee by the production of sensitive materials.

As to the other discovery requests, we do not believe that we can fashion a reasonable solution to these disputes without first reviewing the documentation which was submitted to the Department with respect to alternatives. We are also concerned that the Permittee has moved for a protective order which would restrict counsel for Wallace Township from accessing the confidential business information which we do order produced because of his representation of competitors to whom such information would be valuable.[36] Counsel for Wallace Township has been asked to respond to this charge. It may be that the parties will be able to fashion a resolution of the scope of discovery on alternatives which will suit all of their interests. Regardless, upon submission of the documents submitted to the Department on the subject of alternatives to the proposed

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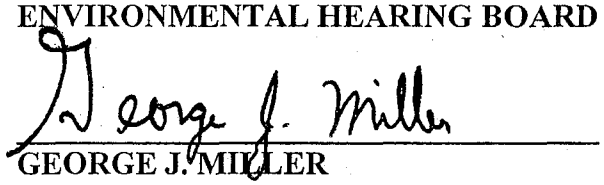
[36] This strikes us as a draconian measure, but evidently it is not completely unheard of, especially in the area of patent infringement cases. *See, e.g. U.S. Steel Corp. v. United States,* 730 A.2d 1465 (Fed. Cir. 1984)(It may be appropriate in some circumstances to deny access of confidential information from either in-house or retained counsel who are involved in "competitive decisionmaking" such as decisions involving pricing, product design, etc..); *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325 (7th Cir. 1985)(restricting access to sensitive business information to counsel who will not represent competing entities for 18 months in the future); *Motorola, Inc. v. Interdigital Technology Corp,*, 1994 U.S. Dist. LEXIS 20714 (D. Del. 1994)(restricting trial counsel from representing competitors for a period of time after the conclusion of litigation and requiring the firm to create a "Chinese wall" to ensure that the protective order is enforced.) Our research to date has revealed no state cases applying similar restrictions.

project, we will make our final ruling on Document Requests 69 and 70, and the motion of the DMWA for production of a representative for deposition. We will also rule on the motions for protective orders filed by both the appealing parties and the Permittee.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: September 20, 2002

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APPENDIX

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WALLACE TOWNSHIP, BRANDYWINE CONSERVANCY, EAST BRANDYWINE TOWNSHIP, DOWNINGTOWN MUNICIPAL WATER AUTHORITY, SIERRA CLUB and DELAWARE RIVERKEEPER, a/k/a MAYA ROSSUM, et al.	:	**: EHB Docket No. 2002-113-MG : (consolidated with 2002-114-MG, : 2002-115-MG, 2002-123-MG, : 2002-124-MG and 2002-126-MG)**
vi.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA SUBURBAN WATER COMPANY, Permittee	:	

DISCOVERY ORDER

AND NOW, this 17th day of September, 2002, in consideration of the Permittee's objections to requested discovery and the motions of the Appellants to compel further discovery, and following a conference call with counsel for the parties, IT IS HEREBY ORDERED as follows:

Interrogatories

1. The Permittee's objection to Interrogatory 32 is overruled in part and the Appellants' motion is granted in part. The Permittee shall answer Interrogatory 32 relating to investigations of wildlife in the general area of the Cornog Quarry, defined as a circle surrounding the center of the Cornog Quarry having a radius of five miles. The Permittee shall answer Interrogatory 32 to the extent of the investigations of drinking water sources hydrologically connected to the Cornog Quarry and any related environmental conditions.

2. The Permittee's objection to Interrogatory 33 is overruled in part and the Appellants' motion is granted in part. The Permittee shall answer interrogatory 33 to the extent of tests conducted on potential or existing sources of drinking water that are hydrologically connected to the Cornog Quarry.

3. The Permittee's objection to Interrogatory 34 is overruled in part and the Appellants' motion is granted in part. The Permittee shall answer interrogatory 34 to the extent of reports and other documents related to wildlife in the general area of the Cornog Quarry, defined as a circle surrounding the center of the Cornog Quarry having a radius of five miles. The Permittee shall also answer this interrogatory with respect to reports and other documents to the extent that the documents concern existing or potential drinking water sources that are hydrologically connected to the Cornog Quarry and environmental conditions related to any such source.

4. The Permittee's objections to Interrogatory 35-37 are overruled in part and the Appellants' motion is granted in part. The Permittee shall answer interrogatories 35-37 to the extent of documents and the general nature of communications with the Department related to wildlife in the general area of the Cornog Quarry, defined as a circle surrounding the center of the Cornog Quarry having a radius of five miles. The Permittee shall also answer these interrogatories to the extent that the communications concern existing or potential drinking water sources hydrologically connected to the Cornog Quarry and environmental conditions related to any such source and to the extent that (1) the person making such a communication has not previously been identified in answer to other interrogatories such as interrogatories 11 and 13, or (2) the document has not already been produced by the Permittee for inspection and copying.

5. The Permittee's objection to Interrogatory 38 is sustained except as to communications relating to wildlife within a radius of five miles of the center of the Cornog Quarry and existing or potential sources of drinking water hydrologically connected to the Cornog Quarry and related environmental conditions. The Permittee may answer this interrogatory by producing documents containing or referring to any such communication.

6. The Permittee's objections to Interrogatories 39-41 are overruled in part and the Appellants' motion is granted in part. The Permittee shall answer interrogatories 39-41 to the extent of communications with the DRBC on the subjects defined in paragraph 4 of this order and to the extent that (1) the person making such a communication has not previously been identified in answer to other interrogatories such as interrogatories 17-19, or (2) the document has not already been produced by the Permittee for inspection and copying.

7. The Permittee's objections to Interrogatories 42-44 are overruled in part and the Appellants' motion is granted in part. The Permittee shall answer interrogatories 42-44 to the extent of the general nature of communications with USFWS on the subjects defined in paragraph 4 of this order to the extent that (1) the person making such a communication has not previously been identified in answer to other interrogatories such as interrogatories 20-22, or (2) the document has not been produced by the Permittee for inspection and copying.

8. The Permittee's objections to Interrogatories 45-47 are overruled in part and the Appellants' motion is granted in part. The Permittee shall answer interrogatories 45-47 to the extent of the general nature of communications with ACE on the subjects defined in paragraph 4 of this order and to the extent that (1) the person making such a communication has not previously been identified in answer to other interrogatories such as interrogatories 23-25, or (2) the document has not been produced by the Permittee for inspection and copying.

9. The Permittee's objections to Interrogatories 48-50 are overruled in part and the Appellants' motion is granted in part. The Permittee shall answer interrogatories 48-50 to the extent of the general nature of communications with PFBC on the subjects defined in paragraph 4 of this order and to the extent that (1) the person making such a communication has not previously been identified in answer to other interrogatories such as interrogatories 26-28, or (2) the document has not been produced by the Permittee for inspection and copying.

10. The Permittee's objections to Interrogatories 51-53 are overruled in part and the Appellants' motion is granted in part. The Permittee shall answer interrogatories 51-53 to the extent of the general nature of communications with DCNR on the subjects defined in paragraph 4 of this order and to the extent that (1) the person making such a communication has not previously been identified in answer to other interrogatories such as interrogatories 29-31, or (2) the document has not been produced by the Permittee for inspection and copying.

11. The Permittee's objections to Interrogatories 86-88 are sustained only in part. The Appellants' motion is granted with respect to wetlands to the extent of wetlands downstream of the proposed intake that may be hydraulically connected to the Brandywine Creek or any of its branches. These objections are overruled in all other respects. The Permittee shall answer these interrogatories with respect to the bog turtle. It shall also answer these interrogatories with respect to any wetland downstream of the proposed intake that may be hydraulically connected to the Brandywine Creek or any of its branches.

12. The Permittee's objections to Interrogatories 111-112 are sustained in part. The Permittee shall answer Interrogatories 111-112 by identifying documents describing or referring to its or the Department's consideration of alternatives to the proposed project or conditions necessary to minimize any environmental harm that might result from the project.

13. The Permittee's objections to Interrogatory 117 are sustained and the Appellants' motion is denied at this time.

14. Nothing in this order shall require the Permittee to respond to the foregoing interrogatories by identifying communications related to any consideration or efforts to acquire some or all of the assets of the Downingtown Municipal Water Authority except as may be required by paragraph 12 of this order.

15. Nothing in this order shall require the disclosure of privileged material. In the event any documents or other information are withheld from discovery on grounds of privilege, the Permittee shall submit a privilege log stating the grounds of any claim of privilege of any such documents on or before **September 30, 2002.**

16. Answers to the interrogatories as directed above shall be served within 20 days of the date of this order.

Requests for Production of Documents

17. The Permittee's objections to Request 17 are sustained. The Appellants' motion is denied.

18. The Appellants' motion to compel a response to Request 18 was withdrawn during the conference call.

19. The Permittee's objections to Request 28 are sustained in part because the request is overbroad. The Permittee shall produce all non-privileged documents relating to Marsh Creek Reservoir and other information relating to the existing wells that serve the Permittee's UGS Northern Division. In the event documents are withheld on grounds of privilege, the Permittee shall submit a privilege log stating the ground of any claimed privilege with respect to all such documents on or before **September 30, 2002.**

20. The Permittee's objections to Requests 65 and 66 were withdrawn during the conference call.

21. The Permittee's objections to Requests 69 and 70 and the Appellants' motion to compel will be further considered by the Board. Counsel shall submit to the Board a copy of the documents which the Permittee submitted to the Department with respect to alternatives and counsel shall discuss whether or not some resolution can be made of the dispute relating to these requests.

22. The documents to be produced as required by this order shall be produced for inspection and copying within **20 days** of the date of this order.

Deposition Notice

23. The Board will withhold a ruling on the motion of Downingtown Municipal Water Authority to require the Permittee to produce a representative for a deposition. A further order on this request will be issued following the Board's consideration of the documents to be submitted to it as required by paragraph 21 of this order.

An opinion describing the contentions of the parties and the reasons for the entry of this order will follow shortly.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: September 17, 2002

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

GREENFIELD GOOD NEIGHBORS, 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., Permittee	:	**Issued: September 24, 2002**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A motion for summary judgment is denied. Where the appellants live and engage in recreational activities in the vicinity of a spray irrigation system permitted by the Department in connection with the operation of a racetrack, they have demonstrated a sufficiently substantial, direct and immediate interest to confer standing to bring this appeal. Where substantive issues in this appeal involve disputed questions of material fact and differing expert opinion, summary judgment is not appropriate. Issues that relate to the operation of the racetrack itself and not to the permitting and operation of the spray irrigation system appear to be outside the scope of this appeal and summary judgment may be warranted. However, due to the proximity of the hearing, these matters will not be addressed in this Opinion but may be raised at the hearing as part of a

motion to strike.

OPINION

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 Productions, Inc. (Lake Erie Productions) 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 Productions.

Lake Erie Productions has filed a motion for summary judgment asserting as follows: 1) the Appellants lack standing; 2) certain issues raised in the notice of appeal relate to the operation of the racetrack itself as opposed to the operation of the spray irrigation system at issue in this appeal; and 3) to the extent the Appellants have raised issues relating to the spray irrigation system, they have failed to present any evidence in support of their allegations. The Appellants filed a response to the motion on September 13, 2002, and Lake Erie Productions filed a reply on September 20, 2002. In its reply, Lake Erie Productions also makes the argument that issues relating to approval of the Planning Module are barred by administrative finality.

Standing

In order to have standing to challenge a Department action, an appellant must be "aggrieved." *Wurth v. DEP*, 2000 EHB 155; *Florence Township v. DEP*, 1996 EHB 282. This concept was explained in *Wurth* as follows:

> [A]n 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 he 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 [Coalition v. DEP*, 1999 EHB 935]; *Raymond Proffitt Foundation v. DEP*, 1998 EHB 677.

2000 EHB at 170. The Appellants in the present case consist of nearby property owners who have alleged that contamination of their groundwater could occur as a result of the spray irrigation system. According to the Appellants' response, the Barnetts live within 2,500 feet of the spray irrigation treatment system, and other members of Greenfield Good Neighbors live in the vicinity of it. In addition, the Barnetts use the area near and adjacent to the Lake Erie Speedway for recreational purposes such as hunting, hiking, biking and fishing.[1] Lake Erie Productions asserts that this is insufficient to confer standing because the Appellants have failed to allege that they or their members own property adjacent to the spray field such that the property could be potentially affected and have further failed to produce any evidence to establish that the groundwater underlying the spray field has the potential to impact groundwater utilized by any of its members.

While ownership of property near a subject site may not always be enough by itself to confer standing, it is certainly a factor to be considered and may provide a sufficient basis for a claim of standing. *Conners v. DEP*, 1999 EHB 669. In addition, this Board has repeatedly held that an aesthetic appreciation or enjoyment of an environmental resource can confer standing. *O'Reilly v. DEP,* 2000 EHB 723; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944 n. 5; *Blose v. DEP*, 1998 EHB 635, 638; *Belitskus v. DEP*, 1997 EHB 939, 951.

In the present case, Lake Erie Productions' hydrogeologist acknowledges that nitrates could appear in the groundwater, but it is his opinion the nitrate concentration will be diluted through dispersion. It is also his opinion that the estimated travel time for groundwater to reach the downgradient property boundary from the lower edge of the spray field ranges from 1.8 to 137 years. The Appellants contend that the design and operation of the facility, as permitted, raise the probability of malfunction and contamination. They further contend that Lake Erie Productions' hydrogeologist failed to take the absence of vegetation into consideration in reaching his conclusions regarding groundwater migration. The Appellants have expressed an objectively reasonable contention that nitrate-contaminated groundwater could travel to their properties as well as properties where they engage in recreational activities as a result of the spray irrigation system. This averment is sufficient to establish the substantial, direct and immediate link between the permit issuance and the Appellants' alleged harm that is necessary to survive a challenge to standing. Therefore, we conclude that the Appellants have standing to pursue this appeal.

Evidence in Support of Appellants' Claims

Lake Erie Productions asserts that the Appellants have failed to produce any evidence to support the claims made in their notice of appeal regarding the spray irrigation system. In their response, the Appellants counter Lake Erie Productions' argument with what they believe to be evidence supporting their claims.

Judge Krancer enunciated the standard for the Board's review of motions for summary judgment in *Wheelabrator Falls, Inc. v. DEP,* EHB Docket No. 2001-100-K (Opinion and Order on Motion for Summary Judgment issued May 16, 2002), slip op. at 7:

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[1] Affidavits of David and Colleen Barnett

> We will only grant summary judgment when the record, which is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. . . . *See* Pa.R.C.P. 1031.1. Also, when evaluating a motion for summary judgment, the Board views the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. [citations omitted]

That is not the case here where each side has presented contradictory facts, based on a difference of expert opinion. As the Board has previously held in *Lower Paxton Twp. v. DEP,* 2001 EHB 753, 775-76 and more recently in *Perkasie Borough Authority v. DEP,* EHB Docket No. 2001-267-K (Opinion and Order on Cross-Motions for Summary Judgment issued September 17, 2002), slip op. at 23:

> [W]e will decline to conduct a trial on the papers. This is especially true where, as here, much of the papers are expert and other competing affidavits. In such cases, the credibility of witnesses is an important subject which needs to be evaluated.

Looking at each of the issues raised by the Appellants with regard to the spray irrigation system, there are separate and competing expert reports and opinions. In addition, the Appellants have raised credible challenges to Lake Erie Productions' contentions that the spray irrigation system is unlikely to cause pollution or other harm. Where a resolution of this matter would require us to consider disputed facts and make judgments concerning the credibility of witnesses, including expert witnesses, summary judgment is inappropriate. *Perkasie Borough, supra.* at 23, citing *Defense Logistics Agency v. DEP*, 2001 EHB 337.

Claims Regarding Matters Other than the Spray Irrigation System

Lake Erie Productions also contends that the issues raised in paragraph 2 of the notice of appeal relate to the operation of the racetrack facility as opposed to the spray irrigation system that is the subject of this appeal. These issues include the following: 1) dust, 2) potential

contamination of Twelve Mile Creek, 3) the plugging of existing gas wells, 4) proximity to state game lands, and 5) source water for the speedway to be taken from the Lake Erie Watershed.

As for the latter issue – source water for the speedway being drawn from the Lake Erie Watershed – the Appellants have admitted that they have presented no hydrogeologic evidence to support this contention. Since we are less than one week from the start of the hearing and expert reports have already been filed, the Appellants may not now come forward with expert evidence in support of this contention. Therefore, summary judgment on this matter is appropriate.

With respect to the issues of potential contamination of Twelve Mile Creek and proximity to state game lands, the Appellants' response refers to evidence that they believe supports their contention that Twelve Mile Creek and adjacent game lands could be contaminated by the spray irrigation system. Therefore, we find no basis for granting summary judgment on these issues.

Finally, the issues of dust and the plugging of gas wells do not appear to relate to the Water Quality Management permit that is the subject of this appeal but, rather, to the racetrack itself. As the Board recently held in *Winegardner v. DEP*, EHB Docket No. 2002-003-L (Opinion and Order on Motion for Partial Summary Judgment), slip op. at 4, "[O]nly objections that relate to the propriety of the action under appeal are directly relevant. Objections to a different Departmental action are beside the point of our inquiry." In this case, the permitting and operation of the racetrack are not only outside the scope of this appeal, but beyond the jurisdiction of the Department, as well. The only action that is being considered in this appeal is propriety of the Department's issuance of the Water Quality Management permit for operation of the spray irrigation system. All other matters are outside the scope of this appeal. To the extent that the issues of dust and the plugging of gas wells do not relate to the spray irrigation system, summary

judgment may be warranted. However, due to the proximity of the hearing, we will entertain a motion to strike these issues at the hearing rather than address them in this Opinion.

Administrative Finality

Finally, Lake Erie Productions contends that matters covered by the Planning Module, which was approved by the Department on June 21, 2001, are barred by the doctrine of administrative finality since no appeal was taken from the approval of the Planning Module. Because Lake Erie Productions raised this argument for the first time in its reply, as opposed to its motion for summary judgment, the Appellants have not had an opportunity to respond to it. Therefore, we find that it is inappropriate to consider it at this time.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREENFIELD GOOD NEIGHBORS, 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., Permittee	:	

ORDER

AND NOW, this 24th day of September 2002, Lake Erie Productions' Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATE: September 24, 2002

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WALLACE TOWNSHIP, BRANDYWINE CONSERVANCY, EAST BRANDYWINE TOWNSHIP, DOWNINGTOWN MUNICIPAL WATER AUTHORITY, SIERRA CLUB and DELAWARE RIVERKEEPER, a/k/a MAYA ROSSUM, et al.	**: EHB Docket No. 2002-113-MG : (consolidated with 2002-114-MG, : 2002-115-MG, 2002-123-MG, : 2002-124-MG and 2002-126-MG)**
v.	**: Issued:** October 8, 2002
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA SUBURBAN WATER COMPANY, Permittee	

OPINION AND ORDER ON APPELLANTS' JOINT MOTION TO AMEND NOTICES OF APPEAL

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants a Joint Motion for Leave to amend notices of appeal from the Department's approval of a water withdrawal permit to a drinking water supplier to add three specific alternative sources, not specifically mentioned in the notices of appeal, to the general claim that the Department improperly failed to consider alternative sources of water supply. The Board concludes that the Permittee will not be prejudiced by this amendment under the particular circumstances of these consolidated appeals.

Background

Three of the Appellants in this consolidated appeal (Brandywine Conservancy, East Brandywine Township, and Wallace Township) have sought leave to amend their notices of appeal to add an objection that the Department failed to consider three sources of water supply in addition to those now set forth in the notice of appeal as better alternatives to the now permitted water allocation. Other appellants have joined in the motion; the Permittee, Pennsylvania Suburban Water Company, and the Department oppose the motion.

The water allocation issued by the Department on April 18, 2002 authorizes the Permittee to withdraw up to 27 percent of the stream flow of the East Branch of the Brandywine Creek in Wallace Township, Chester County. This withdrawal is not to exceed 4.0 million gallons of water per day and is subject to other limitations such as the installation of water gauges downstream. The water is to be stored in the former Cornog Quarry for later distribution to the Permittee's customers in East and West Brandywine Townships. A more complete description of the background of this dispute is set forth in the Board's Opinion and Order on certain discovery matters issued on September 20, 2002.

The notices of appeal as originally filed object to the Department's action for failure to consider alternative sources of water supply claimed to be environmentally superior to the permitted withdrawal including three specific alternative sources of water supply. Objection 10 in these notices of appeal reads as follows:

> DEP committed an error of law and otherwise acted unreasonably in issuing this Permit because superior alternative water sources, which would be less expensive and/or less harmful to the environment, were and are available to the Applicant and were not considered or were not properly considered by DEP. DEP failed to properly consider the use of the Marsh Creek Reservoir, the Kay Wells and/or Dowingtown Municipal Water Authority as alternative water sources.

The proposed amendment to these notices of appeal would add three other specific alternative water sources that the Department is said to have improperly considered. The proposed amendment is to add objection 10.1 to the notices of appeal. This amendment would provide as follows:

> DEP also failed to properly consider the following as alternative water Sources: (a) drilling additional wells in Chester County; (b) importing supply from another division of Pennsylvania Suburban Water Company; (c) purchasing water from the Coatesville Water System, which is now owned and operated by the Pennsylvania American Water Company.

The Appellants contend that this proposed amendment would simply clarify an existing legal issue under their existing Objection 10. The Permittee objects to this proposed amendment because it would raise new factual issues relating to three alternatives that were not referred to in the original notices of appeal. The Permittee also claims that it would be prejudiced by this addition because it would require the reopening of depositions that have been taken on the assumption that the three alternatives set forth in the existing notices of appeal were all the alternatives to the project that were open for consideration.

Discussion

The Board's Rules of Procedure at 25 Pa. Code § 1021.53(b) permits the Board to grant leave to amend a notice of appeal after the 20-day time for an amendment of right has passed if:

(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 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 party or intervenor.

Appellants' motion to amend claims that the proposed amendment is permitted by subparagraph (3) because the amendment only clarifies a legal issue in that the existing objection 10 was intended to apply to all alternative water resources and that the second sentence of this objection was intended to be only an illustration of alternative superior water sources. Appellant's motion contends that the Permittee will not be prejudiced by such an amendment because, among other things, the Permittee will have ample time to explore the factual basis of these claims in discovery.

The Permittee claims that it would be prejudiced by this amendment by the Appellants' waiting to make this motion until 120 days into the discovery period to make claims about alternative sources of water that they have known about long before the commencement of these appeals. Permitting such an amendment would require extension of the time for the completion of discovery and the retaking of some depositions that have already been concluded. The Permittee points out that the permit contains a condition requiring the commencement of construction within two years of the issuance date, and delay in completion of pre-hearing proceedings threatens the ability of the Permittee to meet those deadlines. The Permittee also states that completion of this project is "important and essential" to its ability to meet the growing demand of its customers in East and West Brandywine Townships.

We believe that the permittee will not be prejudiced by the timing of this requested amendment. While the existing notice of appeal might be viewed as limiting the "alternative" claims to the three water sources mentioned, the Appellants' answers to interrogatories, give notice that the claims were not limited to these three sources. These answers said, among other things, that

> The superior alternative water sources include *(without limitation)* Dowingtown Municipal Water Authority, the Marsh Creek Reservoir and wells. (Emphasis Supplied)

These answers were filed before the Permittee took the two depositions referred to in its answer. Counsel's decision not to follow up on what "without limitation" meant in these answers to interrogatories by not inquiring into other possible alternatives to avoid opening a possible "Pandora's Box" is understandable. According to Mr. Luitweiler's affidavit, the other alternatives referred to in the proposed amendment are without substance. [1] They have been fully responded to by the Permittee in materials submitted by it to the Department. [2] Counsel may have decided not to inquire into other alternatives purposely. Accordingly, any need to retake the two depositions referred to in the Permittee's answer may have been only the result of this decision by counsel.

More importantly, the notices of appeal filed by the Sierra Club and the Delaware River Keeper did not limit the claim that the Department failed to consider alternatives to any particular alternatives. Accordingly, in these consolidated appeals the issue of all alternative sources of water appears to be an open issue.

Finally, it appears that the Permittee will have to deal with the claimed alternative water sources set forth in the proposed amendment in any event. The Board recently received 21 notices of appeal from the Department's action in approving four related permits. Some of these notices of appeal object to the Department's action in approving these permits because the

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[1] Mr. Lueitweiler points out that the ground water supply in Chester County is extremely limited and that there is no connection with the Coatesville Water Supply Company, now owned by a major competitor. See Exhibit A to the Permittee's response to the motion.

[2] See Exhibit A to the Permittee's Submission in Response to Discovery Order Paragraph 21 in which the Permittee advised the Department that drilling additional wells would not provide a viable commercial supply of water and that the Coatesville Water Company was regarded to be a long term alternative, but as an interim supply of water.

Department failed properly to consider superior alternative water sources available to the Permittee that would be less expensive and/or less harmful to the environment. This claim is made without limitation as to possible alternative water sources.

Under these circumstances we conclude that the Permittee will not be prejudiced by the proposed amendment. Accordingly we approve the proposed amendment by the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WALLACE TOWNSHIP, BRANDYWINE CONSERVANCY, EAST BRANDYWINE TOWNSHIP, DOWNINGTOWN MUNICIPAL WATER AUTHORITY, SIERRA CLUB and DELAWARE RIVERKEEPER, a/k/a MAYA ROSSUM, et al.	**: EHB Docket No. 2002-113-MG : (consolidated with 2002-114-MG, : 2002-115-MG, 2002-123-MG, : 2002-124-MG and 2002-126-MG)**
v.	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA SUBURBAN WATER COMPANY, Permittee	

ORDER

AND NOW, this 8th day of October, 2002, the joint motion for leave to amend by the Brandywine Conservancy, East Brandywine Township, and Wallace Township is **granted** so that objection 10.1 is added to their Notices of Appeal at Docket Nos. 2002-113, 2002-114 and 2002-115 as follows:

> 10.1 DEP also failed to properly consider the following as alternative water sources: (a) drilling additional wells in Chester County; (b) importing supply from another division of Pennsylvania Suburban Water Company; (c) purchasing water from the Coatesville Water System, which is now owned and operated by the Pennsylvania American Water Company.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: October 8, 2002

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAI

CONSOL PENNSYLVANIA COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 2002-112-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COLUMBIA GAS TRANSMISSION CORPORATION, Intervenor	:	**Issued: October 10, 2002**

OPINION AND ORDER
ON PETITION TO INTEREVENE

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

Synopsis:

The Board denies without prejudice a citizens group's petition to intervene where its petition is not verified. The Board grants another local citizens group's petition to intervene in a coal company's appeal from conditions placed in a Department approved revision to its coal mining activity permit because the petitioner has a direct, immediate, and substantial interest in the revision area which is credibly alleged to be adversely affected by the permitted activity.

OPINION

Consol Pennsylvania Coal Company ("Consol") filed this appeal from the Department of Environmental Protection's (the "Department's") approval of a revision to its bituminous coal mining activity permit (the "permit"). Specifically, Consol objects to the inclusion of Special Condition 5 and Special Condition 26 of the permit. The revision approved additional

subsidence control plan area and limited it to development and partial extraction mining; longwall or full extraction mining is not permitted without additional Departmental approval.

On September 13, 2002, Citizens for Pennsylvania's Future ("PennFuture") and the Wheeling Creek Watershed Conservancy (the "Conservancy") filed a joint petition to intervene in Consol's appeal. Consol filed an answer and supporting memorandum of law opposing the petition. The Department has indicated by letter that it does not object to the petitioners' right to intervene. Consol argues that the petitioning organizations do not have an interest sufficient to establish a right to intervene and that the joint petition is not properly verified.

We addressed intervention in *P.H. Gladfelter v. DEP*, 2000 EHB 1204 (quoting *Giordano v. DEP*, 2000 EHB 1154, 1155-1156), as follows:

> We previously enunciated some of the general principles regarding intervention in *Conners v. State Conservation Commission*, 1999 EHB 669, 670-71, as follows:
>
> > Section 4(e) of the Environmental Hearing Board Act, 35 P.S. §7514(e), provides that "[a]ny interested party may intervene in any matter pending before the [B]oard." 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." *Browning Ferris, Inc. v. DER*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991) ("*BFI*"). 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. *Jefferson County v. DEP*, 703 A.2d 1063, 1065 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.
> >
> > Gaining or losing by direct operation of the Board's determination is just another way of saying that an intervenor must have standing. Stating the Commonwealth Court's holdings another way, a party who has standing must be permitted to intervene. *Fointaine v. DEP*, 1996 EHB 1333, 1346. Considerations concerning whether the intervenor's rights will be adequately protected by existing

> parties and whether the intervenor will add anything new to the proceedings are irrelevant. *General Glass Industries Corp. v. DER*, 1995 EHB 353, 355 n.2.

See also Pennsylvania Game Commission v. DEP, EHB Docket No. 2000-067-R (Opinion issued June 19, 2000), slip op. at 2-3; *Ainjar Trust v. DEP*, EHB Docket No. 99-248-K (Opinion issued January 31, 2000), slip op. at 3-4; *Heidelberg Township v. DEP*, 1999 EHB 791, 793-94.

A person has standing–and is, therefore, entitled to intervene–if the person is among those who have been or are likely to be adversely affected in a substantial, direct, and immediate way. *Friends of the Earth, Incorporated v. Laidlaw Environmental Services, Inc.*, 120 S. Ct. 693, 704-05 (2000) ("*FOE* "); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280-83 (Pa. 1975); *Wurth v. DEP*, EHB Docket No. 98-179-MG, slip op. at 16-17 (Opinion issued February 29, 2000). We must determine whether the intervenor would have been an appropriate party to seek relief in the first instance because he personally has something to gain or lose as a result of the Board's decision. This question cannot be answered affirmatively unless the harm suffered by the would-be intervenor is greater than the population at large (i.e. "substantial"), and there is a direct and immediate connection (i.e. there is causation in fact and proximate cause) between the action under appeal and the person's alleged harm. *William Penn, supra.* In the context of an appeal from the issuance of a permit, intervention will ordinarily be appropriate if (1) the person uses the area affected by the permitted activity and (2) the permittee's conduct has (or will) adversely affect that use by, e.g., lessening the aesthetic and recreational values of the area. *Cf. FOE, supra; O'Reilly v. DEP*, EHB Docket No. 99-166-L, slip op. at 2 (Opinion issued May 24, 2000); *Ziviello v. DEP*, EHB Docket No. 99-185-R, slip op. at 6 n. 9 (Opinion issued July 31, 2000); *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944 n.5; *Blose v. DEP*, 1998 EHB 635, 638; *Belitskus v. DEP*, 1997 EHB 939, 951.

Here, the Conservancy alleges that subsidence from longwall mining adversely affects the courses and currents of watercourses and bodies of water. It further indicates "members of both organizations [PennFuture and the Conservancy] live in the revision area and use the water bodies and watercourses in the Revision area for various purposes." (Petition ¶ 11) Members of the Conservancy use the ponds and streams for farming, fishing, swimming, and other recreational activities. Furthermore, members of the Conservancy are alleged to have a financial interest in the quality of the water bodies in the area; contamination would adversely affect property values and their livelihoods. (Petition ¶ 12) This substantial, direct, and immediate

interest in the condition of the water bodies and watercourses in the Revision area is sufficient to confer standing to intervene upon the members of the Conservancy.

An organization has the right to intervene if at least one of its members has that right. *Gladfelter, supra*, 2000 EHB 1204 (*citing Connors, supra,* at 1999 EHB at 671). Because members of the Conservancy have standing to intervene, the Conservancy has standing.

Consol argues that it has been prejudiced by the timing of the filing of the petition to intervene. The Board finds this argument to be without merit as the Board's rules allow petitions to intervene to be filed anytime prior to the initial presentation of evidence. 25 Pa. Code §1021.81. The initial presentation of evidence has not commenced in this matter, and therefore, the petition is timely. The petitioner, however, takes the case as it finds it. 25 Pa. Code §1021.81(f); *Giordano*, 2000 EHB at 1158-59.

Consol further argues that the petition is not properly verified as required by Rule 1021.81(e) of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.81(e). Consol asserts that, typically, if a pleading is on behalf of a corporation or other organization, an officer will verify the pleading noting his or her position and indicating that he or she has authority to act on behalf of the entity. Here, the original verification contained the signature of Kathleen Martincic without any indication that she is authorized to act on behalf of the petitioning entities or what, if any, position she holds in them.

We agree with Consol that the petition was originally not properly verified. Without a proper verification the Board is unable to rule on a petition to intervene. However, a corrected verification was filed, indicating that Kathleen Martincic is Secretary of the Wheeling Creek Watershed Association and that she is authorized to act on behalf of the Conservancy. A proper verification from PennFuture remains absent. There is no indication of any connection between

Ms. Martincic and PennFuture. Therefore, the Board must deny PennFuture's petition for supersedeas, but we do so without prejudice to its right to repetition the board with a properly verified petition.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL COMPANY:		
v.	:	EHB Docket No. 2002-112-L
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COLUMBIA GAS TRANSMISSION CORPORATION, Intervenor	:	

ORDER

AND NOW, this 10th day of October, 2002, the petition to intervene of Citizens for Pennsylvania's Future is DENIED without prejudice. The petition to intervene of Wheeling Creek Watershed Conservancy is GRANTED. The caption in this appeal is revised to read as follows:

CONSOL PENNSYLVANIA COAL COMPANY:		
v.	:	EHB Docket No. 2002-112-L
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COLUMBIA GAS TRANSMISSION CORPORATION, and WHEELING CREEK WATERSHED CONSERVANCY, Intervenors	:	

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Dated: October 10, 2002

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ROBERT K. GOETZ, JR., db/a/ GOETZ DEMOLITION COMPANY	:	**EHB Docket No. 99-168-C (consolidated with EHB Docket No. 99-220-C)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 11, 2002**

ADJUDICATION

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board dismisses consolidated appeals of two compliance orders issued to Appellant by the Department pursuant to the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. § 3301 *et seq.* (Noncoal Mining Act), for conducting noncoal surface mining activities on his property without complying with applicable performance standards and requirements prescribed in implementing regulations. The Department met its burden of proving that the compliance orders were properly issued and Appellant failed to demonstrate that he was entitled to any of the affirmative defenses provided in the Noncoal Mining Act.

BACKGROUND

This matter concerns appeals from two compliance orders issued by the Department of Environmental Protection (DEP) to Appellant Robert K. Goetz, Jr. d/b/a Goetz Demolition Company (Goetz) on August 10, 1999 and September 24, 1999 respectively. The orders alleged

violations by Goetz of the Noncoal Mining Act on property he owns in Franklin Township, Adams County, Pennsylvania (the Site).

The current appeals are the most recent in a series of appeals by Goetz of inspection reports, compliance orders and a civil penalty assessment issued by DEP for violations of the Noncoal Mining Act at the Site. *See Goetz v. DEP*, 2000 EHB 840 (resolving six consolidated appeals); *Goetz v. DEP*, 1999 EHB 65 (dismissing civil penalty assessment appeal). In June 2000, the Board issued an Adjudication upholding compliance orders and inspection reports issued to Goetz in 1997 and 1998 for: (1) engaging in noncoal surface mining on the Site without a license or permit as required by the Noncoal Mining Act; (2) failing to reclaim the Site in accordance with applicable performance standards set out in the implementing regulations; and, (3) interfering with DEP personnel seeking to inspect the Site. *See Goetz*, 2000 EHB at 857-70. During the course of the litigation which resulted in the Board's June 2000 Adjudication, DEP continued its efforts to compel Goetz to properly, and completely, reclaim all parts of the Site affected by the illegal mining operation. The August 1999 and September 1999 compliance orders, which form the subject of this Adjudication, are part of those DEP efforts to enforce the reclamation requirements attendant upon those who engage in noncoal surface mining.

The Board has issued a prior opinion in this matter granting in part and denying in part a motion to dismiss. *Goetz v. DEP*, 2001 EHB 1127. Administrative Law Judge Michelle A. Coleman presided over a hearing conducted on January 23-24, 2002. Filing of post-hearing briefs was completed in June 2002, and the matter is now ripe for adjudication. The parties stipulated that the factual records made in the Board's prior adjudications concerning the Site are incorporated into the record here; in addition, the record consists of a 174-page hearing transcript and 14 exhibits. After careful review, the Board makes the following findings of fact.

FINDINGS OF FACT

1. The Department of Environmental Protection is the agency with the authority and duty to administer and enforce the Noncoal Mining Act. (Hearing Transcript (Tr.) at 11; Exh. C-1; Exh. C-2).

2. Appellant Robert K. Goetz, Jr. d/b/a Goetz Demolition Company, an individual, is the owner of property located at 649 Bingaman Road, Orrtanna, Franklin Township, Adams County, Pennsylvania (the Site). (Notice of Appeal, at 1; Exh. C-1).

3. The parties stipulated at the hearing that the factual records compiled in the Board's adjudications of EHB Dkt. No. 97-226-C (consolidated with EHB Dkt. Nos. 97-147-C, 97-224-C, 97-225-C, 98-115-C and 98-158-C), *see Goetz v. DEP*, 2000 EHB 840, and EHB Dkt. No. 97-223-C, *see Goetz v. DEP,* 1999 EHB 65, are incorporated into the record for this appeal. (Tr. 15-16).

I. Unauthorized Operation of a Noncoal Surface Mine at the Site in 1997 and 1998

4. Over a course of years, Goetz excavated thousands of cubic yards of minerals at the Site.[1] Various third parties were allowed to remove some of the excavated minerals from the Site for their use, and Goetz used some of the minerals for various jobs that he performed for others off the Site. Goetz did not have a license or permit, issued pursuant to the Noncoal Mining Act, which would have authorized him to engage in his mineral excavation activities at the Site. (*Goetz*, 2000 EHB at 843-53).

5. DEP personnel inspected the Site in June 1997 and recorded their observations in an Inspection Report. As of early June 1997, Goetz had affected approximately 1.5 acres of the

[1] "Minerals" is defined by the Noncoal Mining Act as: "Any aggregate mass of mineral matter, whether or not coherent, that is extracted by surface mining. The term includes, but is not limited to, limestone and dolomite, sand and gravel, rock and stone, earth, fill, slag, iron ore, zinc ore, vermiculite and clay, but does not include anthracite or bituminous coal or coal refuse . . . or peat." 52 P.S. § 3303. We adopt this definition when referring to "minerals" in this Adjudication.

Site as a result of his mineral excavation activity ("Mining Area 1"). DEP issued a compliance order to Goetz in mid-June 1997 directing him to cease all noncoal surface mining at the Site and to immediately commence reclamation of Mining Area 1 in accordance with the standards set forth in applicable DEP regulations. (*Goetz*, 2000 EHB at 843-53).

6. An inspection of the Site by DEP personnel in September 1997 revealed that Goetz had not reclaimed Mining Area 1, and instead had begun to excavate another part of the Site ("Mining Area 2"). A May 1998 inspection discovered the occurrence of further excavation and earthmoving activity at Mining Area 2, as well as a continued failure by Goetz to properly reclaim Mining Area 1. In June 1998, Goetz was again ordered to cease all surface mining at the Site and was directed to immediately commence reclamation of Mining Area 2. (*Goetz*, 2000 EHB at 843-53).

7. Goetz did not cease mining and did not reclaim as directed. Rather, he excavated an additional section and removed the excavated minerals from the Site. A July 1998 inspection by DEP found that, as of that time, Goetz had affected a second 1.5 acre section of the Site due to his mineral excavation activity on Mining Area 2. (*Goetz*, 2000 EHB at 843-53).

II. Further Excavation Activity in 1999 on Another Part of the Site and Use of the Newly-Excavated Minerals for Filling and Regrading of Mining Areas 1 and 2

8. Thomas Flannery is currently employed by DEP as a Surface Mine Inspector Supervisor and has held that position since 1993. His duties in that position include conducting inspections of surface mining sites, investigating complaints of illegal surface mining activities, and performing permit reviews. He conducted an investigation into illegal surface mining activity at the Site beginning in June 1997 and has performed various inspections of the Site between June 1997 and July 2001; he prepared inspection reports for each of those inspections. (Tr. 10-12; Exh. C-1; Exh. C-2; Exh. C-3; Exh. C-6; Exh. C-10).

9. Mr. Flannery conducted an inspection of the Site in the company of several other DEP personnel on March 30, 1999. On that date he observed that some regrading had been done on Mining Areas 1 and 2 since the last inspection, but that the final grades continued to exceed the 35 degree slope requirement. He also observed that neither area had been seeded as required. The compliance orders issued for Mining Areas 1 and 2 thus remained outstanding. (Tr. 24-29; Exh. C-3; Exh. C-4; Exh. C-5; 25 Pa. Code §§ 77.501, 77.591, 77.611).[2]

10. During the March 30, 1999 inspection, Mr. Flannery also observed that another part of the Site, not within the confines of Mining Areas 1 and 2, had been disturbed and excavated.[3] The newly-excavated area was approximately two acres in size ("Mining Area 3"), and had been disturbed between early February 1999—when Mr. Flannery had conducted an inspection of the Site and not seen the newly affected area—and the time of the March 30th inspection. (Tr. 24-29; Exh. C-3; Exh. C-4; Exh. C-5).

11. Mr. Flannery took photographs of Mining Area 3 during the March 30th inspection. The photographs depict disturbance, excavation, piles of debris and minerals, and steeply sloping grades on a substantial portion of the Site. (Exh. C-4; Exh. C-5).

12. DEP determined that Mining Area 3 did not meet the applicable reclamation standards for grading, seeding, planting, and debris removal, and directed Goetz to properly reclaim Mining Area 3. The March 30, 1999 inspection report states in pertinent part:

> An additional approx 2 acre (.810 h) has been affected and partially reclaimed to the east. This parcel was not included in the original compliance orders and court action. Mr. Goetz brought our attention to this newly affected area. This area must also be reclaimed, including seeding. . . . All slopes are to be regraded not

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[2] Goetz appealed the March 30, 1999 inspection report to the Board; however, a motion to dismiss filed by DEP, to which Goetz filed no response, was granted and the Board dismissed the appeal. *See Goetz v. DEP*, 1999 EHB 824.

[3] The regulations implementing the Noncoal Mining Act define a "disturbed area" as: "An area where vegetation or overburden is removed or upon which topsoil, spoil or noncoal waste is placed by surface mining activities. Areas are classified as disturbed until reclamation is complete . . . ." 25 Pa. Code § 77.1.

to excede [sic] 35° of the area seeded. All junk and garbage needs to be removed from site (affected area).

(Tr. 24-29; Exh. C-3).

13. During the March 30, 1999 inspection, Mr. Goetz told Mr. Flannery that he was excavating minerals from Mining Area 3 for use in reclaiming Mining Areas 1 and 2. Mr. Goetz brought Mr. Flannery's attention to the newly-affected area and told Mr. Flannery that the minerals Goetz had excavated from the top northeastern shelf of the Site (*i.e.*, Mining Area 3) were used to fill and regrade the areas affected by Goetz's prior surface mining operation (*i.e.* Mining Areas 1 and 2). (Tr. 20, 51, 62-63, 77, 81-82, 108-13; Exh. C-3).

14. Mr. Goetz did not testify as a witness at the hearing. He did not present any competent evidence contradicting Mr. Flannery's testimony on Mr. Goetz's statements with regard to the purpose for excavating Mining Area 3 and Appellant's use of the minerals excavated from Mining Area 3. Appellant did not present any documentary or testimonial evidence tending to show that Appellant had obtained the fill material used to reclaim Mining Areas 1 and 2 from an off-Site source. (F.F. # 14).

15. Appellant disturbed and excavated minerals from Mining Area 3 for the purpose of using the excavated minerals as fill and regrading material when reclaiming Mining Areas 1 and 2. Appellant actually used the minerals excavated from Mining Area 3 to fill and regrade Mining Areas 1 and 2 as part of the reclamation of those previously-mined areas of the Site. (F.F. # 15).

III. Further Efforts to Enforce Reclamation Performance Standards at the Site and Issuance of the August 1999 and September 1999 Compliance Orders

16. Mr. Flannery and other DEP personnel conducted an inspection of the Site on June 7, 1999 and he prepared a concomitant inspection report. At that time, he observed that the reclamation of Mining Area Nos. 1 and 2 was still not complete, and that some rough grading of

Mining Area 3 had been done, but no other regrading or reclamation of Mining Area 3 had been performed. He also observed that the continued failure to properly reclaim Mining Area 3 was causing a substantial erosion and sedimentation problem at the Site. The 1997 and 1998 compliance orders remained outstanding. (Tr. 29-31, 40-44; Exh. C-6).

17. Mr. Flannery took photographs of Mining Area 3 during the June 7th inspection. The photographs depict piles of excavated minerals, steeply sloping grades, no apparent seeding or planting, the occurrence of unchecked erosion and sedimentation, and idle mining equipment on the Site. (Tr. 29-31, 40-44; Exh. C-7; Exh. C-8; Exh. C-9).

18. On August 2, 1999, DEP personnel, including Mr. Flannery, performed another inspection of the Site. At that time, the 1997 and 1998 compliance orders were deemed to remain outstanding because Mining Areas 1 and 2 had only been sparsely seeded and hay mulched and Mr. Flannery observed continuing erosion and sedimentation problems on those areas. Mr. Flannery also observed that approximately 1.5 acres of the 2-acre section of Mining Area 3 had not been backfilled, regraded nor seeded, and that substantial erosion and sedimentation problems connected with Mining Area 3 were still evident. (Tr. 49-54; Exh. C-10).

19. Mr. Flannery took photographs of Mining Area 3 during the August 2nd inspection. These photographs show incomplete backfilling and grading, debris, no fine grading, or apparent seeding, and continued erosion and sedimentation problems. (Tr. 49-54; Exh. C-11; Exh. C-12; Exh. C-13).

20. Unable to convince Goetz through negotiation to properly reclaim Mining Area 3 without issuance of a compliance order specifically directed to that area, DEP issued to Goetz Compliance Order No. 99-5-072-N, dated August 10, 1999 (the "August 1999 Order"). In issuing the August 1999 Order, DEP determined that: (a) the excavated minerals from Mining

Area 3 had been used to fill, regrade and reclaim Mining Areas 1 and 2; (b) the disturbance and excavation of minerals from Mining Area 3 constituted noncoal surface mining activity which had to conform to the performance standards contained in DEP implementing regulations—specifically those pertaining to reclamation of areas affected by surface mining activities; and (c) as of the August 2, 1999 inspection, Mining Area 3 had still not been properly reclaimed and did not meet the applicable performance standards pertaining to reclamation. (Tr. 17-20, 22-24, 51, 71-76, 80; Exh. C-1; 25 Pa. Code § 77.501).

21. The August 1999 Order cites Goetz for violations of 25 Pa. Code § 77.501 and 25 Pa. Code Ch. 77, and describes the alleged violation more particularly as follows:

> Conducting noncoal/industrial mineral mining activities without complying with the performance standards and requirements of subchapter 77.501. Specifically, the operator failed to backfill, regrade, prepare a seedbed, seed and mulch an area of about 2 acres (0.81 hectares) directly adjacent to mining areas addressed in prior Department compliance order Nos. 97-5-025N, 98-5-050N.

(Exh. C-1).

22. The August 1999 Order directs Goetz to take the following actions to correct the alleged violation:

> Affected area must be backfilled, regraded, fine graded with the best available top strata material, seeded and mulched. All erosion rills and gullies must be filled with top strata material or stone. All slope areas must be seeded and heavily mulched. Any areas which are not revegetated, such as roadways and parking areas, must be stabilized with stone such as what is normally used on driveways and parking lots.

These corrective actions were to be completed by no later than November 2, 1999. (Exh. C-1).

23. Goetz did not present any evidence with respect to whether the conditions on Mining Area 3, as of the date of the August 1999 Order, met the applicable performance standards pertaining to reclamation set forth in 25 Pa. Code Ch. 77. (F.F. # 23).

24. Mr. Flannery and another DEP mining inspector conducted an inspection of the

Site on September 24, 1999, and Mr. Flannery prepared an accompanying inspection report. At the time of the September 1999 inspection, Mr. Flannery observed that conditions at the Site were essentially the same as at the time of the August 2, 1999 inspection. There was some evidence of recent activity on Mining Area 3; some grading equipment was situated on that area and some organic debris that had been burned was still smoldering. But no further backfilling or regrading had been done and no seeding had been commenced on Mining Area 3. The erosion and sedimentation problems had worsened. (Tr. 22-24; Exh. C-2).

25. On account of recent drought-like conditions being experienced in Pennsylvania during August-September 1999, DEP decided to issue a second compliance order, No. 99-5-072-N-A, dated September 24, 1999 (the "September 1999 Order"). The September 1999 Order amended the August 1999 Order only by extending the date for completing the planting and seeding aspect of the reclamation. Goetz was directed to temporarily seed by November 2, 1999, and to permanently seed Mining Area 3 by May 30, 2000, given that favorable planting conditions did not exist at that time. (Tr. 22-24; Exh. C-2).

26. Goetz did not present any evidence with respect to whether the conditions on Mining Area 3, as of the date of the September 1999 Order, met the applicable performance standards pertaining to reclamation set forth in 25 Pa. Code Ch. 77. (F.F. # 26).

27. Goetz ultimately complied with the August 1999 Order, as amended by the September 1999 Order, though not till quite some time after the deadline for compliance set by the amended order. In July 2001, DEP determined that Goetz had reclaimed Mining Area 3 in accordance with applicable performance standards pertaining to reclamation, and DEP consequently lifted the August 1999 and September 1999 Orders. (Tr. 20-21, 24; *Goetz v. DEP*, 2001 EHB 1127, 1129-31).

DISCUSSION

I. Standard of Review

Pursuant to the Noncoal Mining Act, no person shall operate a surface mine unless the person is operating in accordance with the applicable statutes and regulations. 52 P.S. § 3307. It is unlawful to violate the provisions of the Noncoal Mining Act or its implementing regulations, *see* 52 P.S. § 3323(a)(1), and the statute grants DEP the discretionary authority to "issue such orders as are necessary to aid in the enforcement of the provisions" of the Noncoal Mining Act. 52 P.S. § 3311(b). The question before the Board is whether the August 1999 and September 1999 Orders were properly issued. Specifically, we must determine whether the orders conform with applicable law, the factual premises of the orders are supported by a preponderance of the evidence, and the remedial measures imposed are a reasonable exercise of DEP's discretion. *Linde Enterprises, Inc. v. DEP*, 1996 EHB 382, 401, *aff'd*, 692 A.2d 645 (Pa. Cmwlth.), *appeal denied*, 549 Pa. 707 (1997); *Wikoski v. DER*, 1994 EHB 1461, 1466.

DEP bears the burden of proving that the compliance orders were properly issued. 25 Pa. Code § 1021.122(b)(4). The orders alleged that Appellant violated the Noncoal Mining Act—with respect to Appellant's activity on Mining Area 3—by "conducting noncoal/industrial mineral mining activities without complying with the performance standards and requirements of subchapter 77.501." Thus, DEP was required to prove that Goetz: (1) conducted noncoal surface mining activities on Mining Area 3; and (2) those surface mining activities were performed without complying with the requirements imposed by noncoal surface mining regulations.

II. The Parties' Contentions

DEP argues that Appellants' activities on Mining Area 3 constitute "noncoal surface mining" within the meaning of the Noncoal Mining Act in two ways. First, the extraction of earth and fill from Mining Area 3 by disturbing the land and removing the material that overlay

the minerals constituted surface mining within the plain language of the Act. Moreover, under an applicable implementing regulation, such activity is presumed to be noncoal surface mining in the absence of clear and convincing evidence that the activity fits within one of the listed statutory exceptions, and DEP was not presented with any such evidence by Goetz. To the contrary, Goetz stated that he was using the excavated minerals from Mining Area 3 to fill and regrade Mining Areas 1 and 2.

Second, extracting minerals from Mining Area 3 for use in the reclamation of Mining Areas 1 and 2 constitutes noncoal surface mining under the Noncoal Mining Act. DEP argues that the statute should be interpreted to encompass the situation where a landowner extracts minerals from one part of his land for use in reclaiming a previously-mined area, and then leaves the newly-excavated area unreclaimed. According to DEP, in that situation the statute gives the agency the authority to order reclamation of the newly-excavated area.

DEP asserts that, because Goetz was engaging in noncoal surface mining on Mining Area 3, he was required to reclaim that area pursuant to 25 Pa. Code § 77.501 and, despite months of effort to obtain compliance with the regulatory standards, as of the time of the orders Goetz had not properly reclaimed Mining Area 3. In particular, he had failed to backfill, regrade and reseed the area, as required by 25 Pa. Code §§ 77.501, 77.591-596, 77.611-618, and had failed to implement sediment control measures required by § 77.525. Finally, DEP contends that the reclamation measures imposed by the orders were a reasonable means of curing the violations and remediating the environmental harm caused by illegal surface mining at the Site.

Appellant limited his objections to the first element DEP must prove—*i.e.*, that Goetz conducted noncoal surface mining on Mining Area 3.[4] First, he argued that DEP failed to prove

[4] Goetz did not contest, either at the hearing or in his post-hearing brief, DEP's allegation that the conditions of Mining Area 3 did not meet the regulatory standards pertinent to the reclamation of land affected by noncoal surface

that he was engaging in noncoal surface mining on Mining Area 3. The basic premise of Appellant's argument is that the mineral-extraction activity on Mining Area 3 must be connected with the mining on Mining Areas 1 and 2 before the activity can constitute surface mining and thus come within DEP's authority under the Noncoal Mining Act. Goetz contends that DEP did not adequately prove that the minerals extracted from Mining Area 3 were used to fill and regrade Mining Areas 1 and 2 as part of the reclamation of those previously-mined areas. According to Goetz, because DEP did not prove a factual nexus between the mining areas, DEP did not prove he was "surface mining" on Mining Area 3, and the agency consequently had no statutory authority to issue compliance orders directing him to reclaim Mining Area 3.

In making this argument, Appellant implicitly agreed with DEP's position that, if the excavation activity on Mining Area 3 was connected to the mining operations on Mining Areas 1 and 2, then the activity on Mining Area 3 constituted "surface mining" and was subject to the reclamation regulations. Goetz did not directly address DEP's position that the extraction of minerals on Mining Area 3, regardless of any direct connection with Mining Areas 1 and 2, in and of itself constituted "surface mining" within the meaning of the Noncoal Mining Act.

Second, Appellant argued that even if he extracted minerals from Mining Area 3 and used them to reclaim Mining Areas 1 and 2, his activity fits within a statutory exception to surface mining. According to Goetz, the Board should focus exclusively on Mining Area 3 in this appeal and, when that area is examined in isolation, he was simply moving earth from one part of his land to another. His activity on Mining Area 3 would therefore fit within the exception to surface mining for "the extraction of minerals by a landowner for his own noncommercial use from land owned or leased by him." 52 P.S. § 3303; *see also* 25 Pa. Code § 77.1.

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mining operations. He presented no evidence relevant to that issue at the hearing. Nor did he argue that the remedial measures imposed by the two compliance orders were unreasonable, and he presented no evidence at the hearing on that point. *See* Appellant's Post-hearing Brief, at 2-7.

III. The Compliance Orders Were Properly Issued

A. The Orders Conformed With Applicable Law

DEP had authority to issue the compliance orders because Goetz was conducting noncoal surface mining activities on Mining Area 3 without complying with the standards applicable to the performance of such activities. The Noncoal Mining Act defines "surface mining" in pertinent part as:

> The extraction of minerals from the earth, from waste or stockpiles, or from pits or from banks by removing the strata or material that overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip mining, auger mining, dredging, quarrying and leaching, and all surface activity connected with surface or underground mining, including, but not limited to, exploration, site preparation, entry, tunnel, drift, slope, shaft and borehole drilling and construction and activities related thereto;

52 P.S. § 3303; *see also* 25 Pa. Code § 77.1 (defining "noncoal surface mining activities"). "Minerals" is broadly defined by the Noncoal Mining Act as "any aggregate or mass of mineral matter, whether or not coherent," and expressly includes "sand and gravel, rock and stone, earth, fill . . . and clay." 52 P.S. § 3303.

DEP interprets the statutory definition of "surface mining" to include Appellant's activity at issue here. Goetz engaged in unlicensed and unpermitted surface mining on a portion of the Site. After being ordered by DEP to reclaim Mining Areas 1 and 2, Goetz extracted minerals—earth and fill—from another part of his land. The minerals extracted from Mining Area 3 were used to fill and regrade the previously-mined areas, but newly-excavated Mining Area 3 was left unreclaimed. DEP argues that the extraction of minerals from Mining Area 3 for use in reclaiming Mining Areas 1 and 2 is within the definition of "surface mining."

We find DEP's interpretation persuasive. The statutory text expansively refers to the "extraction of minerals from the earth by removing the strata or material that overlies or is above

or between them or otherwise exposing and retrieving them from the surface." 52 P.S. § 3303.[5] Further support for DEP's position is found in prior cases which have broadly construed the statutory definition of surface mining in the Noncoal Mining Act. *See, e.g., Linde Enterprises, Inc. v. DEP*, 692 A.2d 645 (Pa. Cmwlth. 1997); *Holbert v. DEP*, 2000 EHB 796; *Wikoski*, 1994 EHB 1461; *Bedford County Stone & Lime Co., Inc. v. DER*, 1987 EHB 91.[6]

When coupled with the definition of "minerals" (which includes any aggregate mass of mineral matter, including earth and fill), the plain language of the statute encompasses Goetz's excavation activity on Mining Area 3. The uncontroverted evidence showed that Appellant removed the vegetation and overburden, *i.e.*, the strata or material overlying the minerals, and then excavated and extracted substantial quantities of earth and fill from a two-acre portion of the Site. And Goetz has not demonstrated at any time that he qualified for an exception to the definition of "surface mining" provided by the statute or implementing regulations.

In addition, the definition of "surface mining" expressly includes "all surface activity connected with surface or underground mining." 52 P.S. § 3303. The statute makes clear that DEP can exercise authority over lands adjacent to the surface mining area *per se* which may be impacted by a mining operation, and over land whose use is directly connected to the surface

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[5] In line with the statute's expansive definition, the implementing regulations state that it "will be presumed that the extraction of noncoal minerals is surface mining activity unless it can be demonstrated, with clear and convincing evidence, to the satisfaction of the Department, that the activities fit within one or more of the exceptions to the definition of noncoal surface mining activities." 25 Pa. Code § 77.101.

[6] A broad construction is consistent with the express purpose of the Noncoal Mining Act, which states:

> This act shall be deemed to be an exercise of the police powers of the Commonwealth for the general welfare of the people of this Commonwealth, to provide for the conservation and improvement of areas of land affected in the surface mining of noncoal minerals, to aid in the protection of birds and wildlife, to enhance the value of the land for taxation, to decrease soil erosion, to aid in the prevention of the pollution of rivers and streams, to protect and maintain water supply, to protect land, to enhance land use management and planning, to prevent and eliminate hazards to health and safety and generally to improve the use and enjoyment of the lands.

52 P.S. § 3302.

mining operation. *See, e.g.* 52 P.S. § 3307(b) (permit application must include a map showing boundaries of the "proposed land affected"); 52 P.S. § 3307(c) (permit applicant must submit detailed plan for "reclamation of the land affected" by proposed surface mining operation); *see also* 25 Pa. Code § 77.631 (requiring that upon completion of associated surface mining activities, area disturbed by a haul road shall be restored through regrading, revegetation and removal of debris). As with adjacent areas which are connected to, or affected by, the surface mining operation, the nexus between Mining Area 3 and the surface mining conducted on Mining Areas 1 and 2 also authorized DEP to order reclamation of Mining Area 3.

Finally, it would make little sense to exclude the activity on Mining Area 3 from the reach of the Noncoal Mining Act. One purpose of the Act is to "provide for the conservation and improvement of areas of land affected in the surface mining of noncoal minerals," *see* 52 P.S. § 3302, through the restoration of affected land to a condition capable of supporting natural vegetation and productive uses. 25 Pa. Code §§ 77.592, 77.611. To allow a surface mine operator to excavate one part of his land for the purpose of obtaining earth and fill to reclaim another, without requiring the operator to reclaim the newly-excavated portion, runs contrary to the statutory purpose. Indeed, excluding Mining Area 3 from DEP's reach would allow Goetz to benefit from his own misdeeds. He violated the Noncoal Mining Act by not obtaining a license or permit before excavating minerals from Mining Areas 1 and 2. If he had properly applied for and obtained a permit to mine the Site, his application would necessarily have contained a reclamation plan covering all land affected by the proposed surface mining on the Site.

1. Appellant's Activity Does Not Fit Within Any Statutory Exception

The Noncoal Mining Act provides several express exceptions to the definition of surface mining. The relevant exception here is for the "extraction of minerals by a landowner for his own noncommercial use from land owned or leased by him." 52 P.S. § 3303(1); *see also* 25 Pa.

Code § 77.1. The listed exceptions to the definition are in the nature of affirmative defenses, and an appellant arguing that he falls within one of those exceptions bears the burden of proof on that issue. *See, e.g., Goetz v. DEP*, 1999 EHB 856, 859. Appellant argued that his activity on Mining Area 3 does not fall within DEP's purview because it fits within the "landowner noncommercial use" exception to the definition of noncoal surface mining. In Appellant's view, he was simply moving dirt from one part of his property to another. *See* Tr. at 64, 152.

We do not believe the Legislature intended the "landowner noncommercial use" exception to include the circumstances present here—where a landowner has conducted an unpermitted surface mining operation on one portion of his land, extracts minerals from another part for use in reclaiming the previously-mined area, and then leaves the newly-excavated portion unreclaimed. Goetz would have us view his activity on Mining Area 3 in isolation from the prior surface mining operations at the Site, and simply disregard the genesis of his excavation of Mining Area 3, as well as his stated purpose, and ultimate use, for the minerals extracted from that area. The Noncoal Mining Act is intended to provide a means to "protect land," *conserve* and *improve* areas of land affected in the surface mining of noncoal minerals, decrease soil erosion, and generally improve the use and enjoyment of the lands. 52 P.S. § 3302. Appellant's overly-technical, highly-formalistic approach runs contrary to the express purposes of the Noncoal Mining Act.

Goetz did not meet his burden of proving that he was engaging in the kinds of activities on Mining Area 3 that, in our view, would be encompassed by the "landowner noncommercial use" exception, such as landscaping or constructing a driveway or parking area for vehicles on his residential property. Rather, by his own admission he had disturbed and excavated Mining Area 3 to obtain earth and fill for use in reclaiming the areas he had previously mined without a

license or permit.[7]

B. The Orders Are Supported by a Preponderance of the Evidence

We disagree with Appellant's contention that DEP did not adequately prove that he conducted noncoal surface mining on Mining Area 3. The uncontroverted evidence, including photographs, clearly showed that Goetz had disturbed, and extracted minerals from, Mining Area 3 in early 1999, and that in August 1999 he still had not performed any substantial reclamation measures on that area. Mr. Flannery's testimony coupled with the documentary evidence, was sufficient to meet DEP's burden of proving the factual premises of the orders by a preponderance given the lack of any competent controverting evidence. *See Commonwealth v. $32,950 U.S. Currency*, 634 A.2d 697, 698 n.9 (Pa. Cmwlth. 1993), *appeal denied sub nom Commonwealth v. Fried*, 538 Pa. 637 (1994) ("Preponderance of the evidence is tantamount to a 'more probable than not' standard").

Indeed, Goetz did not contest that he extracted minerals from Mining Area 3; nor did he present any evidence controverting DEP's assessment that the conditions of Mining Area 3 did not meet the regulatory performance standards applicable to reclamation of lands affected by noncoal surface mining. Rather, he has insisted that he was not engaged in noncoal surface mining because, in his view, DEP was required to demonstrate a connection between Mining

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[7] At the hearing, Goetz also introduced some testimony regarding an alleged 1997 building permit application and a potential renewal application from 1999, but the testimony was vague and inconsistent and no corroborating documentary evidence was introduced. This testimony was apparently submitted in an attempt to assert that Goetz was constructing a building on Mining Area 3 and so qualified for the "building-construction" exception to surface mining. *See* 52 P.S. § 3303(5) ("surface mining" does not include extraction of minerals "from any building construction excavation on the site of the construction where the minerals removed are incidental to the building construction excavation"). In his post-hearing brief, Appellant notably did not argue that he was entitled to the building-construction exception to surface mining or make any reference to the building permit evidence. Arguments not raised in post-hearing memoranda may be deemed waived. 25 Pa. Code § 1021.131(c).

In any event, to qualify for the building-construction affirmative defense the extraction must be conducted concurrently with the building construction activity (*i.e.*, usually within a month). *See* 25 Pa. Code § 77.1; *Linde Enterprises, Inc.*, 692 A.2d at 650; *Goetz*, 2000 EHB at 861-64. It was clear from the evidence presented at the hearing that no building construction activity had been performed on Mining Area 3 between the time of the subject events in 1998-99 and the time of the hearing in January 2002. *See* Tr. at 133-36.

Area 3 and the previously-mined areas. We disagree with this view of the law; the burden was on Appellant to demonstrate to the DEP inspectors that the excavation activities on Mining Area 3 fit within one of the exceptions to the definition of "surface mining" set forth in the statute. 25 Pa. Code § 77.101; *see* 52 P.S. § 3303 (listing five exceptions to definition of "surface mining"); 25 Pa. Code § 77.1 (listing exceptions to "noncoal surface mining activities"). There was no evidence presented by Goetz that he attempted to make such a demonstration prior to issuance of the compliance orders. The only evidence on this point was that presented by DEP concerning Mr. Goetz's statements to Mr. Flannery that Goetz was excavating minerals from Mining Area 3 for use in reclaiming the previously-mined areas on the Site.

In any event, DEP proved by a preponderance of the evidence that the extraction of minerals on Mining Area 3 was directly related to the surface mining operation on Mining Areas 1 and 2. Mr. Flannery credibly testified that during the March 1999 inspection of the Site, Mr. Goetz pointed out the recent excavation of Mining Area 3 to Flannery and stated that the excavated minerals from Mining Area 3 were being used to fill and regrade Mining Areas 1 and 2. Notations in several inspection reports corroborate Mr. Flannery's testimony.[8]

Remarkably, Goetz did not testify as a witness and presented no evidence controverting Flannery's testimony regarding Goetz's admission. Appellant's decision not to take the witness stand to refute Flannery's testimony lends weight and credibility to that evidence, and his failure to testify raises an inference adverse to his position. *See Fitzpatrick v. Philadelphia Newspapers, Inc.*, 567 A.2d 684, 687-88 (Pa. Super. 1989), *appeal denied*, 525 Pa. 618 (1990) (it is well settled law that "a party's failure to testify at a civil trial raises an inference of fact that the party's testimony would have been adverse or unfavorable to him" and the fact that Goetz was

[8] Goetz did not object to the admission of Mr. Flannery's testimony with respect to Goetz's statements; the testimony was admissible nonetheless as an exception to the hearsay rule for an admission by a party opponent offered against him. *See* Pa. R. Evid. 803(25)(a).

available to be called by either side does not bar the application of this rule); *see also Edmondson v. McMullen*, 381 Pa. 102, 105 (1955) ("a party litigant in a civil action who remains mute when the facilities of the witness stand are available to him cannot complain if the most damaging inferences consistent with logic are drawn from the testimony presented against him").

Similarly, Goetz did not present either documentary or testimonial evidence tending to demonstrate that he had obtained the fill material used to reclaim Mining Areas 1 and 2 from some off-Site source. That evidence was exclusively in his control; his failure to produce any such evidence leads to an adverse inference that the evidence does not exist or is unfavorable to him. *See Coombs v. Workmen's Compensation Appeal Board*, 689 A.2d 996, 998 (Pa. Cmwlth. 1997) ("the nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause"); *see also Downey v. Watson*, 451 Pa. 259, 266 (1973); MCCORMICK ON EVIDENCE § 264 (4th ed. 1992).

When taken together, the evidence presented by DEP is sufficient to meet the preponderance of the evidence standard on this issue. In our view, DEP adequately proved that the extraction of minerals on Mining Area 3 was directly related to the earlier unpermitted surface mining operation on Mining Areas 1 and 2.

DEP also proved that, as of the time of the two compliance orders, Goetz had not complied with the performance standards applicable to reclamation of land affected by surface mining. A person who conducts noncoal surface mining activities "shall comply with the performance standards and design requirements" contained in DEP implementing regulations. 25 Pa. Code § 77.501. Goetz did not contest the allegation that the conditions of Mining Area 3 did not comply with the performance standards applicable to reclamation of lands affected by

noncoal surface mining. Indeed, he presented no evidence on this point at the hearing. The uncontested testimony of Mr. Flannery regarding the conditions on Mining Area 3 and their failure to satisfy the applicable performance standards, taken together with the uncontroverted documentary evidence, was sufficient to meet DEP's burden of proof on this element.

C. The Compliance Orders are a Reasonable Exercise of DEP's Discretion

Finally, the remedial measures in the compliance orders are a reasonable exercise of DEP's discretion. Again, Goetz did not contest this aspect of the two orders and he presented no evidence on the issue. In any event, the remedial measures are a straightforward application of the regulatory standards for reclamation, and are not excessive or burdensome. In fact, DEP attempted for nearly six months to persuade Appellant to reclaim Mining Area 3 without the necessity of another round of compliance orders, but Appellant's dilatory conduct forced DEP to act. The August 1999 Order provided ample time to perform the necessary work, and when the drought conditions obstructed the revegetation of the area, DEP acknowledged the difficulty and issued the September 1999 Order amending the date for completing the revegetation aspect of the reclamation.

In sum, DEP has demonstrated that the August and September 1999 Orders conform with applicable law, are factually supported by a preponderance of the evidence, and were a reasonable exercise of DEP's discretion. Appellant has failed to demonstrate that he is entitled to any affirmative defense. Accordingly, we uphold the validity of the compliance orders at issue and we will dismiss the appeal.

CONCLUSIONS OF LAW

1. DEP bears the burden or proving by a preponderance of the evidence that the compliance orders conform with applicable law, the factual premises of the orders are supported

by a preponderance of the evidence, and the remedial measures imposed are a reasonable exercise of DEP's discretion.

2. DEP had authority to issue the compliance orders because Appellant was conducting noncoal surface mining activities on Mining Area 3 without complying with the standards applicable to the performance of such activities.

3. Appellant's extraction minerals from Mining Area 3 for use in reclaiming Mining Areas 1 and 2 comes within the statutory definition of "surface mining" set forth in the Noncoal Mining Act, 52 P.S. § 3303.

4. The circumstances presented in this appeal—where a landowner has conducted an unpermitted surface mining operation on one portion of his land, extracts minerals from another part for use in reclaiming the previously-mined area, and then leaves the newly-excavated portion unreclaimed—do not qualify for the "landowner noncommercial use" exception to the definition of noncoal surface mining.

5. DEP met its burden of proving that the factual premises of the two compliance orders are supported by a preponderance of the evidence.

6. Because Appellant conducted noncoal surface mining activities he was required to comply with the performance standards and design requirements contained in DEP implementing regulations. 25 Pa. Code § 77.501.

7. DEP met its burden of proving that Appellant failed to comply with the performance standards pertinent to reclamation of lands affected by noncoal surface mining activities.

8. The remedial measures in the compliance orders are a reasonable exercise of DEP's discretion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT K. GOETZ, JR., db/a/ GOETZ DEMOLITION COMPANY	:	**EHB Docket No. 99-168-C**
	:	**(consolidated with EHB**
v.	:	**Docket No. 99-220-C)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 11, 2002**

ORDER

AND NOW, this 11th day of October, 2002, it is hereby ORDERED as follows:

1. The appeals of Robert K. Goetz, Jr., d/b/a/ Goetz Demolition Company, docketed at EHB Dkt. No. 99-168-C and EHB Dkt. No. 99-220-C are hereby dismissed, and the dockets shall be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

Dated: October 11, 2002

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

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WILLIAM T. PHILLIPY IV
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MARYANNE GOHEEN	:	
	:	
v.	:	**EHB Docket No. 2002-077-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW MORGAN LANDFILL COMPANY, INC., Permittee	:	**Issued: October 17, 2002**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT AND FOR SANCTIONS

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

Synopsis:

A motion for summary judgment is denied in an appeal from the renewal of a landfill's permit where, among other things, the proper scope of the Department's inquiry when acting upon a renewal application is not clear. The appellant's objections in her notice of appeal are reasonably specific, and she has backed them up to a sufficient degree in discovery to allow the matter to go forward. Pa.R.C.P. 1023 does not apply to Board proceedings. The appellant, who lives close to the landfill and has testified that she is affected on a regular basis by odors, noise, and truck traffic associated with the continuation of landfill operations authorized by the permit renewal, has standing.

OPINION

Maryanne Goheen ("Goheen") filed this appeal from the Department of Environmental Protection's (the "Department's") renewal of the solid waste permit for New Morgan Landfill

Company, Inc.'s ("New Morgan Landfill's") landfill in New Morgan Borough, Berks County. This opinion addresses New Morgan Landfill's second summary judgment motion.

New Morgan Landfill's argues that Goheen's appeal should be dismissed because she has failed to state a legally cognizable claim. New Morgan refers us to Board Rule 1021.51(e), 25 Pa. Code § 1021.51(e), which requires that a notice of appeal set forth specific objections. New Morgan Landfill characterizes Goheen's arguments as "too general." It concedes that making general allegations in a notice of appeal does not necessarily indicate that an appellant's case should be dismissed on summary judgment, but it complains that Goheen has not substantiated her allegations during discovery. Because she failed to present any specific evidence to support her claims, the appeal, New Morgan Landfill argues, must be dismissed.

Goheen's first objection in her notice of appeal is that New Morgan Landfill's permit should not be renewed because it has failed to comply with applicable regulations and its permit. This claim seems to be relatively straightforward. Goheen has produced numerous notices of violation that the Department has issued against New Morgan Landfill.[1] She has testified that the landfill has produced excessive off-site odors and noise, which, if proven, could constitute violations of the law. The objection would seem to raise a proper subject of inquiry in deciding whether a landfill's permit should be renewed.

Goheen's second and third objections in her notice of appeal relate to whether the benefits of the landfill's continued operation pursuant to a permit renewal outweigh the harms being caused to the local community. Her primary theme seems to be that the Department failed to adequately consider that neighboring municipalities and their residents are suffering all of the

[1] New Morgan Landfill asks us to ignore Goheen's exhibits because they were attached to Goheen's brief instead of the answer to the motion. The exhibits, however, are referenced in the answer, so we are unable to comfortably conclude that the exhibits were only "attached" to the brief. In any event, in the interests of deciding the motion on the merits, we will disregard Goheen's alleged procedural error. *See* 25 Pa. Code § 1021.4; *Kleissler v. DEP*, EHB Docket No. 2001-295-L, slip op. at 2-3 (September 6, 2002).

purported harms but enjoying none of the purported benefits of the landfill. This point raises the fundamental, but unanswered, question of *who* the Department should consider when it evaluates the impact (i.e. harms and benefits) of a project in connection with a permit application. *See Eagle Environmental II, L.P. v. DEP*, EHB Docket No. 2001-198-MG, slip op. at 26 (April 4, 2002) (appeal pending).

We believe these two objections are reasonably specific and understandable. New Morgan Landfill has not provided us with sufficient legal argument to support its contention that the objections fail to state a cognizable claim. As we noted in our opinion denying New Morgan Landfill's first motion for summary judgment, we do not know whether the harms/benefits analysis has any place in deciding whether to *renew* a permit. New Morgan Landfill's second motion sheds insufficient new light on that question, instead merely suggesting that "it is doubtful that such a challenge is appropriate in the context of a permit renewal." (Brief p. 12.)[2] Our independent review of the potentially applicable regulations cited by New Morgan Landfill did not clarify the matter. Generally speaking, while a permit renewal does not call for a reexamination of whether the original permit should have been issued, it does occasion a review of whether the permitted operation should *continue* to be permitted based upon up-to-date information and laws. *See Tinicum Township v. DEP*, EHB Docket No. 2002-101-L (September 18, 2002). It is simply not clear to us at this point how the harms/benefits analysis jibes with this concept. The Department has not weighed in on this important question.

Goheen's fourth objection in her notice of appeal is that the permit renewal should not have been issued because the landfill is adversely affecting the local environment. This claim would seem to be a relevant subject of inquiry, and as noted above, Goheen has provided specific

[2] Indeed, New Morgan Landfill, without conceding that the harms/benefits test applies, posits that the benefits of the landfill's continued operation are substantial. (Reply Brief p. 6 n.9.)

examples of odors, noise, and traffic issues to back up her objection. Again, however, the extent to which these issues are to be considered in the context of a permit renewal remains unexplained.

New Morgan Landfill is critical of Goheen's performance at her deposition. It is true that Goheen was vague regarding some of her allegations, but many of New Morgan Landfill's criticisms boil down to an assertion that Goheen does not understand the legal bases for her claims. We do not find this to be surprising. Lay witnesses are not expected to understand the intricacies of the applicable regulations and the esoterica of the harms/benefits analysis.

New Morgan Landfill's second argument in support of its motion for summary judgment and the imposition of sanctions is that this appeal is "frivolous." New Morgan relies on Pa.R.C.P. 1023 (signature on a court filing constitutes warranty that filing is reasonably based on fact and law) in support of its request that we dismiss the appeal, but that rule does not apply to Board proceedings. In any event, for the reasons discussed above, Goheen's appeal is not frivolous. Neither summary judgment nor sanctions are warranted on this ground.

Finally, New Morgan Landfill attacks Goheen's standing. Goheen, however, lives about a quarter of a mile from the landfill, and she explained at the deposition how odors, noise, and truck traffic associated with the continuing landfill operations as authorized by the permit renewal affect her on a regular basis. (See, e.g., depo. pp. 41-44, 69, 72, 75-76.) She also testified that her house has lost value as a result of landfill operations. (Depo. p. 69.) There can be little doubt that she has been affected in such a substantial, direct, and immediate way that she has standing to prosecute this appeal. *See Giordano v. DEP*, 2001 EHB 713, 729-30.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARYANNE GOHEEN	:	
	:	
v.	:	**EHB Docket No. 2002-077-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW MORGAN LANDFILL COMPANY, INC., Permittee	:	

ORDER

AND NOW, this 17th day of October, 2002, New Morgan Landfill's motion for summary judgment and for sanctions is **DENIED**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: October 17, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARI

WHEELABRATOR FALLS, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-100-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 21, 2002**

OPINION AND ORDER ON WHEELABRATOR'S SECOND MOTION FOR SUMMARY JUDGMENT

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board denies Appellant's second motion for summary judgment because there is a threshold disputed factual issue on the extent to which Appellant's previous air plan approvals and operating permits provided start-up, shut-down and malfunction relief (SSM Relief) which factual issue, in turn, impinges upon the possible application of administrative finality in this appeal of the scope of SSM Relief in Appellant's Title V air permit. In addition, Wheelabrator has not demonstrated that it is entitled to judgment as a matter of law with respect to the question of the meaning of the term "publication" as used in Section 509 of Act 101 with respect to the Best Available Technology (BAT) Policy for resource recovery facilities.

Introduction

We are providing herein this short Opinion and Order which delineates, at least in part, our reasoning in not granting the current motion for summary judgment which is Wheelabrator's second such motion. This second motion was presented only a few weeks before the scheduled start of the trial and was quite unexpected by the Board and by the Department since it was filed

long after all deadlines for dispositive motions had passed and without leave of the Board. Trial is scheduled to commence within a month from now and we normally do not have occasion to hear summary judgment motions in such a compressed time frame much less issue opinions thereon and therein. However, we think that providing our reasoning in writing in an opinion will be of some value to the parties in preparing for and making their respective trial presentations.

Discussion

This matter has already been the subject of a Board opinion denying Wheelabrator summary judgment. *Wheelabrator Falls, Inc. v. DEP*, EHB Docket No. 2001-100 (Opinion and Order, May 16, 2002). The reader is directed to that Opinion and Order for a more detailed explanation of the background of this matter and to be able to place the discussion herein in context. This Opinion is presented with the assumption that the reader has read the previous one inasmuch as we will be referring to concepts and acronyms herein that we have defined in our previous Opinion and that we will not redefine here in the interest of having this Opinion issued as quickly as possible.

In our previous Opinion and Order we noted, among other things, that there seemed to be an open question whether the BAT Policy covering resource recovery facilities was entitled to the enhanced authoritative status granted by Section 509 of Act 101. That section appears to call for the BAT Policy to be published in the Pennsylvania Bulletin.

Trial was scheduled as a follow-up to the Board's denial of Wheelabrator's first summary judgment motion. Then, on September 16, 2002, virtually on the eve of trial, Wheelabrator, without leave of the Board to file a late summary judgment motion, filed one anyway. The second prominent argument of Wheelabrator's second motion is that there is no factual dispute that the BAT Policy was *not* published, meaning set forth in its full text, in the Bulletin, and,

therefore, Wheelabrator is entitled to summary judgment. The Department promptly moved to strike the second motion for summary judgment on the ground that it was filed after the expiration of all deadlines for dispositive motions and without leave of the Board. We heard oral argument *via* telephone conference call on September 24, 2002 on the Department's Motion to Strike during which we concluded that the motion should not be stricken and we issued an Order to that effect the same day. The Department's response papers were filed on October 15, 2002. During the oral argument on the Department's Motion to Strike, Wheelabrator said that it would not file a reply thus removing one of the Department's arguments that the late motion should be stricken because the completion of briefing would come too close to the start of trial.

First, we see the Department's point that there is a threshold disputed factual issue relating to the Department's threshold legal argument that administrative finality bars Wheelabrator from raising its instant challenge to the scope of SSM Relief in its Title V permit. That disputed factual question is to what extent did Wheelabrator's previously issued Plan Approvals and Operating Permits include SSM Relief. Whether or not the Department is able to convince the Board that administrative finality is a proper fit in this case, our determination of that legal question is dependent upon light being shed on the factual question just noted. We think that testimony and evidence on that subject will be helpful. In any event, we decline to make a ruling which would preclude the Department from presenting that testimony and evidence which it tells us is so important to its case on the point of administrative finality and as to which it has expressed its strong desire to do.

The second point we note in denying summary judgment is corollary to the first. If administrative finality does apply here, then not only is Wheelabrator not entitled to judgment as a matter of law, the Department would seem to be so entitled.

Our third point, which really may be two points, relates to the interrelationship between Section 509 of Act 101 and the BAT Policy. The Department points out that the BAT Policy covering resource recovery facilities existed before Act 101 was passed. Act 101 was passed in 1988 while the first BAT Policy covering resource recovery facilities was devised, apparently with invitation for input from the public and consideration thereof, two years before that; in 1986. The Department further notes that the BAT Policy had never been published in full text form in the Pennsylvania Bulletin before Act 101 was passed. Instead, the Department published in the Pennsylvania Bulletin a notice that the BAT Policy had been devised and that whoever was interested in obtaining the full text of the document was welcome to request a copy. The Department makes these points in the context of arguing that the terms "publication" and "publish" as contained in Section 509 do not necessarily mean the publication in the Bulletin of the full text of the BAT Policy. Instead, the terms "publication" and "publish" could mean announcing publicly in the Bulletin that the BAT Policy had been promulgated and telling of its availability in full text form. According to the Department's argument, that construction of the terms "publication" and "publish" in Section 509 is the most logical since it describes the existing state of affairs regarding the BAT Policy's publication at the time the Legislature passed Section 509 and the Legislature, of course, was aware of that fact. That point is interesting and deserves more attention, briefing and deliberation in the context of an adjudication upon a trial record. In any event, it is enough to preclude a conclusion at this time that Wheelabrator is entitled to summary judgment as a matter of law on this question.

These points which the Department has discussed also raise another question, though, about Section 509 and the BAT Policy that deserves more attention and consideration. Section 509(a) mandates publication of the BAT criteria. Section 509(b) imposes the restriction that the Department cannot issue any permit less stringent than "any provision of the applicable [BAT]

criteria". We see an open question whether the Legislature necessarily meant to link subsection (a) to subsection (b) such that subsection (b)'s mandate that the Department not issue any permit which is less stringent than the applicable BAT Policy is dependent upon subsection (a)'s mandate that the BAT Policy be published.

For the forgoing reasons, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHEELABRATOR FALLS, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-100-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 21st day of October, 2002, upon consideration of Wheelabrator's second Motion for Summary Judgment (Motion) and the Department's opposition papers, it is HEREBY ORDERED that Wheelabrator's Motion is **DENIED.**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: October 21, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DIANE LOIS MAZZE, et al.	:	
	:	
v.	:	**EHB Docket No. 2002-193-MG**
	:	**(Consolidated with 2002-196-MG**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2002-197-MG)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and PHILADELPHIA	:	**Issued: October 30, 2002**
WATER DEPARTMENT, Permittee	:	

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies a petition for supersedeas of the Department's approval of the application of biosolids consisting of treated sewage sludge to farmland pursuant to the Department's regulations. The appellant, who resides near this farmland, failed to provide convincing evidence that she will be subject to irreparable harm by the Department's action or that she is likely to succeed in overturning the Department's approval after a hearing on the merits of the appeal.

OPINION

Background

These consolidated appeals are from the Department of Environmental Protection's approval of the application of biosolids to the Laurel Locks Farm in Coventry Township, Chester

County pursuant to the Department's regulations relating to the Beneficial Use of Non-Exceptional Quality Sewage Sludge by Land Application, 25 Pa. Code Chapter 271. The Appellant, Diane Lois Mazze, is an individual proceeding *pro se* who resides in Pottstown, Pennsylvania, adjacent to the fields of the Laurel Locks Farm. Other appellants have appealed from the Department's action, but did not join in the petition for supersedeas. Thomas Kelly is a photojournalist residing in the nearby community of Sanatoga, Pennsylvania. He also is not represented by counsel. North Coventry Township Board of Supervisors is a municipality with jurisdiction over the land of the Laurel Locks Farm. The notices of appeal claim that the Department's action was improper for a wide variety of reasons that focus on the likely harm that the chemicals in the biosolids will have on the community of North Coventry Township. The amended notice of appeal of North Coventry Township Board of Supervisors claims numerous deficiencies in the Department's action in support of its contention that the Department's action failed to comply with the Department's regulations.

The Department's approval of this application of biosolids is based on the issuance of a general permit for the beneficial use of these materials by land application on farms. Notice of the grant of coverage to the City of Philadelphia by this general permit was published in the *Pennsylvania Bulletin* on December 29, 1997. On July 23, 2002, the Department determined that the site requirements for the notification of first land application had been met. This site determination was made after adjustments to the farm's conservation plan required by the Department and was published in the *Pennsylvania Bulletin* on August 10, 2002. North Coventry Township was advised of this determination by letter dated August 28, 2002.

The Petition For Supersedeas

Appellant Diane Lois Mazze filed a Petition for Supersedeas claiming that she is a "chemically sensitive" person;[1] that airborne pathogens, chemical outgassing and heavy metals could harm her; that "our property values could plummet"; and she does not know what will be present in the land application materials that would harm her because no one knows all of the pathogens, radioactive materials and hazardous chemicals that may be present in these materials. This petition, as amended, was accompanied by an affidavit from this Appellant summarizing prior adverse exposures to chemicals that she and her husband had experienced in their home or her workplace from sulfur compounds, formaldehyde, pesticides, and other chemicals. The affidavit states that some of these chemicals are found in Philadelphia Class B sewage sludge, and that exposure to these chemicals could have extremely adverse health consequences for her if she were exposed to them again.

The Department filed a Motion to Deny the Amended Petition for Supersedeas and the City of Philadelphia filed a Motion to Dismiss the Petition. Both motions stated, among other things, that the petition failed to comply with the Board's Rules of Practice and Procedure with respect to particularity of facts and applicable law, addresses only the factor of irreparable harm and generally fails to meet any of the requirements for the filing of a petition for supersedeas.

The Board nevertheless ordered a hearing on the petition and on the motions to dismiss or deny because of the Appellant's strongly held belief that she will be irreparably harmed by the

[1] This presumably refers to the Pesticide Hypersensitivity Registry maintained by the Department of Agriculture in accordance with its regulations at 7 Pa. Code § 128.111 and .112. This program requires notice to a person so registered of any application of pesticides within 500 feet of the hypersensitive person's home or workplace.

Department's action, because she is apparently unable to afford representation by counsel and because of the public importance of the safe execution of this program to the North Coventry Township community and to the City of Philadelphia.

The Hearing

At the hearing held on October 23, 2002 Ms. Mazze testified to the adverse consequences she had experienced as a result of exposure to many chemicals in both her workplace and her home, many of which she believes are contained in the biosolids to be applied to the farm adjoining her home. She identified many exhibits relating to the characteristics of chemicals that she believes to be contained in the biosolids from the City of Philadelphia. The primary basis for this belief is based on Appellant's Exhibit 1. This exhibit is a summary prepared by an unknown person of chemicals purportedly discharged to the Philadelphia waste treatment system based on an EPA summary of Toxic Release Inventory (TRI) reports.[2] She also testified to their adverse effects based on government reports, scientific texts and other reports identified as Appellant's Exhibits.[3] She gave extensive testimony as to the adverse effects she had experienced as a result of having previously been exposed to a suite of chemicals that included the chemicals to which these exhibits relate. These chemicals included methanol, phenol, cumene, sulfur compounds, styrene, benzene, propylene, hydrogen sulfide, trimethalamine, and dimethyl formaldehyde, among others.

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[2] These are reports that EPA requires industrial dischargers to file annually so that it, state regulators and members of the public may be advised of the source and the amount of toxic materials that are discharged into streams or public treatment systems.

[3] In order to expedite the hearing, the Board gave no specific ruling as to the admissibility of these documents and deferred ruling on the admissibility of the Exhibit 1 summary of EPA's summary of TRI reports. However, for purposes of this hearing, and for no other purpose, the Board has considered the exhibits that purport to be reports of domestic government agencies as being admissible in evidence. By contrast, it has considered Appellant's Exhibit 1 and corporate

Ms. Mazze testified that the home in which she lives is directly adjacent to and down-wind of the Laurel Locks Farm, but was unable to provide the exact distance from her home to the fields on which the biosolids are to be applied or have been applied. She had no expert available to testify that she would in fact be adversely affected by the application of biosolids as authorized by the Department.

The City of Philadelphia presented testimony through William E. Toffey that tended to demonstrate that the City's municipal waste treatment system, including secondary and tertiary treatment methods, is effective in reducing hazardous materials contained in materials discharged to its treatment system to levels well below regulatory standards. The resulting "product" is a semi-solid cake material that employees of the City deliver to the application contractor. In the case of organic chemicals, he testified that the application of the TCLP test[4] for the presence of hazardous materials indicated that these chemicals were non-detect after full treatment. He described the City's sewage sludge enhancement program aimed to reduce hazardous materials to the lowest practicable level. He said that this program employs 14 industrial discharger inspectors and the testing of 2,000 samples per year.

As indications that the biosolids in this cake are safe for use, he testified that employees working in the treatment system and in delivery of the cake for transport wear coveralls, gloves and protective shoes and glasses common to many manufacturing facilities. He said that there were no incidents of illness among these workers from exposure to the sludge over the years

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reports on the effects of toxic materials to be inadmissible under the hearsay rule.

[4] The Toxic Characteristics Leaching Procedure (TCLP) test is a standard EPA laboratory test for the presence of hazardous or toxic materials in organic constituents specified by EPA. A finding of non-detect means only that the presence of the chemical cannot be detected above the level specified in the EPA approved test protocol.

from 1983 when the program was first developed. He is not aware of any illness from the application of biosolids on farmland other than the one death reported by the press to have been a result of exposure to applied biosolids. Since 1983 the City has shipped two-and-one-half-million tons of this material to 100 sites including 40 farms.

He also testified to safeguards employed at the site before and after application. The 30-day notice of application required to be given to adjacent landowners requires a review of the history of nutrient application at the farm, sampling for nutrients, and the development of a nutrient management plan to be approved by the County Conservation Authority and the Department. In this case, the first notice of application was not approved by the Department because of deficiencies in the farm's nutrient management plan. After changes were made to remedy these deficiencies, the Department issued its approval of the 30-day notice so that the contractor, Mobile Dredging Company, could proceed with application. He said that the contract with Mobile Dredging required it to conduct testing in the field of the applied biosolids and to report the results to the City and the Department.

The City also presented the testimony of Keith M. Dudley, the Department employee primarily responsible for approving the 30-day notice of application to adjacent landowners. He testified concerning the required setback distances from homes and streams in the application of the biosolids to farmland. He testified that after required changes in the conservation plan for the Laurel Locks Farm the application met all of the Department's regulatory standards.

Discussion

The circumstances affecting the grant or denial of a supersedeas petition are described at 25 Pa. Code § 1021.63, as follows:

(a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered:

(1) Irreparable harm to the petitioner.

(2) The likelihood of the petitioner prevailing on the merits.

(3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.

(b) A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.

We most recently described some of the general principles regarding supersedeas in *Tinicum Township v. DEP*, EHB Docket No. 2002-101-L, Slip Op. (issued September 18, 2002), as follows:

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

At the conclusion of the hearing the Board denied the petition because the Appellant's evidence failed to meet the standards for the granting of a supersedeas of the Department's approval. In doing so, we assumed for purposes of this petition that the biosolids to be applied to the Laurel Locks Farm contained some level of the chemicals testified to by the Appellant. We also assumed that these chemicals could have the adverse effects indicated by the Appellant's testimony and the documents submitted by her in support of her testimony at some level of

concentration and exposure. However, her belief that the biosolids to be applied to the neighboring farm contain hazardous chemicals at unsafe levels ignores the probable effect of the City's secondary and tertiary treatment system in reducing the levels of chemicals contained in the raw sewage to that found in the biosolids. However, we make no finding as to the efficacy of the City's treatment system in this respect. Nevertheless, the Appellant's evidence is deficient in failing to account for the levels of chemicals that may be in the biosolids following the application of the City's treatment systems.

In addition, she presented no testimony to indicate that she would be adversely affected by any resulting airborne chemicals resulting from this application. Her testimony as to her past experiences was limited to exposure to chemicals in her home and in her work place. Chemical exposure that originates from an indoor source presumably is more intense than exposure from an outside source. We credit her testimony that her home is downwind of the fields of the Laurel Lock Farm and that her home is immediately adjacent to this farm. However, there was no testimony to indicate the Appellant would most likely suffer adverse effects from any resulting airborne exposure to any chemical contained in the biosolids.

The evidence submitted by the City, by contrast, tended to prove that the chemicals contained in the biosolids to be applied to this farm are at such reduced levels that they would pose no likely risk to the Appellant. Further, this evidence tended to indicate that the Department acted properly in approving the application under the terms of the general permit and the Department's regulations. Admittedly, this evidence did not direct itself to concentrations of any likely airborne exposure, but the burden of proof in this proceeding, particularly in support of a petition for supersedeas, is on the Appellant.

Nothing in the foregoing discussion constitutes a finding that the Department acted properly in approving this application of biosolids or that the Appellant will not be adversely affected by such an application. We find only that the Appellant's evidence in support of the petition for supersedeas fails to support her claim that she will suffer irreparable harm or that it is likely that she will succeed in overturning the Department's actions. Those are all contested matters that remain for decision after a full hearing on the merits in this consolidated proceeding.

For all of these reasons we entered the following order at the conclusion of the testimony at the hearing on the petition for supersedeas and the motions of the Department and the City to dismiss or deny:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DIANE LOIS MAZZE, et al.	:	
	:	
v.	:	**EHB Docket No. 2002-193-MG**
	:	**(Consolidated with 2002-196-MG**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2002-197-MG)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and PHILADELPHIA	:	
WATER DEPARTMENT, Permittee	:	

ORDER

AND NOW, this 23rd day of October, 2002, following the completion of the hearing on the petition for supersedeas of Appellant, Diane Lois Mazze, and on the motions of the Department and the Philadelphia Water Department to dismiss the petition, IT IS HEREBY ORDERED as follows:

1. The petition for a supersedeas is **denied**.

2. The motions to dismiss the petition for supersedeas are **granted**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: **October 23, 2002**

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

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SECRETARY TO THE BOARI

WALLACE TOWNSHIP, BRANDYWINE CONSERVANCY, EAST BRANDYWINE TOWNSHIP, DOWNINGTOWN MUNICIPAL WATER AUTHORITY, SIERRA CLUB - PENNSYLVANIA CHAPTER and DELAWARE RIVERKEEPER, a/k/a MAYA ROSSUM, et al.	**: EHB Docket No. 2002-113-MG : (consolidated with 2002-114-MG, : 2002-115-MG, 2002-123-MG, : 2002-124-MG and 2002-126-MG)**
v.	**: Issued: October 30, 2002**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA SUBURBAN WATER COMPANY, Permittee	

OPINION ON
SUPPLEMENTAL DISCOVERY ORDER AND PROTECTIVE ORDER

By George J. Miller, Administrative Law Judge

Synopsis

This opinion is issued to further explain rulings made in an earlier order disposing of discovery disputes related to an appeal from a water allocation permit. The Board granted in part and denied in part motions to compel by the appellants and issued a protective order governing subsequent discovery by the parties. The discovery order resolved remaining disputes in favor of the permittee concerning discovery related to the permittee's proposed acquisition of the assets of the appellant water authority and relating to the prices paid and charged by the permittee for drinking water from other sources. The order does permit the exploration by other means of discovery of alternatives to

sources of water other than the permitted source which might be less environmentally harmful. The protective order provides a mechanism for the parties to shield or limit access in discovery to material claimed to be confidential and privileged.

OPINION

On September 17, 2002, we issued a discovery order which largely disposed of the contentions raised in motions to compel filed by the Wallace Township Appellants (Wallace Township, the Brandywine Conservancy, and East Brandywine Township). However, we reserved ruling on certain aspects of the motion concerning a past negotiation by the Pennsylvania Suburban Water Company (Permittee) to acquire some of the assets of the Downingtown Municipal Water Authority (DMWA) and the prices paid or charged by the Permittee for water in bulk from other sources, pending the receipt of further information about the extent to which alternate sources of water were considered by the Department in its review of the water allocation permit. The DMWA also moved to compel the designation of a representative to testify on matters relating to the pricing of water paid or charged by the Permittee for bulk water and the Permittee's past negotiations to acquire some or all of the assets of the DMWA. Further, both the Wallace Township Appellants and the DMWA proposed protective orders for the management of confidential information for the remainder of the discovery period. We reserved ruling on these motions as well. The Permittee responded to these motions and proposed its own protective order. [1]

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[1] An opinion detailing our reasoning for the September 17 Order was issued on September 20, 2002.

On September 30, 2002 the Permittee filed with the Board materials related to the Department's consideration of alternatives to the project[2] and on October 2, 2002, we issued a supplemental discovery order and a protective order.[3] The purpose of this opinion is to explain our rulings in those orders.

The motion to compel filed by the Wallace Township Appellants sought, among other things, to compel the answers to interrogatories and the production of documents related to the Permittee's consideration of alternatives, specifically the purchase of water from the DMWA and the acquisition of some or all of the assets of the DMWA. The DMWA sought the designation of a witness to testify concerning efforts of the Permittee to acquire the assets of the DMWA, the prices the Permittee pays to other public water suppliers for water, and the prices the Permittee charges other public water suppliers for water. The Permittee objected to this discovery and opposed the motion to compel on the grounds that much of the information was irrelevant and constituted confidential business information. The affidavit submitted by the Permittee stated that its efforts to acquire the assets of the DMWA occurred in the early 1990's before it acquired the UGS Northern Division service area.

Our September 17th Order reserved judgment on these requests pending submission of the Permittee's materials relating to alternatives which were submitted to

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[2] Our September 20, 2002 opinion describes the details of the proposed project, therefore we will not completely repeat them here. Briefly, the Permittee proposes to withdraw a quantity of water from the East Branch of the Brandywine Creek and store it in the former Cornog Quarry. This water will be used to serve customers in an area known as the UGS Northern Division.

[3] These orders are attached to this opinion as an appendix.

the Department for its review of the permit application.[4] That material was indeed submitted to the Board by the Permittee. The materials submitted by Appellants and the Permittee indicate that the Department was advised by the permit application materials of a number of alternatives to the Cornog Quarry project. These included the drilling of additional wells, the use of a reserved supply in the Marsh Creek Reservoir, importing water form the Permittee's Western Division, purchase of water from the DMWA and from the Coatesville water system, now owned by Pennsylvania American Water Company. In the case of each alternative the Permittee submitted information and analysis as to why each of these alternatives was rejected in preference to the Cornog Quarry project as a source of supply. None of these materials as submitted to the Department referred to the alternative of the Permittee's acquisition of the DMWA as an alternative source of water supply, but the alternative of purchasing water from the DMWA was fully considered.

As a result of our examination of these materials, our Supplemental Discovery Order sustained the Permittee's objections to discovery with respect to the acquisition negotiations in the early 1990's aimed at a possible acquisition of DMWA by the Permittee and with respect to prices charged or paid for bulk water throughout the Permittee's system. However, paragraph 2 of the Supplemental Discovery Order permits discovery by other means of the other alternatives to the Cornog Quarry project, including the purchase of water in bulk from DMWA. As we explained in our September 20th Opinion, the Water Rights Act does require some consideration of alternative

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[4] September 17 Order, ¶ 21.

sources of water.[5] However, after our review of the materials submitted by the Permittee to the Department, we conclude that the negotiations between the Permittee and the DMWA in the early 1990's are irrelevant to this permit application. This conclusion is bolstered by the fact that the Wallace Township Appellants' interrogatories are very broad and would require the production of highly sensitive and confidential business information.[6]

This ruling does not preclude the Wallace Township Appellants from exploring the Permittee's consideration of other alternative water sources to the project or from discovering the circumstances and reasons for the termination of the negotiations between the DMWA and the Permittee.[7] We further required the Permittee to produce documents relating to the purchase of bulk water from the DMWA after the fall of 1992 when the negotiations concluded, to the extent such information was considered as a method of providing water to UGS Northern Division customers as an alternative to the water withdrawal authorized by the permit under appeal.

We also granted in part and denied in part the DMWA's request to compel the designation of a witness to discuss certain matters related to the consideration of alternatives to the project. Similar to our disposition of the interrogatories discussed above, we denied the DMWA's motion to the extent it sought to explore the negotiations with the DMWA in the early 1990's other than the circumstances and reasons for the

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[5] *Wallace Township v. DEP,* EHB Docket No. 2002-113-MG (consolidated), slip op. at 11 (Opinion issued September 20, 2002); Act of June 24, 1939, P.L. 842, *as amended,* 32 P.S. § 637.

[6] Supplemental Discovery Order ¶ 1.

[7] Supplemental Discovery Order ¶ 2.

termination of the negotiation.[8] We also denied the DMWA's motion to compel the designation of a witness to discuss prices paid and charged for water in bulk throughout the Permittee's system. Since the service area of East and West Brandywine Townships is remote from many of the Permittee's facilities in many other areas, water prices relative to the other areas is not relevant to the issue of whether alternatives methods of providing water for this service area was appropriate. However, we authorized the discovery of the reasons for the Permittee's rejection of alternative sources of water supply by other means.

In addition to ruling on remaining discovery matters, we also fashioned a protective order to manage the exchange of documents which may be privileged or confidential. We initially reserved ruling on the motions proposed by both the appellants and the Permittee because the Permittee wished to restrict counsel for the Wallace Township Appellants from accessing the confidential business information which may be produced in discovery because of his representation of competitors to whom such information would be valuable. We were troubled by this request and discussed it with the parties in a conference call. Counsel for the Wallace Township Appellants agreed that he had represented competitors of the Permittee in other matters and was in fact retained by water utilities because of his expertise in this area. However, he did not feel there was an impediment to his ability to abide by the conditions of a protective order.

In our September 20th Opinion we acknowledged that there was some authority in federal court for restricting access to confidential information by lawyers who were

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[8] We note that it is likely that the DMWA would have access to some of this information in its own files.

involved in "competitive decisionmaking" for a competitor.[9] However, those decisions generally involve in-house counsel or situations unique to patent prosecution and infringement matters which do not appear to be analogous to Mr. Klein's apparent representation of competitors to the Permittee. We believe this is so particularly in view of our limitation on discovery of the subject of prices charged or paid by the Permittee for bulk water from other sources. Therefore we did not restrict his access as trial counsel to confidential information subject to the provisions of the protective order and such further order as the Board might make. Similarly, we did not restrict the access of the DMWA's trial counsel to confidential information. However, for the purposes of the protective order, we restricted the access of Mr. Valocchi and his firm to the Permittee's confidential information because, as the solicitor for the DMWA, the nature of his representation of it is much broader than that of trial counsel. The risk of inadvertent disclosure is much higher. Because trial counsel for the DMWA has unfettered access, the DMWA will not be prejudiced by this limitation.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: October 30, 2002

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[9] *See Wallace Township v. DEP,* EHB Docket No. 2002-113-MG (consolidated), slip op. at 12 n. 36 (Opinion issued September 20, 2002).

APPENDIX

WALLACE TOWNSHIP, BRANDYWINE CONSERVANCY, EAST BRANDYWINE TOWNSHIP, DOWNINGTOWN MUNICIPAL WATER AUTHORITY, SIERRA CLUB - PENNSYLVANIA CHAPTER and DELAWARE RIVERKEEPER, a/k/a MAYA ROSSUM, et al.	:	**EHB Docket No. 2002-113-MG (consolidated with 2002-114-MG, 2002-115-MG, 2002-123-MG, 2002-124-MG and 2002-126-MG)**
v	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA SUBURBAN WATER COMPANY, Permittee	:	

SUPPLEMENTAL DISCOVERY ORDER

AND NOW, this 2nd day of October, 2002 in consideration of the Permittee's objections to requested discovery and the motions of the Appellants to compel further discovery with respect to matters on which decision was reserved in the Board's order dated September 17, 2002 (prior discovery order) it is hereby ordered as follows.

1. Other than as provided in the prior discovery order, the Permittee's objections to Interrogatories 111,112 and 117 are sustained as being over broad and as unnecessarily requiring the production of confidential information having little or no relevance to any issue in this case.

2. This ruling is without prejudice to the Appellants exploring on oral depositions or other discovery the basis for Permittee's rejection of alternative sources of water supply to provide water to the public in East and West Brandywine Townships, provided that no discovery of the Permittee's negotiations with Downingtown Municipal Water Authority with a view to acquiring its assets shall be conducted beyond the circumstances and reasons for the termination of those negotiations.

3. The Permittee's objections to Request 69 is sustained in part and the Appellants' Motion is granted in part. The Permittee shall respond to this request to the extent of producing all documents and communications regarding the possibility of purchasing water from the Downingtown Municipal Water Authority after the termination of the negotiations for acquisition of some of that authority's assets in the Fall of 1992, but only to the extent that these documents and communications were in furtherance of an analysis or other consideration by the Permittee of methods of providing a supply of water for the public in East and West Brandywine Townships alternative to the permitted withdrawal of water from the East Branch of the Brandywine Creek. The Permittee's objections are sustained in all other respects.

4. The Permittee's objections to Request 70 is sustained and the Appellants' motion is denied.

5. The Permittee's objections to the deposition notice served by Downingtown Municipal Water Authority are sustained to the extent that (1) paragraph 9 of the deposition notice would require testimony as to all aspects of efforts by the Permittee to acquire some or all of the assets of Downingtown Municipal Water Authority prior to the termination of those negotiations in the Fall of 1992 and (2) paragraphs 10 and 11 of the deposition notice might require testimony with respect to prices paid and charged for water throughout the Permittee's system. To this extent the Appellant's motion is denied.

6. The Appellants'motion is granted to the extent that the Permittee is required to produce witnesses to testify to the matters permitted by paragraphs 2 and 3 of this Order.

An opinion describing the contentions of the parties and the reasons for the entry of this order will follow shortly.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: October 2, 2002

WALLACE TOWNSHIP, BRANDYWINE CONSERVANCY, EAST BRANDYWINE TOWNSHIP, DOWNINGTOWN MUNICIPAL WATER AUTHORITY, SIERRA CLUB - PENNSYLVANIA CHAPTER and DELAWARE RIVERKEEPER, a/k/a MAYA ROSSUM, et al.	:	**EHB Docket No. 2002-113-MG (consolidated with 2002-114-MG, 2002-115-MG, 2002-123-MG, 2002-124-MG and 2002-126-MG)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA SUBURBAN WATER COMPANY, Permittee	:	

PROTECTIVE ORDER

AND NOW, this 2nd day of October, 2002, upon consideration of cross motions of the Appellants and the Permittee for a protective order with respect to the production of confidential information in discovery, it is hereby ORDERED as follows:

1. A party providing Confidential Information to an authorized representative of another party ("Authorized Person") in the course of discovery in these proceedings shall specifically identify the information as "Confidential Information-Subject to Protective Order". Confidential Information includes both Confidential Business Information and Legally Privileged Information.

2. Legally Privileged Information (such as information protected by the attorney-client privilege) may be withheld from discovery subject to the service on all other parties of a privilege log describing the document or oral communication with sufficient specificity to enable all other parties to evaluate the claim of privilege.

3. Any document containing both Confidential Information and unprivileged information shall be produced or served in redacted form so as to disclose only the unprotected information.

4. In the case of an oral deposition, a party whose witness is asked to disclose Confidential Information may require (1) that the deposition room be cleared of all persons other than Authorized Persons as defined in this order, (2) may

require that the transcript of the deposition as delivered to any unauthorized persons be redacted so as to prevent disclosure of Confidential Information to an unauthorized person, and (3) that unredacted pages of the transcript be marked "Confidential Information-Subject to Protective Order" prior to delivery to Authorized Persons.

5. Authorized Persons receiving Confidential Information shall use this information solely for purposes relating to the prosecution, review and processing of these appeals. All such information shall be maintained in secure files marked "Confidential Information-Subject to Protective Order" until destroyed or returned to the party producing the information as provided in this order.

6. Access to documents, and the information contained therein, designated as Confidential Information shall be limited to Authorized Persons.

7. Authorized persons may not disclose Confidential Information to anyone other than another Authorized Person or entity except with the express written consent of the party producing the information or their counsel or upon further order of the Board, or of any court of competent jurisdiction that may review a Board Order or Adjudication in these appeals.

8. Subject to the execution of a certification as set forth below, Authorized Persons for purposes of this order may include only:

   (a) Trial counsel, assistants in their firm, law clinic or other organization of attorneys necessary to a party's conduct of this litigation, and expert consultants;

   (b) Subject to any further order of the Board, trial counsel shall include Michael Klein and his immediate support staff in these appeals and Robert Sugarman and his firm, but shall exclude Jeffery J. Valocchi and his firm because of his close association with Downingtown Municipal Water Authority;

   (c) Representatives of a party necessary to the conduct of this litigation other than representatives of Downingtown Municipal Water Authority; and

   (d) The Members of the Environmental Hearing Board, the presiding administrative law judge, his support staff and court reporters utilized in these proceedings.

9. Any person desiring to become an Authorized Person and to receive Confidential Information, other than Members of the Environmental Hearing

Board and court reporters utilized in these proceedings, shall first execute a certificate attached to a copy of this protective order stating as follows:

> I, _____, expect to receive information or documents designated as Confidential Information in accordance with the attached Protective Order issued by the Pennsylvania Environmental Hearing Board. I have read and understand the terms of this Protective Order and agree to be bound by its terms.

10. Any party may challenge the designation of documents or information as Confidential Information by filing an appropriate motion with the Board. Reasons for requiring production of the information or the removal of the Confidential Information designation may include:

    (a) The information is neither Confidential Business Information nor Legally Privileged Information;

    (b) There is good cause for requiring the production of conditionally Legally Privileged Information such as information protected by the attorney-work-product privilege;

    (c) The information has become known to another party or has become publicly available to the party free of any obligation to keep it confidential and free of any restriction on its use or disclosure; or

    (d) Has been approved for release by written authorization from the party producing the information or has been produced by any such party without any restrictions on use or disclosure.

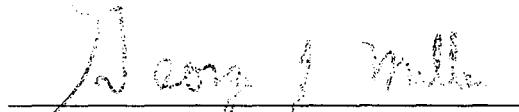
11. The court reporter and any party desiring to submit Confidential Information to the Board shall submit it in an envelope or other appropriate container that is clearly labeled "Confidential Information-Subject to Protective Order". Subject to any order made during the hearing on the merits or otherwise with respect to the confidentiality of information, the Board shall maintain all such confidential information under seal so that it will not be available as a part of the public record except as may be necessary for review by an appellate court of appropriate jurisdiction.

12. Upon final resolution of these appeals, including exhaustion of appeals, any party or attorney possessing any Confidential Information shall promptly return all Confidential Information used in these appeals including any copies made of Confidential Information. In lieu of returning this information, the party or its attorney may destroy it. Counsel of record for any party who receives Confidential Information during the course of these appeals shall certify in writing to the party producing the information within 30 days of the

resolution of these appeals that the terms of this Protective Order have been satisfied.

An opinion describing the contentions of the parties and the reasons for the entry of this order will follow shortly.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: October 2, 2002

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAF

B & W DISPOSAL, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-052-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 8, 2002**

OPINION AND ORDER DENYING THE DEPARTMENT'S MOTION *IN LIMINE*

By Michael L. Krancer, Administrative Law Judge

Synopsis:

In an appeal of penalty assessments issued as a result of the statewide Operation Clean Sweep the Board denies the Department's Motion *in Limine* seeking to bar evidence concerning: (1) the relative amounts of penalties for similar violations both before and after Operation Clean Sweep; (2) Appellant's past NOV history, in particular, that it had been issued only 13 NOVs in the last ten years; and (3) the fact that Appellant had paid the fines issued to the particular drivers. These matters are not waived because not specifically referenced in the Notice of Appeal. Also, under the circumstances, the Board does not accept, at this stage of the proceedings, the argument that the evidence is inadmissible because other penalty amounts in other cases are irrelevant.

Introduction and Factual Background

This case is an appeal of four civil penalty assessments which the Department levied in connection with the much publicized Operation Clean Sweep. Operation Clean Sweep was a

coordinated and concentrated enforcement effort involving the Department, the Department of Transportation and the State Police aimed at inspection of trash-hauling vehicles across the Commonwealth. Operation Clean Sweep took place from Monday, May 21, 2001 through Friday, May 25, 2001 and Tuesday, May 29, 2001. The violations in this case involve: (1) three instances of trucks not having a sign identifying the waste type being hauled and; (2) one truck not having a level load of waste. Each penalty assessed was in the amount of $1,500 making the total penalty at issue in this case $6,000.[1]

The Department has filed a Motion *in Limine* which seeks an Order precluding evidence of the following nature: (1) evidence regarding the relative amounts of penalties for similar violations both before and after Operation Clean Sweep;[2] (2) evidence of B & W's past NOV history, in particular, that it had been issued only 13 NOVs in the last ten years; and (3) that B & W had paid the fines that were issued to the particular drivers.

Discussion

We reject the Department's argument that Appellant is barred by its Notice of Appeal (NOA) from trying to introduce evidence about other penalty amounts assessed for similar or even the same violations before and after Operation Clean Sweep. The NOA asserts that the fines imposed in this case were unreasonable. NOA ¶¶ 24, 33. In addition, the caption to Paragraphs 29 through 37 of the NOA states specifically that "[t]he $7,500 Civil Penalty

[1] Another violation of not properly enclosing a load of waste, for which a $1,500 fine had been imposed and which had originally been part of this appeal, has been withdrawn by the Department.

[2] The parties' pre-trial papers (especially Paragraph 41 of B & W's response to the Department's Pre-Hearing Memorandum) lead us to conclude this genre of evidence to be proffered in this regard does not involve comparisons of what penalty amounts were assessed for similar violations which occurred during Operation Clean Sweep. Instead, we understand that the evidence would involve a comparison of penalty amounts for similar violations which had occurred before Operation Clean Sweep and, then, after Operation Clean Sweep.

Assessment imposed by the DEP against B & W was an abuse of discretion as the amount of the penalty was neither reasonable nor appropriate." Obviously, this means that the Appellant is complaining that the penalty amount(s) are unreasonably high or excessive. An assertion in a notice of appeal that a penalty is unreasonable and excessive in our mind inherently includes the notion or argument that the penalty at issue is out of proportion to other penalties issued in other similar situations. As we noted in *Jefferson County Board of Commissioners v. DEP*, under *Croner, Inc. v. DER*, 589 A.2d 1183 (Pa. Cmwlth. 1991), "it is not necessary for a notice of appeal to enumerate every statutory basis of objection to an action of the Department, so long as the issue is raised generally." 1996 EHB 997, 1005. Here the issue of unreasonableness of the penalty amount is raised at least in general, and probably more than generally, in the NOA.

Moreover, we do not see how the NOA could bar the attempted introduction of the evidence to be proffered in any event. The essence of the analysis of whether a notice of appeal waives any matter is whether the appellant is trying later to introduce a new *issue* beyond what was raised, even generally, in its notice of appeal. Here, we do not see that Appellant is trying to raise any new issue at all. All Appellant is trying to do is prove what it said in the NOA is true. The information that the Appellant will seek to bring to the Board's attention about other penalties for other similar infractions being much lower is nothing more than an attempt to demonstrate the veracity of the assertion in the NOA that the penalty in this case is excessive and unreasonable. Here Appellant *has alleged unreasonableness* of the penalty amount in the NOA and the evidence at issue is one way it intends to show unreasonableness. An appellant does not have to delineate in its Notice of Appeal each and every way it intends to attempt to prove or demonstrate the truth of its allegations contained in the NOA. In other words, not every piece of

evidence that Appellant intends to proffer to prove a point made in its NOA has to be set out in the NOA.

For those reasons, we do not believe that the Appellant's right to proffer evidence of penalty amounts for the same or similar violations before and after Operation Clean Sweep is waived because not specifically outlined in its NOA.

The other ground for seeking to bar evidence of prior and after the fact penalty amounts is the theory that such evidence of penalty amounts in other cases is simply not relevant. The latest pronouncement on this subject is *Farmer v. DEP*, 2001 EHB 271, 292-93 *citing F.R. & S. Inc. v. DEP*, 1999 EHB at 271 (unspecified allusion to civil penalties that may have been imposed against other parties as having any relevance to whether the penalty assessed in this case is appropriate).[3]

Generally, the parameters as outlined in the *Farmer* and *F.R. & S.* cases are that evidence of other penalty assessments should not enter into the determination of whether the instant penalty assessment is reasonable unless there is evidence of similar situations to be compared to or that the Department took into account other penalty assessment amounts in setting the amount of the instant penalty. Here, we do not know at this stage whether B & W can provide a

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[3] The Department's citation to *Dauphin Meadows, Inc. v. DEP*, EHB Docket No. 2000-212-L (Opinion and Order issued March 5, 2002) p. 6 is noted but we think that case does not deal directly with the point the Department is trying to make. First, Judge Labuskes denied the Department's motion *in limine* there which sought to prohibit evidence regarding how the Department acted in other cases on the question at hand in that case. Second, that case did not involve the imposition of a penalty and/or whether the Department acted reasonably but, instead, the interpretation of permit language. As Judge Labuskes said,

> The issue at hand in the instant appeal, however, involves a question of permit interpretation, not so much whether the Department acted reasonably. The Department's decisions regarding expiration dates at other facilities that have been granted major expansions is akin to a "usage of trade" that may be useful to a tribunal in interpreting the terms of a document.

Id. The *Farmer* and *F.R. & S.* cases, therefore, are more on point for discussion and analysis purposes in this case.

foundation regarding similar situations or activities or if there will or will not be evidence that the Department took other penalty situations into account when setting the penalties in this case. Thus, it would be premature to grant the Department's request. We have been told by both parties that the Department conducted a statewide meeting (or a series of such meetings) in July of 2001, which were attended by personnel from all 6 Regions and Central Office, at least one purpose of which was to determine the amount of penalty to be assessed for violations that occurred during Operation Clean Sweep. It was at this "July Meeting" (or these "July Meetings") that consensus was reached to assess a minimum penalty for most, if not all violations that were written-up during Operation Clean Sweep. We do not know the substance of the discussion at those meetings but we anticipate that we will find out at trial. We cannot rule out here and now the possibility that the historical magnitude of penalties for similar violations was not an input into the consensus that was reached by the Department in its July Meeting(s).

Furthermore, there are allegations from both sides that Operation Clean Sweep was an operation of unprecedented nature. We are left with the impression reading the parties' papers that Operation Clean Sweep was a coordinated, special and unique application of government enforcement resources and assets as well as punishment. We are certain that we will hear testimony about the nature of Operation Clean Sweep and the penalty phase which followed. Given those circumstances about Operation Clean Sweep we will not bar, up-front, Appellant's attempt to show just how different Operation Clean Sweep was, especially its penalty aspects, from historical practice. Such evidence could be probative of the reasonableness of the penalties imposed for violations which, although no different in degree or nature than ones in the past, just happened to have taken place during this specific six day period in May, 2001.[4]

[4] We note in this regard that there is no information which has yet come to our attention which informs us that there was a particular temporal significance to those six days in May of 2001 during which

We will not now bar evidence that B & W received only thirteen NOVs since 1992. Again, we see this type of evidence as a fair attempt to show, among other things, that the penalties assessed in this case against this company were unreasonable. If the company kept its proverbial nose clean over such a long period of time, the company is entitled to put that on the record and base an argument thereon that the penalty here was unreasonable.[5]

We will also not now bar evidence that B & W paid the fines that were issued to the individual drivers. The Department argues that this particular point was not in the NOA, and, even if it was, it is irrelevant since this fact had nothing to do with the penalty assessed against B & W here. As before, we do not think that the fact that this particular point was not specifically mentioned in the NOA is determinative. Although we do not see right now how the two may relate, B & W may try to argue that this fact demonstrates the truth of the allegation in the NOA that the penalty amount was unreasonable. We will not at this point preclude it from attempting to make that connection. That discussion also dispatches the Department's relevancy argument. We will not presume right now that the facts B & W intends to show about who paid the individual drivers' fines is irrelevant to the issue of the reasonableness of the penalty.

Thus, we issue the following:

Operation Clean Sweep took place. For example, one might understand why the fine for having an unlawful outdoor fire in state forest lands during the height of a well publicized forest fire warning period may reasonably call for imposition of a higher fine than typically imposed for such activity in the past. Whether a similar rationale could apply here with respect to fines imposed for activities which took place during the period of Operation Clean Sweep we do not know.

[5] The Department's assertion with regard to these prior NOVs that they are irrelevant and should be barred from evidence "as these NOVs were not considered as part of this civil penalty assessment" is a *non sequitur*. B & W's position is that the Department should have considered these prior NOVs, specifically, the infrequency of their issuance to B & W, in setting the penalty amount in this case.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

AND NOW, this 8th day of November, 2002, the Department's Motion *in Limine* is **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: November 8, 2002

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

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SECRETARY TO THE BOARD

HANSON AGGREGATES, PMA, INC.	:	
GLACIAL SAND AND GRAVEL COMPANY	:	
TRI-STATE RIVER PRODUCTS, INC.	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLEAN WATER ACTION	:	
Intervenor	:	
and		**EHB Docket No. 2001-138-R (Consolidated with 2001-139-R;**
CLEAN WATER ACTION	:	**2001-140-R; 2001-157-R;**
	:	**2001-158-R and 2001-159-R)**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GLACIAL SAND AND GRAVEL COMPANY, PIONEER MID-ATLANTIC, INC. and TRI-STATE RIVER PRODUCTS, INC.	:	**Issued: November 8, 2002**

OPINION AND ORDER ON DISCOVERY MOTIONS

By Thomas W. Renwand Administrative Law Judge

Synopsis:

This opinion addresses a number of discovery issues. The membership list of an advocacy group is not discoverable unless the need for discovering such information clearly

outweighs the chilling effect such disclosure would have on the members' First Amendment right of association. Here, the Permittees have not demonstrated such a need and, therefore, the Appellant will not be required to turn over its membership list. Information regarding the Permittees' customer lists, as well as specific sales and prices, constitutes highly confidential business information. This information is not discoverable where the Appellant is able to obtain information relevant to the issues in this appeal by making a more general inquiry.

OPINION

This matter involves a number of appeals surrounding the Department of Environmental Protection's (Department) issuance of Water Obstruction and Encroachment Permits (permits) to Hanson Aggregates, PMA, Inc.; Glacial Sand & Gravel Company; Tri-State River Products, Inc.; and Pioneer Mid-Atlantic, Inc. (the Permittees). The permits authorize dredging for sand and gravel in certain areas of the Allegheny and Ohio Rivers. Three of the Permittees have appealed certain conditions contained in the permits. In addition, Clean Water Action has appealed the issuance of the permits.

This Opinion addresses a number of discovery-related issues that have arisen between Clean Water Action and the Permittees. The parties have set forth their respective positions in statements filed with the Board. In addition, a discovery conference was held on October 25, 2002, at which time the parties presented oral argument in support of their positions. In response to issues raised at the discovery conference, the parties were advised they could file supplemental briefs on November 4, 2002.

Interrogatories and Request for Document Production Served on the Permittees by Clean Water Action

A party may obtain discovery regarding any matter, not privileged, that is relevant to the

subject matter of the action, whether it relates to the claim or defense of a party. Pa.R.C.P. 4003.1; *T.W. Phillips Oil and Gas Co. v. DEP*, 1997 EHB 608. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Id.*

Clean Water Action's Interrogatory 14 requests that the Permittees identify their customers or related entities to whom they have sold aggregate produced from dredging operations from 1998 through the present. Interrogatories 15 (a), (b) and (c) request the type and quantity of aggregate purchased, the price paid, and the use for which the aggregate was purchased for each of the customers identified in Interrogatory 14. At the discovery conference, Clean Water Action advised the Board that it was seeking this information in order to determine the types of customers to whom the Permittees are selling their product and whether these customer orders could be met by aggregate obtained from a land-based operation. One of the arguments advanced by Clean Water Action in these appeals is that the river aggregate is a public trust and DEP has acknowledged that it has a legal obligation to conserve this resource and ensure that it is used for only high priority projects, such as construction of highways.

The Permittees assert that information regarding their customers and sales is tantamount to a trade secret and merits similar protection. In response, Clean Water Action states that it is willing to negotiate a protective order for discovery purposes but reserves the right to seek to have the order lifted for trial "or for other purposes at some future date." It is the Permittees' contention that a protective order is not sufficient to protect this information and, further, that general economic information can be obtained in a manner other than by requesting the names of specific customers, prices and uses.

The information requested by Clean Water Action constitutes highly confidential

business information and should be afforded trade secret protection. The term "trade secret" applies to such information as names of customers and customer lists. Packel and Poulin, *Pennsylvania Evidence* 2d. ed., § 537 (1999). Whereas Clean Water Action has agreed to enter into a protective order for discovery purposes, it admits that it may not be possible to keep this information confidential in the future. At best, any protection afforded to the Permittees by the protective order may be illusory. On the other hand, we recognize that information regarding the Permittees' sales is relevant to Clean Water Action's theory that aggregate obtained from the river is to be used only for specific purposes.

"Pennsylvania recognizes a privilege to refuse disclosure of a trade secret where the interests of justice can be served without it." Packel and Poulin, *supra.* In this case, we find that Clean Water Action can obtain the same information for purposes of its case by asking for more general information that does not require the Permittees to reveal their customer lists and specific sales transactions. Clean Water Action shall be permitted to inquire into the following areas: the types of customers to whom the Permittees sell aggregate (e.g. government entities, contractors, landscapers, etc.), the percentage of sales to each type of customer, and whether the same type of material can be obtained from a land-based operation. As to the latter, Clean Water Action may also inquire into whether these materials can be obtained at either the same or less cost than from the river and, if not, whether the Permittees can still make a profit by obtaining the aggregate from a land-based operation. This information is properly discoverable. In summary, Clean Water Action may inquire into the same general area covered by Interrogatories 14 and 15 (a), (b) and (c) but may not seek specific information regarding names of customers, as well as individual purchases and prices paid by specific customers.

Interrogatory 31(i) and 32(g) ask for the cost of any mussel surveys and environmental

impact inquiries performed by the Permittees. It is Clean Water Action's contention that because the entities that performed these studies have been listed as expert witnesses, and the fees paid to experts are discoverable, the cost of their studies is also discoverable. In addition, Clean Water Action points out that the Department considers the cost of such studies in determining what types of surveys and studies it will require when assessing a dredging application. The Permittees argue that this information is confidential business information and should be protected. We agree with Clean Water Action's assertion that this information is relevant, particularly if these studies were relied upon by the Permittees' experts and the Department and, further, if the Department factors in cost in determining whether certain studies should be performed. We find that this information is discoverable and, therefore, the Permittees are required to produce it.

Interrogatory 32 asks the Permittees to identify each and every inquiry undertaken by them or on their behalf into the actual or potential environmental impact of dredging operations. Document Request 15 requests the identification of all documents responsive to Interrogatory 32. In particular, Clean Water Action is seeking all documentation and information used in preparing the draft environmental impact statement. We find this information to be discoverable and, therefore, the Permittees are required to produce it.

Interrogatories 33 (c) and (d) seek the same type of customer information as Interrogatories 14 and 15 but with respect to land-based operations. Again, we find this to constitute highly confidential business information. Clean Water Action may obtain the same type of information by propounding the questions set forth earlier in the discussion of Interrogatories 14 and 15.

Interrogatory 45 asks if there are ways in which the current mussel sampling protocol

could be revised to make it more likely to find threatened and endangered mussels, what those revisions are and why they have not been implemented. In response, the Permittees assert that they do not employ the technical staff necessary to respond to this question; they simply follow the protocol required by the Department. We find that, while this information is discoverable, this question is more appropriately addressed to the Department.

Interrogatory 57 requests the Permittees to identify all persons and organizations who purchased type SLR E gravel from 1998 to the present. Clean Water Action requests this information because it is its contention that river aggregate should be treated as a scarce resource and is to be used only for certain specific operations such as highway construction. The Permittees object to providing this information on the basis of confidentiality. For the same reasons set forth earlier, we agree that the information being requested is confidential business information and should be protected. Clean Water Action can obtain the same type of information by asking whether the Permittees sell SLR E aggregate to any entities other than construction companies, government entities or other entities that use the product for road construction and, if so, what types of entities and the percentage of sales thereto. In summary, Clean Water Action may inquire into this area generally but may not seek specific information regarding names of customers, or individual purchases and prices paid by specific customers.

Interrogatory 59 asks the Permittees to identify any and all uses of gravel that could qualify as type SLR E gravel. The Permittees object on the basis that this information is not relevant and the request is unduly burdensome. Clean Water Action argues that this information is relevant to the Permittees' contention that this type of gravel is needed for highway construction, yet, according to Clean Water Action, is also being used for non-highway purposes. Clean Water Action further argues that this request is not unduly burdensome because it simply

asks the Permittees to provide this information if known. We agree with Clean Water Action that this information is relevant and that the request is not unduly burdensome. To the extent the Permittees have this information, they are required to produce it.

The final dispute concerns Permittee Glacial Sand & Gravel's (Glacial) response to Clean Water Action's document request. On September 30, 2002, Clean Water Action inspected documents produced by Glacial and marked a number of the documents for copying. Glacial's counsel reviewed the documents Clean Water Action had marked and objected to one of the documents being produced on the basis of privilege. Glacial further objected to certain other documents being produced on the grounds they were non-responsive.

We reject Glacial's assertion that the documents are non-responsive. Glacial produced these documents as responsive to Clean Water Action's discovery request in the first instance and cannot now seek to pull them back after Clean Water Action has requested copies of them. Since these documents were produced in the first instance and determined by Clean Water Action to be relevant, Glacial cannot now make the argument that the documents are non-responsive. Moreover, the Board reviewed a list of documents produced by counsel, and the documents appear to be responsive to Clean Water Action's discovery request. Therefore, Glacial is ordered to produce the documents in question.

Glacial's argument of privilege concerns a letter from Glacial's counsel addressed to a high-ranking official of the Department of Environmental Protection. Glacial contends the letter was never sent and is, therefore, privileged. At the discovery conference, both Glacial's counsel and counsel for the Department agreed to check their files further to verify whether the letter was in fact sent. In the event the letter was sent, we find that it does not constitute a privileged communication, and, therefore, it must be produced by Glacial.

Interrogatories and Request for Documents Served on Clean Water Action by the Permittees

Interrogatories 4, 5, 8, 10 and 11 request the following information regarding Clean Water Action: organizational structure and means of governance and related documents, the source of its funding and, finally, its membership list. The Permittees contend they are seeking the organizational information in order to determine whether Clean Water Action is authorized to file this appeal; they are seeking the membership information in order to verify Clean Water Action's claim as to the size of its membership. We find that the information sought is not relevant, nor is it likely to lead to admissible evidence. We further find that disclosure of such information could have a chilling effect on the First Amendment rights of Clean Water Action's membership. *NAACP v. Alabama*, 357 U.S. 449 (1958).

Interrogatory 14 requests Clean Water Action to identify members who wrote to the Department regarding dredging activities authorized by the permits. To the extent Clean Water Action has this information, it must produce it. However, Clean Water Action is not required to canvass all of its members for this information, as it would be unduly burdensome. The Permittees may also attempt to obtain this information from the Department's files.

Interrogatories 16, 17, 18, 19, 22 and 23 request Clean Water Action to identify members who observe wildlife and nature, fish, engage in recreational activities and/or own real property in the vicinity of the dredging activities authorized by the permit. Upon reviewing Clean Water Action's response to these interrogatories, we find that its answers are responsive; therefore, the Permittees' request that Clean Water Action supplement its answers to these interrogatories is denied.

Interrogatories 24, 30, 31, 33, 35, 36, 37, 39, 40, 41, 42, 43 request Clean Water Action

to state in detail all facts relied upon in making certain assertions in its appeal. At the discovery conference, Clean Water Action stated that it would supplement its answers to these interrogatories. Therefore, it is ordered to do so by the date set forth in this Order.

Finally, Document Request 3 asks for all copies of communications from Clean Water Action to the Department relating to matters alleged in the notice of appeal. Clean Water Action is ordered to produce all such communications that are part of its records.

In conclusion, the following order is entered:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HANSON AGGREGATES, PMA, INC.	:	
GLACIAL SAND AND GRAVEL COMPANY	:	
TRI-STATE RIVER PRODUCTS, INC.	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CLEAN WATER ACTION,	:	
Intervenor	:	
		EHB Docket No. 2001-138-R
and		**(Consolidated with 2001-139-R; 2001-140-R; 2001-157-R; 2001-158-R and 2001-159-R)**
CLEAN WATER ACTION	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and GLACIAL SAND AND	:	
GRAVEL COMPANY, PIONEER	:	
MID-ATLANTIC, INC. and TRI-STATE	:	
RIVER PRODUCTS, INC.	:	

ORDER

AND NOW, this 8th day of November 2002, the Permittees and Clean Water Action are ordered to supplement their discovery responses as set forth in this Opinion on or before **November 18, 2002**.

ENVIRONMENTAL HEARING BOARD

Thomas W. Renwand/mcw

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: November 8, 2002

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

For Commonwealth, DEP"
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Tri-State River Products, Inc.:
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and

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

HISSONG FARMSTEAD, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-291-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
STATE CONSERVATION COMMISSION	:	**Issued: November 12, 2002**

OPINION AND ORDER MOTION FOR SUMMARY JUDGMENT

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

Synopsis:

A nutrient-management regulation that includes setback requirements provides that it applies to "new" manure storage lagoons. This appeal presents the question: "new" relative to what? The Board, in denying an operator's motion for summary judgment, declines to adopt the operator's position that, as a matter of law, a lagoon can only be "new" if it is built after the date chosen by the operator to submit its nutrient management plan for approval.

OPINION

Hissong Farmstead, Inc. ("Hissong") had a manure storage and treatment facility constructed and operational before it submitted a Nutrient Management Plan ("NMP") to the State Conservation Commission's delegatee, the Franklin County Conservation District (hereinafter collectively referred to as the "Commission"), for approval. The Commission disapproved the NMP "[s]olely due to the manure storage pond not meeting property line setback requirements as set forth in Section 83.461 of the PA Act 6 Nutrient Management Rules and

Regulations." Hissong appealed from that disapproval to this Board.

Hissong now moves for summary judgment. It relies exclusively on the fact that the storage pond at issue was existing and operational prior to Hissong's submission of its NMP. Hissong argues that the regulation relied upon by the Commission in disapproving the plan, 25 Pa. Code § 83.461, by its very terms only applies to "new manure storage facilities constructed and existing manure storage facilities expanded as part of a [nutrient management] plan...." Because Hissong's pond allegedly was neither new nor proposed for expansion as part of Hissong's NMP, Hissong contends that the regulation (including its setback requirements) was improperly applied to its preexisting pond.

In response, the Commission claims that there are a multitude of disputed facts, but it does not dispute the one fact that Hissong relies upon in support of its motion. Indeed, the Commission admitted in response to Hissong's requests for admissions that the pond was constructed and operational before the NMP was submitted. Instead, the Commission argues that "questions were raised" about whether Hissong's proposed farm expansion would subject the operation to NPDES permitting requirements "[b]efore Hissong turned a blade of earth for construction of its" pond. The Commission argues that Hissong intended from the beginning to expand its operations to the point that it would need a permit, and, therefore, an approved NMP. The Commission does not explain the *legal* basis for its contention that an intent to expand is relevant to the application of the regulation at issue, but instead, simply argues that there are disputed facts concerning Hissong's intent. We agree with Hissong that "the Commission has attempted to convert a legal issue into a factual issue."

Nevertheless, in order to grant Hissong's motion, we would need to hold that the setback requirements set forth in 25 Pa. Code § 83.461 do not apply under any circumstances as a matter

of law if it is an undisputed fact that the manure storage facility is existing and operational at the time a farm operator choses to submit an NMP for approval. We are not prepared to do that at this time. The question presented here in applying Section 83.461 is: "new" relative to what? It may be that some date other than the operator's choice of a plan submittal date should apply in some cases. For example, if an agricultural operation expands to the point that it is required to obtain an NPDES permit (and an approved NMP), it may be more appropriate to assess whether the pond was built before or after the point at which the operator was legally obligated to have an approved plan. The date that the operator gets around to submitting the plan may not be particularly meaningful in such a situation. To hold otherwise would mean that unpermitted operators could build facilities without regard to regulatory requirements so long as they build first and submit their NMPs later.

Alternatively, the Commission may be correct in arguing that Section 83.461 might apply before the permitting requirement kicks in if the operator manifests "an ultimate plan to eventually expand" to become a permitted operation. We need not decide that question now, and we are not here suggesting that either of these fact patterns apply in this case. We simply refer to them as situations that might prevent us from concluding as a matter of law that Section 83.461 can *never* apply if a pond is built before an NMP is submitted. Because we abstain for the time being from this absolute position, Hissong's motion must be denied. Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HISSONG FARMSTEAD, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-291-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION	:	

ORDER

AND NOW, this 12th day of November, 2002, Hissong's motion for summary judgment is **DENIED.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: November 12, 2002

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

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SECRETARY TO THE BOAR

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: November 13, 2002**

OPINION AND ORDER ON MOTION FOR EXPEDITED DISPOSITION AND FOR A MORE SPECIFIC PLEADING

By Thomas W. Renwand Administrative Law Judge

Synopsis:

A motion to shorten the discovery period from 90 days to 60 days; to expedite the filing of expert reports and Dispositive Motions; and to schedule a merits hearing approximately four to five months from the filing of the Appeal is denied where the opposing party has presented valid reasons why such an expedited schedule would infringe upon its right to due process. However, because the issues in this appeal are relatively narrow, the parties should be able to conduct all necessary discovery within the parameters of Pre-Hearing Order No.1, and the Board will endeavor to establish a pre-hearing and hearing schedule that will balance the interests of all parties and still provide for a prompt hearing.

INTRODUCTION

Presently before the Board is Permittee Orix-Woodmont Deer Creek Venture's (Permittee or Orix-Woodmont) Motion for Expedited Disposition and for a More Specific Pleading (Motion). The Appellants, Pennsylvania Trout, Trout Unlimited – Penns Woods West Chapter, and Citizens for Pennsylvania's Future (Appellants or Penn Future), appealed the Pennsylvania Department of Environmental Protection's (Department) issuance of a Water Obstruction and Encroachment Permit (Permit) for Orix-Woodmont's proposed shopping center and office complex (a "mixed-use commercial center" according to the Permit) in Harmar Township, Allegheny County, Pennsylvania. Notice of the Permit was published in the *Pennsylvania Bulletin* on September 14, 2002. On October 15, 2002, Penn Future appealed the Permit. Penn Future wants the Pennsylvania Environmental Hearing Board (Board or EHB) to revoke the Permit.

On October 16, 2002, the Board issued Prehearing Order No. 1 (PHO#1) establishing various prehearing deadlines and advising the parties that the case was assigned to the undersigned for primary handling. PHO#1 is a "standard" Board Order that sets forth prehearing deadlines in accordance with 25 Pa. Code Section 1021.101. On October 28, 2002, Orix-Woodmont filed its Motion. The next day, October 29, 2002, the Board conducted a conference call with counsel to discuss the Motion. The Department advised the Board "it had no position on the Motion" while Penn Future indicated strong opposition. Pursuant to 25 Pa. Code Section 1021.92(f), the Board ordered Penn Future to file their response on or before November 5, 2002 which they did.

Motion for Expedited Disposition

The Board's Rules of Practice and Procedure provide that "discovery shall be concluded

within 90 days of the date of the pre-hearing order."[1] Indeed, in this Appeal, PHO#1 provides that discovery will conclude on January 14, 2003. However, as pointed out by Penn Future in its response, extensions of pre-hearing deadlines are routinely granted. Moreover, in appeals proceeding to a hearing, the Board will usually grant at least one and often several extensions. However, these extensions are most times requested by ***all*** counsel. It is exceedingly rare to have a situation where only one counsel is asking for an expedited hearing.

Orix-Woodmont's Motion requests the Board to shorten discovery to approximately 60 days and further compresses the other pre-hearing deadlines. For example, instead of filing Dispositive Motions on April 16, 2003, as currently set forth in PHO#1, Orix-Woodmont suggests a December 31, 2002 deadline.

Orix-Woodmont argues that Penn Future would suffer no prejudice from such a fast-paced litigation scheduled because 1) they were a party (an intervenor) to the earlier Appeal filed by Orix-Woodmont in December, 2002, 2) they have received copies of most, if not all, of the filings regarding this Permit, 3) they have actively participated in the application process including public comment hearings conducted by the Department and the United States Army Corps of Engineers, and 4) they have viewed the site and are aware of the details of the Permit. Permittee further contends that "protracted litigation can be as harmful as an adverse decision" and that "in order to maintain a reasonable construction schedule, and meet the needs of tenants and financial sources, it is important that Orix-Woodmont have this matter resolved in time to make good use of the next construction season." Orix-Woodmont proposes a specific modification of PHO#1 as follows:

1) All discovery shall be completed by December 13, 2002.

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[1] 25 Pa. Code Section 1021.101(a)(1).

2) All interrogatories and requests for production shall be answered within 20 days rather than 30 days.

3) The parties shall supply a preliminary list of witnesses that they intend to call at the hearing with dates they are available for depositions.

4) The party with the burden of proof shall serve its expert reports and answers to all expert interrogatories by December 30, 2002. The opposing party's expert reports would be due by January 14, 2003.

5) Dispositive Motions shall be filed by December 31, 2002.

6) Pre-hearing memoranda shall be filed by February 1, 2003.

7) A hearing in this matter will be scheduled by March 1, 2003.

Penn Future opposes the Motion on several grounds:

1) The application and Permit involve a great deal of written information which Appellants have not yet reviewed.

2) Their ability to fully develop issues raised in their Appeal is unrelated to their participation in the public meetings held by the Department and the United States Army Corps of Engineers.

3) Penn Future has one expert but has not yet retained additional experts because "there were strong indications that the Department would again deny" Orix-Woodmont's application.

4) Penn Future believed that based on the "Board's normal procedures...they would have sufficient time to obtain expert assistance in developing discovery requests and to fully develop their case."

5) The Permittee has spent approximately 5 years in the planning, development

and permitting process and it is unrealistic to expect Appellants to proceed to a hearing four or five months after filing their appeal.

6) Appellants believe that the Permittee still needs to obtain necessary approvals from other governmental entities such as the Pennsylvania Department of Transportation before beginning construction.

7) Penn Future contends that their interests in this matter are no less legitimate than Orix-Woodmont's interests and they should be afforded adequate time to develop their case.

Penn Future's excellent points rest on solid legal ground. We believe Penn Future is correct in arguing that the discovery deadlines should not be shortened in this case. The Environmental Hearing Board Act established the Board as the forum for protecting the due process rights of the parties.[2] As such, it is imperative that the process is fair to all parties. The Board's Rules provide a mechanism for the parties to join together and ask the Board to modify its pre-hearing procedures,[3] while at the same time allowing a party to unilaterally request "expedited consideration" of a matter.[4]

This litigation is in its earliest stages as we approach the holiday season. It would be extremely difficult to complete all the necessary discovery, locate and retain expert witnesses, file Dispositive Motions and obtain Board rulings on such, and still hold a hearing during the month of February 2003. To accomplish such a schedule would require herculean efforts on the part of the Board, parties, counsel, and witnesses. Here, one of the parties rightly contends that such a schedule could very well infringe on its due process rights.

---

[2] Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7516.

[3] 25 Pa. Code Section 1021.101(a)(4) provides that "[t]he parties, may, within 45 days of the date of the pre-hearing order, submit a Joint Proposed Case Management Order to the Board."

We are not unsympathetic, however, to the arguments of Orix-Woodmont for a prompt hearing. Penn Future's issues appear to be relatively confined and they should be able to conduct all necessary discovery within the parameters of PHO#1. Furthermore, if none of the parties plans on filing Dispositive Motions, then the other pre-hearing dates may be able to be modified. We are confident that we will be able to establish a pre-hearing and hearing schedule after meeting with counsel that will balance all interests in a fair manner yet still provide for a rather prompt hearing. As part of this process, we may explore having Orix-Woodmont and the Department serve their expert reports and answers to expert interrogatories prior to the service of Appellants' expert reports and answers to expert interrogatories. In any event, based on both what needs to be done in this case and the Board's own hearing schedule, we do not foresee holding a hearing in this Appeal prior to the second week of May, 2003.

Motion for a More Specific Pleading

Penn Future has filed a short Notice of Appeal that provides only slightly more detail than a "skeletal appeal." At the conference call and in its response, Penn Future has provided amplification of their objections while at the same time narrowing the scope of their Appeal. Moreover, they have indicated that "they will not pursue Objection 3 of their Notice of Appeal relating to inadequate wetland replacement." Therefore, we will issue an Order requiring the Appellants to file an amended Notice of Appeal consistent with what they have set forth at both the conference call and their response while not precluding a further amendment of their Notice of Appeal based on their discovery efforts.

[4] 25 Pa. Code Section 1021.92(a).

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	:	

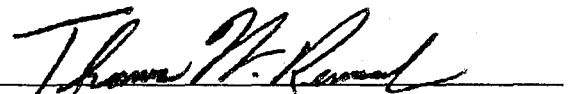
ORDER

AND NOW, this 13th day of November, 2002, after a review of Permittee's Motion and Appellant's Response, it is ordered as follows:

1) The Motion for Expedited Disposition is ***denied without prejudice*** in accordance with this Opinion. The Board will explore with counsel at a pre-hearing conference on November 14, 2002 the feasibility of amending various pre-hearing deadlines and, if possible, setting a prompt hearing date.
2) The Motion for a More Specific Pleading is ***granted*** in accordance with this Opinion.
3) Appellants shall file an Amended Notice of Appeal on or before **November 25, 2002.**

EHB Docket No. 2002-251-R

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administration Law Judge
Member

DATE: November 13, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAF

DONALD F. GOETZ	:	
	:	
v.	:	**EHB Docket No. 2002-069-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NATIONAL WIND POWER, Permittee	:	**Issued: November 19, 2002**

OPINION AND ORDER ON MOTION TO COMPEL

By Michael L. Krancer, Administrative Law Judge

Synopsis:

A motion to compel filed by a *pro se* appellant is denied. A review of the four sets of interrogatories and document production requests and the four sets of answers thereto shows that the interrogatories are confusing, misleading, repetitive, compound and highly argumentative and that the core information requested has been provided. A recipient of discovery requests is not required to agree with the proponent's underlying premises or theories of the case in its answers.

Discussion

Before us is *pro se* appellant Mr. Goetz's Motion to Compel. We have reviewed it together with all sets of interrogatories and document production requests, the Permittee's responses thereto and the Permittee's response to the instant Motion and we deny the Motion.

This case is an appeal of an NPDES permit for the discharge of storm water during prospective construction activities at the so-called Waymart Wind Farm to be located in Clinton

and Canaan Townships in Wayne County. The prospective Waymart Wind Farm is intended to be a wind energy project consisting of a number of wind turbines to be located on a ridge, which turbines will generate electricity.

Mr. Goetz served four separate sets of interrogatories and requests for production in this case and received four sets of answers. We have reviewed all sets of interrogatories and all responses. We agree with Permittee's description of the interrogatories at issue, *i.e.*, they are "confusing, misleading, repetitive, compound and argumentative". We think that "polemical" could be added to that list of adjectives. There is no deficiency at all in the responses. Permittee has provided copious information and then provided it again and in some cases again and again.

It is apparent from the tone of the interrogatories and the instant Motion that what Mr. Goetz is complaining about most of all in his Motion is that the Permittee has declined to admit or agree that Mr. Goetz's putative theories of his case are correct and that his putative complaints against the Waymart project are valid. That, of course, is not a valid legal basis for any motion to compel. A party has not failed to comply with discovery obligations when it fails to acknowledge agreement with the opponent's theories of the case or that the opponent's points are valid.

We think that both the nature and quality of the discovery requests, their multiplicity and the, basically, off-base nature of the motion to compel in this case is a product of Mr. Goetz's insistence that he, and not a counsel on his behalf, prosecute this case. In that regard we had warned Mr. Goetz very early in this case of the dangers of proceeding without counsel. Our letter to him of April 5, 2002 states, in relevant part, as follows:

> Dear Mr. Goetz:
>
> We have reviewed your Notice of Appeal which you have filed in this matter which has been assigned to me as Judge. We are concerned that you appear to be proceeding without the services of counsel to represent you in this appeal. The Board's Rules do require that counsel

appear on behalf of corporations and unincorporated associations and there may be other particular factual circumstances where counsel is mandatory. It does appear, at least at this stage, that this particular appeal, being the appeal by you as an individual, does not fall within the rules requiring that a party have counsel. We will, thus, assume for the purposes of this letter that this particular appeal is not a case where counsel is required. We make this assumption only for present purposes and we are not in any way foreclosing further development of information which may disclose that this is a case where counsel is mandatory.

In any event, as noted, the Board wants to be sure you are well aware of the burdens and risks of proceeding without counsel.

Pursuing an appeal from a Department order, or as in this case, its granting of a permit, in environmental matters is a highly technical matter in which the development of the merits of the case, if any, depends on the employment of an able environmental attorney who in turn can retain appropriate expert witnesses to provide evidence in support of your objections to the Department's action at the hearing on the merits. Pre-hearing discovery of information important to processing an appeal is governed by the technical rules of Pennsylvania Statutes and Pennsylvania Rules of Civil Procedure. The hearing on the merits will be a formal hearing, very similar to non-jury civil trials before Common Pleas Courts or Federal District Courts. Pennsylvania Statutes, the Pennsylvania Rules of Evidence, the Rules of this Board and case precedent will govern and be applied to the testimony and documents which you may wish to offer at the hearing.

Our experience is that people not trained in the law or experienced in environmental litigation rarely succeed in appeals before the Board without the services of these professionals. While we realize that you have a constitutional right to represent yourself in this appeal, you may find that you will become extremely frustrated by spending the amount of time and money required to pursue your appeal without a significant promise of success as you continue to represent yourself.

Our Commonwealth Court has provided the following wisdom with respect to litigants who decide to proceed *pro se*:

> The fact that Green decided to be her own lawyer does not excuse her from failing to follow the rules of civil and/or appellate procedure. "The right of self-representation is not a license . . . not to comply with relevant rules of procedure and substantive law." *Faretta v. California*, 422 U.S. 806, 834 n. 6, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975). Our Supreme Court in *Peters Creek*

> *Sanitary Authority v. Welch*, 545 Pa. 309, 681 A.2d 167, 170 (1996) n.5, again enunciated its position as to *pro se* litigants *citing Vann v. Unemployment Compensation Board of Review*, 508 Pa. 139, 494 A.2d 1081 (1985) (*pro se* litigant must to some extent assume the risk that his lack of legal training will prove his undoing); *Commonwealth v. Abu-Jamal*, 521 Pa. 188, 200, 555 A.2d 846, 852 (1989) (*pro se* litigant "is subject to the same rules of procedure as is a counseled defendant; he has no greater right to be heard than he would have if he were represented by an attorney") and finally, *Jones v. Rudenstein*, 401 Pa. Super. 400, 585 A.2d 520, *appeal denied*, 529 Pa. 634, 600 A.2d 954 (1991) (*pro se* litigant not absolved of complying with procedural rules).

Green v. Harmony House North 15 Street Housing Association, Inc., 684 A.2d 1112, 114-1115 (Pa. Cmwlth. 1996). The theme stated in the *Green* case that that a *pro se* litigant assumes the risk that his lack of legal training will prove his undoing has been restated by this Board in many cases.

Nevertheless, in the event you elect to continue to represent yourself in this matter, we are enclosing a copy of a guide to practice and procedure before the Board which is intended primarily for attorneys. However, you may find it of some assistance. While the Board Judge assigned to the case and his or her legal assistant, in this case Mr. Carmelite, will be able to give you some guidance on legal procedures, we cannot go beyond the most rudimentary explanations to advise you how to proceed.

Failure to obey Board orders issued during the course of these proceedings may require the imposition of sanctions pursuant to § 1021.125 of the Board's rules which may result in the dismissal of your appeal.

As Judge Labuskes has recently said,

> An appellant . . . will not receive any special consideration because he has made the ill-advised decision to proceed *pro se*. *See Green v. Harmony House North 15 Street Housing Association, Inc.* 684 A.2d 1112 (Pa. Cmwlth. 1996). He proceeds without proper representation at his own risk. *Van Tassel v. DEP*, EHB Docket No. 2001-110-R, slip op. at 3-4 (Opinion issued July 18, 2002) (discussing risks of *pro se* appearance).

Kleissler v. DEP, EHB Docket No. 2001-295-L (Opinion and Order, September 6, 2002).

We close by noting our unhappiness with the fact that, according to Permittee's response, "at no point prior to the filing of his motion to compel did Mr. Goetz raise any concerns with Permittee's counsel regarding the adequacy of Permittee's discovery responses". It is fundamental courtesy between counsel, as well as courtesy toward the Board, that those representing litigants communicate with each other about perceived discovery problems as a first step and try to resolve such difficulties without Board intervention. We think this *faux pas* is another product of Mr. Goetz's ill-advised decision to proceed *pro se* but, as we have noted, that is no excuse nor grounds for any special consideration. As Permittee says, "[s]ince much of Mr. Goetz's motion is dedicated to explaining, clarifying and even recasting the information he was inartfully seeking by way of his interrogatories, a simple telephone call or letter might have obviated the need for the present motion practice." As part of its response to the instant motion, Permittee has supplied an additional Stipulation outlining various facts. We think this information was either already provided or is above and beyond what the rambling and rhetorical waves of interrogatories required in response in the first place. However, to the extent that there was a perceived lack of responsive information, this Stipulation provides it and demonstrates the truth of Permittee's statement that the perceived problem could have been solved with a telephone call.

For the foregoing reasons, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD F. GOETZ	:	
	:	
v.	:	**EHB Docket No. 2002-069-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NATIONAL WIND POWER, Permittee	:	

O R D E R

AND NOW, this 19th day of November, 2002, Donald F. Goetz's Motion to Compel is **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **November 19, 2002**

c: **DEP Bureau of Litigation**
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HANSON AGGREGATES, PMA, INC.	:	
GLACIAL SAND AND GRAVEL COMPANY	:	
TRI-STATE RIVER PRODUCTS, INC.	:	
	:	
v.		
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLEAN WATER ACTION, Intervenor	:	
and		**EHB Docket No. 2001-138-R (Consolidated with 2001-139-R; 2001-140-R; 2001-157-R; 2001-158-R and 2001-159-R)**
CLEAN WATER ACTION	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GLACIAL SAND AND GRAVEL COMPANY, PIONEER MID-ATLANTIC, INC. and TRI-STATE RIVER PRODUCTS, INC.	:	**Issued: December 9, 2002**

OPINION AND ORDER ON DISCOVERY MOTIONS

By Thomas W. Renwand Administrative Law Judge

Synopsis:

Discovery is extended for the limited purpose of allowing the depositions of individuals identified for the first time as fact witnesses in supplemental responses to interrogatories. Where

such information is requested in discovery, a party has an obligation to produce it in good faith and may not simply state it will provide such information in its prehearing memorandum.

OPINION

This case involves the appeal of dredging permits issued by the Department of Environmental Protection (Department). A more detailed background of this matter is set forth in an earlier opinion and order issued on November 8, 2002.

This Opinion concerns the Permittees' motion to extend fact discovery for an additional five weeks. It is the Permittees' contention that Clean Water Action identified new fact witnesses in supplemental responses to interrogatories on November 7 and 18, 2002. The Permittees state that they wish to depose these witnesses and will not have an opportunity to do so before the end of the discovery period on December 13, 2002.

Clean Water Action opposes the motion to extend discovery on the grounds that all of the witnesses except one should have been known to the Permittees. Second, Clean Water Action contends that it will be prejudiced by having to attend the deposition of fact witnesses during a time when the parties will be concentrating their efforts on expert discovery, dispositive motions and pre-hearing memoranda.

For the purpose of clarifying certain matters raised by the parties in the motion and response, the Board held a conference call with counsel on the afternoon of December 3, 2002.

Standing Witnesses:

Clean Water Action contends that five of the six individuals listed in its supplemental responses as witnesses who will testify regarding the group's standing were previously identified in earlier responses to discovery, as evidenced by Exhibit 1 to its response in opposition. According to Clean Water Action, these five individuals have been deposed. As to the sixth

individual, he replaces another standing witness who is unavailable. His deposition is scheduled for December 11, 2002. Based on the fact that the depositions of all the standing witnesses will have been conducted prior to December 13, 2002, there is no need to further address this matter.

Other Fact Witnesses:

Clean Water Action contends that all of the remaining witnesses listed in its supplemental response, with the possible of exception of Kevin Eshbaugh, should have been known to the Permittees on one or more of the following grounds: 1) they were identified in prior responses to discovery as individuals having relevant knowledge about the claims made by Clean Water Action in this appeal; 2) they were mentioned during depositions of other witnesses; or 3) their knowledge of relevant facts is apparent from documents produced in discovery. As to Mr. Eshbaugh, Clean Water Action states he is a witness who was discovered only recently; nevertheless, Clean Water Action asserts that the Permittees could have deposed him before the December 13 deadline.

Clean Water Action does not dispute the fact that its November 7 and 18 supplemental discovery responses were the first occasion on which it named the aforesaid individuals as actual witnesses. In prior discovery responses, some of the individuals had been named as having relevant knowledge to claims made in this appeal but were not necessarily identified as witnesses that Clean Water Action intended to call at the hearing. Two of the individuals were not named in discovery responses, but Clean Water Action contends their knowledge of relevant facts is apparent from documents produced in discovery by either the Permittees or the Department.

Clean Water Action argues that it is not required to identify the witnesses it plans on calling at a hearing until it files its prehearing memorandum. We disagree. If an interrogatory requests this information, as did Permittees' Interrogatory No. 12, then a party is required to

answer it in good faith. Of course, early in an appeal a party may not know all the witnesses it will call at the hearing. However, counsel often have a very good idea of who will be called, even early in the case. Moreover, just because individuals are mentioned in depositions does not support an argument, such as the one advanced by Clean Water Action, that such an individual will be called at the hearing even though not previously listed in response to an interrogatory specifically seeking this information.

Clean Water Action cites the following cases in support of its assertion that a list of witnesses need not be produced until parties file their pre-hearing memoranda and other disclosures: *Stacy v. Thrower Trucking, Inc.*, 384 A.2d 1274 (Pa. Super. 1978), and *Parenteau v. Ferri's Kartway, Inc.*, 30 Pa. D&C 2d 455. In the latter, the Court of Common Pleas of Bucks County ruled that in the early stages of a case, the plaintiff was not required to answer the defendant's interrogatories seeking the identity of all persons to be called at trial as witnesses since he may not yet have decided whom to rely upon as witnesses. The court went on to state, however, that the rules of discovery "do ordinarily require a party, if demanded by the opponent, to divulge the identity and whereabouts of those witnesses upon whose testimony he in fact really expects and intends to rely, after he has prepared for trial and reasonably in advance thereof. . . ." 30 Pa. D&C 2d at 458.

In *Stacy*, the Pennsylvania Superior Court ruled that the plaintiff's contention that the trial court had erred by improperly allowing two witnesses to testify on the defendants' behalf where the defendant had not timely disclosed their identity could not be asserted on appeal since the plaintiff had not raised this objection during the trial. In dicta, the court noted that the defendants had listed the witnesses in supplemental pre-trial statements filed six months and one month prior to trial.

What is noteworthy about both cases is that neither addresses the point at issue here, i.e. whether discovery should be extended to give the opposing parties an opportunity to depose witnesses not revealed until now. We are not being asked to exclude the witnesses provided by Clean Water Action in its supplemental responses but, rather, to decide whether discovery may be extended to allow the Permittees an opportunity to depose these witnesses. We find that there is no prejudice to Clean Water Action by extending discovery for the limited purpose of allowing the Permittees to conduct depositions of the newly-disclosed witnesses. Conversely, the Permittees would suffer prejudice if they were not allowed an opportunity to conduct discovery of these witnesses.

In this case, the Board has worked extremely closely with counsel in fashioning a schedule that provided counsel and their clients with ample time to conduct all aspects of this case in a relaxed manner. For example, counsel have had over one year to conduct discovery and prepare any dispositive motions. Now it seems that most of the discovery has been conducted in the past few weeks. This is neither the Board's fault nor, frankly, its problem.

Discovery will be extended for the limited purpose of allowing the Permittees to depose those individuals identified in Clean Water Action's November 7 and 18 supplemental responses who were not previously identified in response to the Permittees' Interrogatory No. 12 asking for the identity of each person Clean Water Action expects to call as a fact witness. Discovery is extended to January 10, 2003 for this purpose only. All other discovery is to be completed by December 13, 2002.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HANSON AGGREGATES, PMA, INC.	:	
GLACIAL SAND AND GRAVEL COMPANY	:	
TRI-STATE RIVER PRODUCTS, INC.	:	
	:	
v.		
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLEAN WATER ACTION, Intervenor	:	
and		**EHB Docket No. 2001-138-R (Consolidated with 2001-139-R 2001-140-R; 2001-157-R;**
CLEAN WATER ACTION	:	**2001-158-R and 2001-159-R)**
	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GLACIAL SAND AND GRAVEL COMPANY, PIONEER MID-ATLANTIC, INC. and TRI-STATE RIVER PRODUCTS, INC.	:	

ORDER

AND NOW, this 9th day of December, 2002, discovery is extended to **January 10, 2003** for the limited purpose of allowing the Permittees to depose or conduct written discovery of any individual listed in Clean Water Actions' November 7 and 18 supplemental responses who was not previously identified in response to Interrogatory No. 12 seeking the names of all fact witnesses. All other discovery shall be concluded by **December 13, 2002.**

EHB Docket No. 2001-138-R
(Consolidated with 2001-139-R;
2001-140-R; 2001-157-R;
2001-158-R and 2001-159-R)

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: December 9, 2002

c: **DEP Bureau of Litigation:**
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Glacial Sand and Gravel Company:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TIRE JOCKEY SERVICES, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-155-K**
	:	**(Consolidated with 2001-041-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 23, 2002**

ADJUDICATION

By: Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board dismisses an appeal from an order and civil penalty assessment issued to Appellant by the Department pursuant to the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*, for operating a residual waste processing facility without a permit. The Department proved that the order was properly issued, and Appellant failed to sustain challenges to the Department's authority to issue the order. Appellant's position that all of the whole tires which would come to the site are not waste within the meaning of the Solid Waste Management Act is rejected. The civil penalty is upheld as lawful and reasonable. The Board also dismisses an appeal from the denial of an application for a determination of applicability of a general permit to Appellant's waste tire processing facility. The Department correctly determined that the application was fundamentally deficient with respect to adequate bonding. It also correctly determined that Appellant's principal had demonstrated a lack of ability or intention to comply with environmental laws and regulations as set forth in the "compliance history" provision of Section 503(c) of the Solid Waste Management Act.

BACKGROUND

This case presents the issue of when is a waste tire a waste tire. This case has been the subject of a prior four-day supersedeas hearing and subsequent supersedeas opinion issued on December 17, 2001. *Tire Jockey Services, Inc. v. DEP*, 2001 EHB 1141. The temporary, conditional supersedeas granted therein was vacated by Order dated January 7, 2002 because Tire Jockey failed to fulfill the conditions outlined for continuation of the supersedeas.

The operations and intended operations of Appellant were amply described in that opinion. Tire Jockey Services, Inc. (Tire Jockey) operates an in-door waste tire processing facility located in Fairless Hills, Pennsylvania. The President and chief operating officer of Tire Jockey is Mr. Alfred Pignataro. Indeed, he is the only active employee of Tire Jockey involved in its day-to-day operations.

Mr. Pignataro's/Tire Jockey's plan of operation involves its acquisition of large quantities of discarded whole used tires, primarily from automobile dealers and new-tire retailers. Initially it will sift through the accumulated waste tires by means of visual inspection and inflation testing. Those tires which meet minimum quality standards, and thus are capable of being reused as automobile tires, are segregated and inventoried. Tire Jockey's plan is to sell those tire in wholesale lots. Tire Jockey would cut the remaining tires into pieces and stack them on pallets for storage and transport. The cut components would be sold for further processing as raw material components for products such as rubber mats, playground surfacing or tire-derived fuel. Tire Jockey also intends to engage in on-site manufacture of certain recycled-rubber products using tire pieces cut at its facility.

Tire Jockey does not and never has possessed a permit under the Solid Waste Management Act, 35 P.S. §§ 6018.101 *et seq.* (SWMA), or the residual waste regulations

promulgated thereunder, to operate a residual waste processing facility. Moreover, Tire Jockey proceeded to commence its operations in June, 2000 without a permit. It is the confluence of those situations which bred this case.

The Department of Environmental Protection (DEP or the Department) issued a notice of violation to Tire Jockey for operating a residual waste processing facility without a permit in August, 2000. After conducting a series of follow-up inspections, DEP issued another notice of violation to Tire Jockey on October 27, 2000 for operating a residual waste transfer facility without a permit. The Department's enforcement action culminated with its January 22, 2001 Administrative Order and Civil Penalty Assessment which is, in part, the subject of Tire Jockey's present appeal. The Order directed Tire Jockey to: (1) cease accepting and processing waste tires; (2) remove all waste tires from its facility within thirty days; (3) submit records documenting proper disposition of the waste tires; and (4) pay a $54,000 civil penalty.

The appeal of the Order bears EHB Docket No. 2001-041-K. Tire Jockey's sole theory on appeal of the Order is that none of the material that finds its way to the Tire Jockey site is "waste" within the meaning of the SWMA and that, therefore, the Department has no authority under the SWMA to regulate anything on or about its Site.

Although maintaining that it required no permit to operate, Tire Jockey had, in December, 2000, nevertheless, filed an application/request for determination of applicability under Residual Waste General Permit No. WMGR038 which covers processing and/or beneficial reuse of waste tires or tire-derived materials. DEP denied Appellant's permit application in June 2001. The were two basic reasons for denial. First, Tire Jockey insisted that only "waste tires" need be covered by a waste permit bond. Tire Jockey's argument on this is a cousin of its argument that most or all of the tires that would come to the Site are not "waste tires" under the

SWMA. Second, the Department concluded under Section 503(c) of the SWMA that Mr. Pignataro, the main if not sole person behind Tire Jockey, had demonstrated a lack of intention or ability to comply with environmental laws. Tire Jockey timely appealed the permit denial and that appeal is EHB Docket No. 2001-155-K. The two appeals were subsequently consolidated by Order dated August 8, 2001.

Administrative Law Judge Michael L. Krancer presided over a hearing on the merits, conducted from June 4, 2002 through June 7, 2002 and June 10, 2002 and a closing oral argument, held on June 14, 2002. Filing of post-hearing briefs was completed on October 7, 2002, and the matter is now ripe for adjudication. The record consists of the 529-page supersedeas hearing transcript, the supersedeas exhibits, the 1,373-page hearing transcript, several hundred trial exhibits, and a joint stipulation. After a careful review of the record, the Board makes the following findings of fact.

FINDINGS OF FACT

1. DEP is the agency with the authority and duty to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101 *et seq.* (SWMA), the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. § 4000.101 *et seq.* (Act 101), the Waste Tire Recycling Act, Act of December 19, 1996, P.L. 1478, No. 190, *as amended*, 35 P.S. § 6029.101 *et seq.* (WTRA) and the regulations promulgated pursuant to those statutes. (Joint Stipulation (Jt. Stip.) at ¶ 1).

2. Appellant Tire Jockey Services, Inc. is a New Jersey corporation and the operator of a facility located at USX Industrial Park, Building No. 238, Fairless Hills, Bucks County, Pennsylvania (Fairless Hills Facility or Site). Alfred J. Pignataro, Jr. is the President and majority shareholder of Tire Jockey and is responsible for the company's day to day operations. (Jt. Stip.

¶¶ 2-3; Supersedeas Hearing Transcript (Su. Tr.) at 176; Hearing Transcript (Tr.) at 961).

3. Mr. Pignataro was granted a process patent (Patent No. 5,834,083) on November 10, 1998 for a manner of used tire recycling (the Patent). The Patent consists of two basic parts: a method of processing discarded whole used tires for recycling purposes and, processes for manufacturing certain recycled-rubber products. (Exhibit (Exh.) P-9; Su. Tr. 184-85).

4. The Patent describes a method for sorting accumulated waste tires to segregate those which continue to be serviceable as used automobile tires and then processing the remaining tires into strips useful for other applications. After sorting the "serviceable" tires by means of visual inspection and inflation testing, a machine is used to separate the tread section from the two sidewalls of the "non-serviceable" tires. The sidewalls are then debeaded to remove the metallic beads and leave soft steel-free rubber. Each of the cut pieces can be used for certain recycling purposes. For example, the sidewall sections can be shredded to produce crumb rubber, which has a variety of applications. (Exh. P-9; Su. Tr. 351-64; Exh. P-14; Exh. P-15).

I. Prior Waste Tire Processing Operations Conducted in New Jersey

5. Mr. Pignataro was formerly President and minority shareholder of a New Jersey corporation called Tire Derived Products, Inc. (TDP). TDP operated a waste tire processing business in New Jersey from 1996 to early 2000. Mr. Pignataro was responsible for TDP's daily operations. (Jt. Stip. ¶ 4; Tr. 1108-13, 1260-77; Exh. P-57; Exh. P-58; Exh. P-59; Exh. P-60).

6. TDP initially operated a facility in Newark, New Jersey but after executing a lease agreement and purchase contract for certain property located at 316-338 Broadway, Elizabeth, New Jersey (Elizabeth Facility), TDP transferred its waste tire processing operation from Newark to the Elizabeth Facility in September 1998. (Su. Tr. 472; Exh. P-60; Exh. P-67).

7. At the Elizabeth Facility, TDP acquired and accumulated substantial quantities of used whole tires. The tires were inspected to locate those which, because they met certain quality

thresholds, were capable of being sold for reuse on automobiles (the "serviceable" tires). The remaining ("non-serviceable") tires were cut at the facility into separate components which were stacked on pallets for storage and transport. TDP sold the "serviceable" tires both domestically and for export and sold the cut tire pieces for use in the manufacture of recycled-rubber products or for processing into tire derived fuel. (Su. Tr. 474-79, 486; Tr. 1275-77; Exh. P-60).

8. TDP applied for, but was unable to obtain, a Certificate of Occupancy from the City of Elizabeth for its operation at the Elizabeth Facility. TDP commenced operations nevertheless, but soon encountered financial difficulties and disputes with the property owner. By September 1999, Mr. Pignataro and the other TDP shareholders had decided that the Elizabeth Facility was no longer a viable location for a waste tire processing business. At that time, Mr. Pignataro and several associates began to consider relocating the business to Pennsylvania. (Su. Tr. 486-89; Tr. 1108-39, 1260-86; Exh. P-60; Exh. P-70).

9. In September 1999, Mr. Pignataro and two associates submitted an application to DEP for an Industrial Market Development Grant for Waste Tires. The application proposed the establishment of a waste tire processing/recycling facility in southeast Pennsylvania based on the model described in the Patent, and sought grant money to fund initial capital expenditures. In September 1999, Mr. Pignataro and his associates had contact with certain DEP officials (including DEP Secretary James Seif) and were informed that a permit would be needed for their proposed waste tire processing/recycling operation in Pennsylvania. (Tr. 1108-39, 1260-86; Exh. P-70; Jt. Stip. ¶¶ 5-6).

10. The grant application materials indicate an understanding that a permit from DEP would be necessary to operate the proposed facility and specifically state that the necessary paperwork to operate the facility pursuant to a General Permit for Processing/Beneficial Use of

Residual Waste was being submitted to DEP. (Tr. 1108-39, 1260-86; Exh. P-70).

11. By November 1999, Mr. Pignataro and his associates had begun negotiations on a lease for the site in Fairless Hills currently occupied by Tire Jockey. Certain DEP personnel were requested to meet with Mr. Pignataro at TDP's Elizabeth Facility in order to see the type of operation that Mr. Pignataro and his associates were proposing to move to Pennsylvania. In early November 1999, Ronald Furlan, the Program Manager of the Waste Management Program for the Southeast Regional Office, and Tom Woy and Sam Sloan of the Bureau of Land Recycling and Waste Management in the DEP Central Office, visited the Elizabeth Facility. (Su. Tr. 71-74, 139-43, 176-77; Tr. 749-54; Jt. Stip. ¶ 7).

12. During their visit to the Elizabeth Facility, Messrs. Furlan, Woy and Sloan observed TDP employees receiving used whole tires, visually inspecting and inflation testing the tires, segregating the serviceable used tires, and operating a machine that slit the non-serviceable tires into sidewall and tread components. During the November 1999 meeting at the Elizabeth Facility, Mr. Furlan informed Mr. Pignataro that a DEP permit would be necessary to conduct an operation in Pennsylvania which engaged in the activities that Mr. Furlan had observed at the Elizabeth Facility. (Su. Tr. 71-74, 114-15, 139-43).

13. After deciding to discontinue its operation at the Elizabeth Facility, TDP's financial problems and dispute with the property owner intensified during late 1999. TDP ceased paying rent to the property owner, an eviction proceeding ensued, and ultimately a negotiated settlement was reached pursuant to which TDP agreed to vacate the Elizabeth Facility premises. (Su. Tr. 486-89; Tr. 1108-39, 1260-86; Exh. P-60).

14. In February 2000, the DEP grant administrator for the Industrial Market Development Grants for Waste Tires informed Mr. Pignataro and his two associates that their

proposed operation did not qualify for a grant. Mr. Pignataro broke off his business association with his two associates and, instead, joined with Warren Smith, an officer of TDP. Under the corporate form of Tire Jockey, they continued to pursue the establishment of a waste tire processing/recycling facility in southeast Pennsylvania. (Tr. 1108-39, 1260-86).

15. In April 2000, TDP vacated the Elizabeth Facility. As of April 2000 when TDP vacated the property, approximately 100,000 waste tires—either cut into components, stacked and stored on pallets, or in whole form—remained at the Elizabeth Facility. TDP was no longer continuing business operations, and the approximately 100,000 whole tires or tire equivalents were left at the Elizabeth Facility when TDP vacated the property. (Su. Tr. 473-75; Exh. P-60).

II. Commencement of Tire Jockey's Pennsylvania Operations

16. Very shortly thereafter, Tire Jockey and USX Corporation entered into a five-year Lease Agreement, dated May 1, 2000, for the Fairless Hills Facility in Bucks County, Pennsylvania. The Fairless Hills Facility is comprised of a building of approximately 26,928 square feet and adjacent grounds within the USX Fairless Works Industrial Park. (Su. Tr. 177-78, 307-08; Tr. 749-54; Exh. P-7; Exh. P-18; Exh. P-21).

17. Following execution of the Lease, Tire Jockey occupied the Fairless Hills Facility, cleaned the building, and performed some initial repairs and preparatory work on the building's plumbing and electrical systems. By early June 2000, Tire Jockey began accumulating at the Site discarded used whole tires collected from automobile dealers and retail tire sellers. Tire Jockey also began visually inspecting and inflation-testing the tires, segregating and storing the serviceable tires for resale as used tires, cutting the non-serviceable tires into component parts, stacking the sidewalls and tread sections on separate pallets, and storing the pallets inside and outside the building. (Su. Tr. 206, 236-38, 267, 375-77; Jt. Stip. ¶ 8).

18. Tire Jockey commenced its operations at the Site in June 2000 without having

applied for or obtained any of the permits required by Falls Township for operating a business of that kind within the township. Tire Jockey commenced its operations also without having applied for or obtained a permit of any kind from DEP. (Su. Tr. 375-77; Jt. Stip. ¶¶ 9-11).

19. By letter dated June 27, 2000, Tire Jockey informed the Falls Township Manager of its intent to occupy the building at the Fairless Hills Facility. By letter dated June 30, 2000, Tire Jockey was informed by Falls Township that, prior to occupying the building at the Site, Tire Jockey must complete the Use and Occupancy Permit Application and have the required Township inspections performed. (Exh. C-6; Jt. Stip. ¶ 10).

20. Following the June 30, 2000 correspondence, Tire Jockey continued operating at the Site without the permits or inspections required by the Township. On July 26, 2000, the Falls Township Code Enforcement Officer issued a Notice of Violation to Tire Jockey for operating a business in the Township without a license. Also on July 26th, the Township Fire Marshal's office inspected the Site and noted various fire code violations which had to be cured before Tire Jockey could be issued a U&O Permit. (Jt. Stip. ¶ 11, ¶ 18; Tr. 34-42; Su. Tr. 541; Exh. C-43).

21. On July 28, 2000, Tire Jockey finally applied for the Falls Township Use and Occupancy Permit and Fire Prevention Permit, and paid the fees for the Township business license and required inspections. (Exh. P-19; Exh. P-20; Su. Tr. 237-39; Tr. 36-37).

III. DEP Inspections of the Site, Notices of Violation and Issuance of the Order and Civil Penalty Assessment in January 2001

22. Jonathan Bower is currently employed by DEP as a Solid Waste Specialist for the Solid Waste Program and has held that position since 1999. His duties in that position include conducting inspections of waste management facilities and investigating complaints of illegal waste management activities. He conducted five inspections of the Site between August 2000 and December 2000; he prepared inspection reports for each of those inspections. (Tr. 765-87;

Exh. C-13; Exh. C-16; Exh. C-18; Exh. C-20; Exh. C-21).

23. On August 1, 2000, Mr. Bower conducted an inspection of the Site at which Mr. Pignataro was present. On that date Mr. Bower observed approximately 1,500 to 3,000 whole used tires stored in the building and numerous pallets of stacked cut tire components inside and outside the building. He also observed Tire Jockey employees operating a machine that cut whole used tires into five component pieces—tread section, two sidewalls, and two intact metal beads—and, he observed the operation of another machine that slit the tread sections transversely so they could be stacked flat on pallets. (Su. Tr. 766-69, 269-70; Exh. C-13; Jt. Stip. ¶ 13).

24. During the August 1st inspection, Mr. Bower discussed the operations at the Site with Mr. Pignataro, as well as Mr. Pignataro's intention to eventually conduct a more elaborate operation at the Site based on the Patent model. (Su. Tr. 766-69; Exh. C-13; Exh. C-6).[1]

25. Mr. Bower informed Mr. Pignataro that the observed operations at the Site were considered residual waste processing by DEP, that Tire Jockey was required to have a residual waste processing facility permit before engaging in such activity, and that conducting the operations without such a permit was a violation of law. Mr. Bower provided a copy of the SWMA and the applicable regulations to Mr. Pignataro, and advised him that Tire Jockey's operations should cease until it had obtained a permit. (Su. Tr. 766-69; Exh. C-13).

26. DEP subsequently issued a Notice of Violation (NOV) to Tire Jockey on August 16, 2000. The NOV cited Tire Jockey for violations observed during the August 1st inspection, specifically that it was processing waste tires without a residual waste processing facility permit

[1] Tire Jockey's fully-implemented operation would consist of three parts—the sale of serviceable tires; the sale of cut component pieces of non-serviceable tires; and the manufacturing of playground safety cover (Percofill) and rubber mats. The serviceable tires would be identified, categorized by size, branded, and stored as inventory in the building. They would then be available for wholesale in truck or container load either domestically or for export. The non-serviceable tires would be cut at the Site into five component pieces based on the Patent model. The tread sections and metal beads would be sold to manufacturers of recycled-rubber products, for tire-derived fuel or for scrap. The steel-free sidewall sections would be retained and used by Tire Jockey as raw material for manufacture at the Site of Percofill or rubber mats. (Exh. C-6; Exh. P-8; Jt. Stip. ¶¶ 16-17; Su. Tr. 178-94).

in violation of the SWMA and 25 Pa. Code § 297.201(a), and requested Tire Jockey to submit a plan for correcting the violations. (Su. Tr. 770-71; Exh. C-13; Jt. Stip. ¶ 14).

27. Tire Jockey responded to the NOV by letter dated August 28, 2000. The letter states that Tire Jockey was in the midst of obtaining the necessary local permits for its operation, and asserted, incorrectly, that it could not commence the DEP permit application process until municipal approvals were received. (Exh. C-6; Exh. P-22; Su. Tr. 347-51, 796-99; Jt. Stip. ¶ 15).

28. DEP responded to Tire Jockey's August 28th letter by arranging a meeting between Tire Jockey and DEP personnel from the permitting and operations sections of the waste management program in the DEP Southeast Region. At a September 20, 2000 meeting, DEP and Tire Jockey representatives discussed the necessary permitting of the Tire Jockey operation and compliance with applicable DEP regulations. At the meeting, Tire Jockey was informed by DEP that all tires, whether serviceable, non-serviceable, whole or cut, would have to be removed immediately from the Site for Tire Jockey to come into compliance with applicable law, because a permit was needed prior to commencing the operations at the Site. DEP also provided Mr. Pignataro with application materials for a determination of applicability under a general permit, and informed him that submission of such an application would be appropriate for Tire Jockey's operation. (Jt. Stip. ¶ 19; Su. Tr. 685-86, 798-800, 826-27).

29. On September 25, 2000, Mr. Bower conducted a second inspection of the Site at which Mr. Pignataro was present. During this inspection, Mr. Bower observed approximately one hundred pallets of stacked tire pieces and numerous whole tires stored in the building. He took photographs of the Site during the September 25th inspection which depict the pallets of cut tire pieces sitting outside the building, and substantial quantities of whole tires stored both inside and outside the building. (Su. Tr. 769-74; Exh. C-16; Exhs. C-16A through C-16J).

30. After an inspection by the Falls Township Fire Marshal in September 2000, Tire Jockey was issued a Use and Occupancy Permit for the Fairless Hills Facility by Falls Township in early October 2000. (Exh. C-43; Exh. P-19; Su. Tr. 237-38; Tr. 41-42).

31. On October 26, 2000, Mr. Bower and Cheri Niemeyer, a DEP solid waste specialist, conducted a third inspection of the Site. Several Tire Jockey employees were present at the time of the inspection. Tire Jockey had clearly brought more tires onto the Site since the August 2000 inspection. During the October 26th inspection, Mr. Bower observed numerous pallets of stacked tire pieces and substantial quantities of whole tires at the Site; he also observed Tire Jockey employees receiving and sorting whole used tires. He took photographs of the Site during the October 26th inspection which depict many pallets of cut tire pieces sitting outside the building, and myriad whole tires situated inside and outside the building. (Jt. Stip. ¶ 20; Su. Tr. 774-79, 836-41; Exh. C-18; Exhs. C-18A through C-16X).

32. DEP issued a second NOV to Tire Jockey on October 27, 2000, citing violations observed during the October 26th inspection: specifically, by receiving, sorting and storing waste tires at the Site, Tire Jockey was operating a transfer facility without a permit in violation of the SWMA and 25 Pa. Code § 293.201(a). (Su. Tr. 776-78, 836-41; Exh. C-19; Jt. Stip. ¶ 21).

33. On November 2, 2000, Mr. Bower, Ms. Niemeyer, and Darrell Bigelow, a DEP compliance specialist, conducted a fourth inspection of the Site. Mr. Pignataro was present and was again informed by Mr. Bower that the activities at the Site required a permit. During this inspection, Mr. Bower observed that the number of pallets of stacked tire pieces remained approximately the same as during the previous inspection but the quantity of whole tires in the building had noticeably increased. He also observed Tire Jockey employees receiving and storing discarded whole used tires. (Jt. Stip. ¶ 22; Su. Tr. 779-81; Exh. C-20).

34. DEP personnel—Mr. Bower, Ms. Niemeyer, Alex Page, Gerald Radomski, and Andrew Sinclair—conducted an inspection of the Site on December 20, 2000. The purpose of this inspection was to perform a count of the waste tires then situated at the Site. During the inspection, Mr. Pignataro was present and he informed the DEP personnel that additional whole used tires had been brought onto the Site since the time of the last inspection. Mr. Pignataro was again informed by Mr. Bower that the activities at the Site required a permit. The DEP personnel observed and counted approximately 30,000 whole used tires located inside the building; approximately 20,000 waste tires, either in whole form or cut into component pieces were situated outside the building at the Site. (Jt. Stip. ¶¶ 29-30; Su. Tr. 781-87, 846; Exh. C-21).

35. Mr. Bower also requested Mr. Pignataro to provide documents showing the number of all incoming and outgoing tires and the inventory of tires at the Site. Mr. Pignataro indicated that he was unable to provide such records. (Su. Tr. 781-87, 846; Exh. C-21).

36. Mr. Pignataro showed constant uncooperativeness, rudeness, flippancy and sarcasm to Ms. Neimeyer during DEP's visits to inspect the Site. (Tr. 847-49, 883-88; Exh. C-24).

37. At one point, after a DEP tire count, he showed Ms. Neimeyer that certain tires had other smaller tires inside them and he sarcastically, snidely and mockingly remarked that maybe DEP would like to redo their tire count. (Tr. 848, 884).

38. DEP issued an administrative Order and Civil Penalty Assessment on January 22, 2001, (the January Order) which was hand delivered to Mr. Pignataro at the Site that same day. In issuing the January Order, DEP determined that: (1) Tire Jockey had commenced operating a waste tire processing facility at the Site in June 2000 and had continued to operate such facility through the December inspection; (2) that the waste tire processing operation being conducted by

Tire Jockey required a residual waste processing facility permit under the SWMA; (3) that Tire Jockey had been repeatedly advised that a permit was required for its operation; and (4) that Tire Jockey had never been issued a residual waste processing facility permit under the SWMA. (Jt. Stip. ¶¶ 31-32; Exh. C-22; Su. Tr. 787-89).

39. The January Order describes the activities being conducted at the Site as observed in the series of monthly inspections performed by DEP from August to December 2000, and cites Tire Jockey for operating a residual waste processing facility without a permit in violation of 25 Pa. Code §§ 293.201(a) and 297.201(a). DEP further determined that Tire Jockey's conduct constituted violations of 35 P.S. §§ 6018.301, -.302(a), -.302(b)(3) and unlawful conduct under the SWMA, 35 P.S. §§ 60018.501, -.610(2), -.610(4), -.610(9), and subjected Tire Jockey to a claim for civil penalties under the SWMA, 35 P.S. § 6018.605. (Exh. C-22).

40. The January Order directed Tire Jockey to take the following actions to correct the alleged violation: (1) immediately cease accepting and processing waste tires at the Site without a permit from DEP; (2) remove all waste tires from the Site within 30 days; (3) submit to DEP within 45 days all records related to the disposal of waste tires from the Site. In addition, Tire Jockey was ordered to pay a civil penalty in the amount of $54,000 for the violations of the SWMA and implementing regulations described in the Order. (Jt. Stip. ¶ 31; Exh. C-22).

IV. DEP's Calculation of the Amount of the Civil Penalty Assessment

41. Darrell Bigelow is employed by DEP as a compliance specialist for the solid waste program in DEP's southeast regional office; he has been employed by DEP for six years and has held the compliance specialist position for the last three years. His duties as a compliance specialist include drafting enforcement documents and calculating civil penalties for SWMA violations. He was responsible for calculating the amount of the civil penalty assessed against Tire Jockey as part of the January Order (the Penalty). (Tr. 603-06; Exh. C-109).

42. In calculating the Penalty, Mr. Bigelow 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. (Tr. 606-07; Exh. C-108; 35 P.S. § 6018.605; 25 Pa. Code § 287.412).

43. Mr. Bigelow decided to assess a penalty only for a single violation on each of four days—the inspections of the Site in August, October, November and December. He did not assess a penalty for the September inspection date, nor did he calculate a penalty for each continuing day of violation from the August inspection forward, though he was aware that the statute authorized a penalty for each day of continuing violations. He examined each of the factors described in the Guidance Policy with respect to the four Tire Jockey violations, and applied those factors which were relevant. (Tr. 604-12, 640; Exh. C-108; Exh. C-109).

44. Examining the "Degree of Severity" factor, Mr. Bigelow determined that the degree of severity for each violation was low (as opposed to moderate or severe). The range of penalty amounts suggested by the Guidance Policy for a "Low Severity" violation is from $1,000 to $5,000; Mr. Bigelow selected the lowest figure in the proposed range ($1,000) for each violation. (Tr. 606-09, 615-18; Exh. C-108; Exh. C-109).

45. He also examined the degree of willfulness for each violation. 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. Referring to the category descriptions in the Guidance Policy, Mr. Bigelow decided that each of the four Tire Jockey violations was properly characterized as a "willful"

violation, but he selected the lowest figure in the suggested monetary range for the willful category, *i.e.* $12,500. He determined the violations were willful because Mr. Pignataro had been repeatedly advised that a permit was required for the Tire Jockey operations at the Site, and in spite of that knowledge Tire Jockey had commenced and continued the operations without applying for a permit. (Tr. 609-12, 634-37, 644-45; Exh. C-108).

46. Mr. Bigelow decided not to assess any amount for the "Costs Incurred by the Commonwealth" factor, and he decided the other factors were not relevant to the Tire Jockey circumstances. Each violation was thus ascribed a $13,500 penalty ($1,000 for severity + $12,500 for degree of willfulness), and the total amount of the penalty for the four days of violation equaled $54,000 (4 x $13,500). (Tr. 604-12; Exh. C-108; Exh. C-109).

V. Tire Jockey's Application for a General Permit for Processing/Beneficial Use of Residual Waste, Further Events Concerning the TDP Elizabeth Facility, and DEP's Denial of the Permit Application

47. DEP is authorized by the residual waste regulations to issue general permits on a statewide basis for a category of beneficial use, or for a category of processing when processing is necessary to prepare the residual waste for beneficial use, when DEP determines that such use does not present a threat of harm to the public welfare or the environment, and the activity can be adequately regulated using standard conditions. (25 Pa. Code § 287.611; Tr. 467).

48. In 1996, DEP determined that waste whole tires or tire derived material can be beneficially used as fuel in many industrial operations, or as feedstock for the production of crumb rubber which in turn may be beneficially used as a raw material in numerous products such as carpets, athletic surfaces and footwear. DEP further determined that the beneficial use of waste tires, and the processing necessary to prepare waste tires for beneficial use, can be adequately regulated using general conditions. Consequently, DEP issued statewide General Permit No. WMGR038 for the processing and beneficial use of waste tires, tire derived material

and tire derived fuel. Persons who seek approval to operate under the terms of General Permit WMGR038 must obtain a determination of applicability from the regional DEP office for the site where the waste tires or tire derived material will be processed for beneficial use or beneficially used. (26 Pa. Bull. 243-44 (Jan. 20, 1996); 26 Pa. Bull. 4273 (Aug. 31, 1996); Exh. P-45).

49. On December 12, 2000, more than six months after commencing operations and nearly four months after receiving the August 16th NOV, Tire Jockey filed an application with DEP seeking a determination that the operations at the Site qualified for General Permit No. WMGR038 (as amended August 24, 1999). (Jt. Stip. ¶ 23; Exh. C-30; Exh. P-45).

50. DEP first reviewed Tire Jockey's general permit application for administrative completeness. By letter dated December 27, 2000, DEP advised Tire Jockey that the application was administrative incomplete, and requested submission of a list of additional information and required forms. In particular, DEP requested submission of Form HW-C, which provides information on relevant compliance history. DEP also requested additional information with respect to bonding of the waste tires to be stored at the Site; DEP specifically sought a calculation of the proposed amount of the required bond based on the maximum number of tires that would be typically stored at the Site. (Exh. P-23; Jt. Stip. ¶ 24).

51. At about the same time as DEP's request for information on compliance history, the New Jersey Department of Environmental Protection (NJDEP) issued a Notice of Violation to TDP and/or Mr. Pignataro, dated December 21, 2000, with respect to the Elizabeth Facility. NJDEP had conducted an inspection of the Elizabeth Facility in early December after receiving notice of what the agency determined to be a potentially hazardous situation. During the interim between TDP vacating the facility in April 2000 and the NJDEP inspection, the approximately 100,000 tires left behind by TDP had remained on the property. However, someone had

bulldozed the whole tires and pallets of tire components on the property into an enormous jumble. In its Notice of Violation, NJDEP cited TDP and/or Mr. Pignataro, as lessors of the Elizabeth Facility, for operating a solid waste facility without a permit required by New Jersey environmental regulations. (Tr. 174-82, 844-51; Su. Tr. 486-97, 595-96; Exh. C-92; Exh. C-5).

52. Tire Jockey supplemented its application in response to DEP's December 27th letter regarding administrative incompleteness. On January 9, 2001, Tire Jockey submitted the compliance history Form HW-C. The submitted form makes no mention of the NOVs issued by DEP to Tire Jockey in August and October 2000. Nor does the Form HW-C contain any information regarding the NOV issued by NJDEP to TDP and Mr. Pignataro with respect to the Elizabeth Facility; Tire Jockey's supplemental response does not disclose the existence of TDP, the Elizabeth Facility, or Mr. Pignataro's relationship with TDP and the Elizabeth Facility. (Exh. C-31; Jt. Stip. ¶ 25; Su. Tr. 684-90).

53. Mr. Pignataro's failure to disclose the fact of his involvement with Tire Derived Products and the enforcement action taken against it by the New Jersey Department of Environmental Protection was intentional. (F.F. # 53).

54. Tire Jockey's original submission included a bonding calculation indicating 25,000 whole tires or passenger tire equivalents (equaling 250 tons) as the maximum volume of waste which could potentially need to be removed from the Site. An estimate of $75/ton was given as the unit disposal cost, though no substantiating quotations from disposal contractors were provided. Tire Jockey also indicated $2,000 as the cost to decontaminate and clean areas of operation and equipment. The total closure cost was calculated at $20,750 with $26,145 being the total bond liability amount indicated. (Exh. P-24; Exh. C-30).

55. By letter dated January 30, 2001, Tire Jockey further supplemented its general

permit application in response to DEP's administrative completeness letter—including a revised bonding calculation. Tire Jockey's second bonding calculation revised the unit disposal cost to $95/ton, but significantly revised downward the maximum volume of waste to 10,000 whole tires or passenger tire equivalents (equaling 100 tons). The revised calculation indicated a total closure cost of only $9,500 and a significantly lower bond liability amount of $11,970. No explanation is provided for the figure of 10,000 tires as the maximum volume of waste tires and tire derived material to be stored at the Site. Nor does the submission contain any analysis showing that the calculation of the proposed bond amount is based on the maximum number of tires that would be stored at the Site. (Exh. C-30; Exh. C-31; Su. Tr. 555-64).

56. Following Tire Jockey's submissions in January 2001, DEP determined that Tire Jockey's general permit application was administratively complete and commenced its technical review in February 2001. (Exh. P-25; Su. Tr. 694-95).

57. On February 16, 2001, NJDEP issued an Order and Civil Penalty Assessment to TDP and Mr. Pignataro, both individually and as President of TDP, with respect to the Elizabeth Facility. The Order and Civil Penalty Assessment cited TDP and Mr. Pignataro for knowing and purposeful violations of various New Jersey environmental statutes and regulations for operating a solid waste facility without a permit, ordered them to remove all of the tire debris from the Elizabeth Facility within 30 days, and assessed a civil penalty of $50,000 against them. NJDEP determined to move expeditiously to an order and penalty assessment in the case due to the dangerous conditions presented by the facility, including its proximity to many residential buildings and the serious fire hazard. (Exh. C-93; Tr. 180-87).

58. On March 12, 2001, DEP sent a Technical Deficiency Letter to Tire Jockey which enumerated a series of technical deficiencies in the permit application materials previously

submitted. In the March 12th letter, among other things DEP requested additional compliance history information, and DEP provided detailed comments on deficiencies in the closure cost estimate and bonding calculation made by Tire Jockey in its prior submissions. DEP emphasized again that all tires brought to the facility must be treated as waste for purposes of bonding, and that all tires and tire derived material stored at the Site must similarly be treated as waste for bond liability purposes. DEP requested information and substantiating documentation of disposal costs which included the cost of transport to the disposal facility, and requested a breakdown of the estimated quantities of whole tires and tire derived material to be stored at the Site, as well as associated disposal costs for each. An estimate of decontamination cost, omitted in the most recent submission, was also sought. (Exh. C-36; Su. Tr. 958-77; Tr. 1039-40, 1073-76).

59. Tire Jockey responded to DEP's Technical Deficiency Letter by letter dated April 17, 2001. Although Tire Jockey provided some additional information on its shareholders, Tire Jockey did not provide any information with respect to the Administrative Order and Civil Penalty Assessment issued by the NJDEP to Mr. Pignataro and TDP in February 2001. Nor was the NOV from NJDEP mentioned in the supplemental materials. Tire Jockey also failed to amend its Form HW-C to include the NOVs and the January Order from DEP issued to Tire Jockey for the operations at the Site. (Exh. C-37; Exh. P-37; Su. Tr. 690-94; Jt. Stip. ¶ 25).

60. Mr. Pignataro's continued failure to disclose the fact of his involvement with Tire Derived Products and the ongoing enforcement actions taken against it by the New Jersey Department of Environmental Protection was intentional. (F.F. # 60).

61. Tire Jockey provided additional information concerning its proposed bond amount. Tire Jockey insisted that the only means of establishing a basis for the bond amount was to use the approximate number of whole used tires brought to the Site during a one-month period

(10,000 tires). Tire Jockey did not provide a calculation of the number of tires and passenger tire equivalents that would be stored at the Site on a regular ongoing basis. Tire Jockey also simply disagreed with DEP's position that all tires brought to the Site must be treated as waste for bonding purposes, and it refused to provide either an account of the number of "serviceable" tires that would be regularly stored at the Site. (Exh. C-37; Exh. P-37; Su. Tr. 433-35; Tr. 1073-76).

62. In early April 2001, Mr. Pignataro perpetrated a ruse in which he telephoned various DEP officials under false pretenses in an effort to elicit a favorable response regarding a mat-making operation he wanted to engage in at the Site. Mr. Pignataro telephoned several DEP regional offices and made a series of prevarications to the officials with whom he spoke. When speaking with the DEP officials, he did not identify himself or provide any information concerning Tire Jockey or the operations at the Site. Instead, he falsely stated that he was merely a retired gentleman who wanted to weave some rubber mats in his garage using rubber from cut tires, and that he wanted to purchase some equipment for that purpose. He then asked the DEP official whether he would need a permit to make rubber mats in his garage using strips of rubber cut from tires. (Su. Tr. 292-300, 448-64).

63. At trial Mr. Pignataro admitted to this series of lies to environmental authorities and labeled his approach as "somewhat creative." (Su. Tr. 451).

64. In May 2001, NJDEP determined that the Elizabeth Facility posed such a serious environmental threat that an expeditious remedy should be sought in the New Jersey Superior Courts. NJDEP consequently rescinded its February 2001 Administrative Order and filed a Complaint against TDP, Mr. Pignataro and others in New Jersey Superior Court with respect to the conditions at the Elizabeth Facility. (Tr. 186-91; Exh. C-94; Exh. C-95).

65. In May 2001, DEP personnel responsible for reviewing Tire Jockey's general

permit application learned from NJDEP personnel of the enforcement actions being taken by NJDEP against TDP and Mr. Pignataro, as well as his relation to TDP. (Su. Tr. 691-92-704-05).

66. By letter dated June 8, 2001, DEP denied Tire Jockey's application for a determination of applicability of General Permit No. WMGR038. DEP denied the application for two primary reasons. First, Tire Jockey had failed to demonstrate to DEP's satisfaction that the proposed operation at the Site was consistent with the terms and conditions of the General Permit WMGR038. Second, the compliance history of Tire Jockey and its related parties, and the failure of Tire Jockey to accurately report that compliance history, showed a lack of ability or intention to comply with the terms and conditions of the general permit. (Exh. P-2).

67. James Wentzel, Chief of the Engineering Section in DEP's Southeast Regional Office, who oversaw the review of Tire Jockey's application, testified that DEP was specifically concerned with Tire Jockey's calculation of the proposed bond amount. Tire Jockey refused to accept DEP's determination that all tires brought to the Site, serviceable or non-serviceable, had to be considered waste for bonding purposes. Based on prior inspections of the Site, Mr. Wentzel was aware that approximately 50,000 tires or tire equivalents were then being stored at the Site; yet, Tire Jockey was proposing to bond for no more than 10,000 tires. Tire Jockey also repeatedly failed to provide DEP with the information to ascertain the proper bonding amount based on the conditions in General Permit No. WMGR038. Based on the written submissions and oral negotiations with Mr. Pignataro, DEP determined that Tire Jockey had no intention of bonding for the amount of waste tires that would be regularly accumulated and stored at the Site. (Su. Tr. 634-41, 657-69, 677-79, 684-711, 958-71; Tr. 1073-76; Exh. P-45).

68. Mr. Wentzel specifically testified that Tire Jockey's negative compliance history at the Site, coupled with the occurrence at the Elizabeth Facility and Tire Jockey's failure to

report the pertinent enforcement actions in the permit application materials, showed a lack of ability or intention to comply with the terms of the general permit and the environmental statutes and regulations of the Commonwealth. (Su. Tr. 635-41, 684-711; Exh. P-2).

VI. Additional Findings Relevant to the Permit Denial

69. DEP continued to perform periodic inspections of the Site between the date of the January Order and the hearing in this matter. An inspection conducted in March 2001 revealed that additional whole used tires had been brought to the Site since the December 2000 inspection. A July 2001 inspection discovered that additional tires had been brought to the Site, and the machine for cutting tires into component pieces had been utilized. A November 2001 inspection again found that more tires had been brought to the Site since the prior inspection. (Jt. Stip. ¶¶ 37-39; Exh. C-23; Exh. C-25; Exh. C-28, Exhs. C-28A through C-28V).

70. In October 2001, DEP filed a Petition to Enforce the January Order against Tire Jockey in Commonwealth Court. A hearing on the Petition was held by the Commonwealth Court in February 2002. Following the hearing, Commonwealth Court issued an Order which directed Tire Jockey to, *inter alia*, remove and properly disposal all waste tires from the Site within thirty days. (Jt. Stip. ¶¶ 43-46; Exh. C-110).

71. Mr. Pignataro admitted that Tire Jockey did not comply with the January Order. DEP performed an inspection of the Site in mid-March 2002; DEP personnel estimated that approximately 75,000 whole used tires and 42,000 passenger tire equivalents in cut pieces were stored at the Site at that time. Despite the denial of the Supersedeas Petition and the subsequent Commonwealth Court Order enforcing the January Order, Mr. Pignataro testified that as of the hearing in June 2002, Tire Jockey still had approximately 47,000 whole used tires at the Site. (Tr. 106-15; Su. Tr. 389-94; Jt. Stip. ¶ 63-64; Exh. C-105; Exh. C-105a through 105h).

72. The City of Elizabeth expended approximately $364,000 to clean up and have

removed and properly disposed all of the waste tires materials at the Elizabeth Facility in May-June 2001. In January 2002, the New Jersey Superior Court found Mr. Pignataro and TDP jointly and severally liable for the payment of $300,000 in statutorily authorized penalties assessed with respect to events at the TDP Elizabeth Facility. (Tr. 844-68; Exh. C-96; Tr. 191).

73. Mr. Pignataro has demonstrated a lack of respect for and belligerency toward environmental authorities who inspected the Site. (Tr. 847-49, 883-88; Exh. C-24; FOFs 36-37).

74. Mr. Pignataro was an evasive witness who did not always testify to the whole truth. For example, he responded in the negative to a question from DEP's counsel whether Tire Jockey had received a notice of violation from the Falls Township Fire Marshall other than the one issued by the Fire Marshall on December 3, 2001. Cross-examining counsel then confronted Mr. Pignataro with Exhibit C-43, a document entitled Fire Prevention Application, dated September 18, 2000. It reflects the notes of the initial fire department inspector who inspected the site in connection with Tire Jockey's attempt to obtain an occupancy permit. The second page of the document is captioned "Township of Falls Fire Marshall's Office **INSPECTION DEFICIENCIES**" (all caps and bold in original). The list of deficiencies noted covers the entire second page of the document. The document concludes by stating that "you are being given 30 days to correct these violations". Mr. Pignataro, after being confronted with this document, then insisted that he did not think this was a notice of violation. His explanation included the following attempted self-rehabilitation:

> I don't take this as a notice of violation no more than I take a letter from the DEP of what is deficient in an application. This is you're given an inspection. The inspection revealed certain deficiencies. You're given 30 days to correct them and have a reinspection which you do. This is, I don't think, a notice of violation because nowhere on here does it say notice of violation as does the initial paragraph on anything you get that says, re, notice of violation, storage of tires. This, I believe, is much different than this and this is just a checklist of things that have to be corrected to pass a fire inspection.

(Su. Tr. 527; Tr. 522-527; Exh. C-43).

75. Mr. Pignataro has shown a lack of ability or intention to comply with environmental laws. (F.F. # 75).

DISCUSSION

I. Standard of Review

This consolidated matter requires the Board to review three separate DEP actions: the issuance of the January Order; the assessment of the $54,000 civil penalty; and, the denial of Tire Jockey's general permit application. 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. Each action implicates a specific standard of review.

The January Order was issued pursuant to the authority granted the agency by the SWMA. DEP "may issue orders . . . as it deems necessary to aid in the enforcement of the provisions" of the SWMA. 35 P.S. § 6018.602(a). To prevail, DEP must prove that the order was properly issued—*i.e.*, that the order conforms with applicable law, is supported by a preponderance of the evidence, and is a reasonable exercise of the agency's discretion. *See, e.g.*, *Starr v. DER*, 607 A.2d 321, 324 (Pa. Cmwlth. 1992); *Starr v. DEP*, No. 2002-049-C, slip op. at 8-9 (EHB, Sept. 18, 2002); *see also* 25 Pa. Code § 1021.122(b)(4).

DEP also bears the burden of proof with respect to the civil penalty assessed against Tire Jockey. 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., Stine Farms and Recycling, Inc. v. DEP*, 2001 EHB 796, 811-13.

In contrast to the order and penalty contexts, Tire Jockey bears the burden of proof in its

appeal of the denial of applicability of the general permit. 25 Pa. Code § 1021.122(c)(1). The question presented to the Board is whether Tire Jockey met the criteria for a determination that General Permit WMGR038 applies to the operations at the Site. Tire Jockey must prove by a preponderance of the evidence that DEP's denial of the general permit application was an error of law or otherwise unreasonable and inappropriate. *See Environmental and Recycling Services, Inc. v. DEP*, No. 2000-172-C, slip op. at 21-23 (EHB, May 8, 2002).[2]

II. The January 22, 2001 Order

We turn first to the question of whether the January Order was properly issued. The order specifically cites Tire Jockey under the SWMA and its regulations for illegally operating a residual waste processing facility, and/or a transfer facility, without a permit in violation of 25 Pa. Code §§ 297.201(a) and 293.201(a).[3] Thus, DEP was required to prove that: (1) Tire Jockey was engaged in conduct at the Site which constitutes operation of a residual waste processing or transfer facility; and, (2) Tire Jockey did not have a permit for such facility. To satisfy its burden, DEP also had to demonstrate that the remedial measures imposed by the order were a reasonable means of curing the alleged violations.

Tire Jockey generally does not contest the factual premises underlying the January Order, and there is no dispute that Appellant has not obtained a permit for a residual waste processing or

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[2] For purposes of prescribing management requirements, certain types of materials—including "waste tires"—are treated as residual waste, regardless of whether the material would fit within the definition for municipal or residual waste. *See* 25 Pa. Code § 287.2(c)(3). Amendments to the residual waste regulations were made effective as of January 13, 2001. *See* 31 Pa. Bull. 235 (Jan. 13. 2001). Because the Board applies the law in effect at the time of DEP's final action, *see, e.g., Eastern Consolidation and Distribution Services, Inc. v. DEP,* 1999 EHB 312, 328, we apply the version of the regulations in effect when the January Order was issued on January 22, 2001.

[3] Section 297.201(a) provides that a "person or municipality may not own or operate a residual waste processing facility, unless the Department has first issued a permit to that person or municipality for the facility under this chapter." 25 Pa. Code § 297.201(a). Similarly, a "person or municipality may not own or operate a transfer facility, unless the Department has first issued a permit to that person or municipality for the facility under this chapter." 25 Pa. Code § 293.201(a). *See also* 35 P.S. § 6018.301 (no person "shall own or operate a residual waste processing or disposal facility unless such person or municipality has first obtained a permit for such facility from the department"); 25 Pa. Code § 287.101(a).

transfer facility. Nor does Appellant object to the remedial measures imposed by the January Order. Tire Jockey's challenge focuses solely on DEP's legal authority to issue the January Order under the SWMA and its implementing regulations. Appellant asserts that DEP has not proven that the operations at the Site constitute a residual waste processing or transfer facility, as those terms are defined by law and the applicable regulations.[4]

A. The Waste Tire Recycling Act

Tire Jockey first argues that the tires at its facility, or most of them anyway, are not waste at all by definition under the Waste Tire Recycling Act (WTRA), 35 P.S. § 6029.101, *et seq.* According to Tire Jockey, "serviceable" tires cannot be considered "waste tires" within the purview of the SWMA or its regulations because the WTRA defines "waste tire" as: "[a] tire that will no longer be used for the purpose for which it was originally intended." 35 P.S. § 6029.104 (2001). In other words, the WTRA completely trumps the SWMA on the issue of regulation in the context we see here. We reject that argument.

First of all, the WTRA's definitional section states clearly that the words and phrases listed therein "*when used in this chapter*" shall have the meanings given to them in this section. 35 P.S. § 6029.104. Also, the WTRA does not include a provision that it is to be read *in pari*

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[4] The residual waste regulations define "residual waste processing facility" as "a facility for processing of residual waste," 25 Pa. Code § 287.1. The term "processing" is defined in part as: "A method or technology used for the purpose of reducing the volume or bulk of municipal or residual waste or a method or technology used to convert part or all of the waste materials for offsite reuse"; or [the activities conducted at] "Transfer facilities, composting facilities and resource recovery facilities." *Id.*

A "transfer facility" is defined as:

> A facility which receives and processes or temporarily stores municipal or residual waste at a location other than the generation site, and which facilitates the transportation or transfer of municipal or residual waste to a processing or disposal facility. The term includes a facility that uses a method or technology to convert part of all of the waste materials for offsite reuse. The term does not include a collection or processing center that is only for source separated recyclable materials, including clear g lass, colored glass, aluminum, steel and bimetallic cans, high-grade office paper, newsprint, corrugated paper and plastics.

Id.

materia with the SWMA. This is to be contrasted with Act 101 which does provide that it is to be read *in pari materia* with the SWMA. Thus, the Legislature evidenced a specific intent in the WTRA itself that the WTRA not tread on whatever jurisdiction the SWMA may have in a case like this one. Tire Jockey's argument that the WTRA completely eviscerates or supersedes whatever applicability the SWMA may have is contrary to the very language of the WTRA.

Also, it is clear, taking the WTRA in context, that it was not intended to circumscribe whatever jurisdiction the Department may have over discarded whole used tires pursuant to the SWMA. There is no indication of such purpose anywhere in the WTRA; on the contrary, that statute expands DEP's oversight of discarded tires. *See* 35 P.S. § 6029.105. Moreover, the WTRA is concerned with the remediation of existing tire piles and focuses on establishing grant programs and other means for accomplishing such remediation. *See* 35 P.S. §§ 6029.107; 6029.109 to 6029.113. Attempting to transfer the WTRA provisions to the context of an SWMA enforcement action runs contrary to the purpose of the WTRA. Finally, recent amendments to the WTRA undercut Appellant's argument; a revised definition of "waste tire" has added the following text: "The term includes a tire that has been discarded." Waste Tire Recycling Act, sec. 104, § 1, 2002 Pa. Laws 111 (July 10, 2002). It is clear from this amendment that the Legislature intended for discarded whole used tires—the type Appellant accumulates—to be encompassed within the WTRA's expansive definition of "waste tire."

Finally, we note that only about 40% of the tires Tire Jockey collected are considered by it as "serviceable." *See, e.g.*, Exh. C-37. Thus, only that portion of the tires would be reusable as tires, and, thus, supposedly not waste, even using the WTRA definition to the exclusion of potential applicability of the SWMA. Thus, this defense of Tire Jockey to the January Order could not even apply to the majority of other tires that would found their way to the Site.

B. The Solid Waste Management Act

Relying on its interpretation of the residual waste regulations, Appellant argues that the materials being handled at the Site—the serviceable and non-serviceable tires—are simply not waste because all materials fall within an exception to the definitions of waste. Because Tire Jockey was not handling "waste" of any kind at the Site, it was not operating a "residual waste" processing facility in the absence of a permit; indeed, Tire Jockey avers that it did not need a permit to conduct its operations. Rather, according to Appellant, DEP's authority to regulate its operations was limited to assuring compliance with regulations pertinent to waste tire storage sites. *See* 25 Pa. Code §§ 299.101; 299.155 to 299.163.

Alternatively, Tire Jockey contends that its operations at the Site actually constitute a "collection or processing center that is only for source-separated recyclable materials," as those materials are defined by the SWMA and applicable regulations. Such a "collection or processing center" is an express exception to the regulatory definitions for a residual waste processing facility and transfer facility. Because it fits within this exception, Appellant argues that DEP failed to prove the violations cited in the January Order.

DEP generally maintains that all discarded tires and tire derived materials, regardless of intention with respect to reuse, constitute waste within the meaning of the SWMA and implementing regulations. For DEP, whole used tires—which are regularly discarded in great quantities and which, when accumulated, present serious hazards to public health and safety and the environment—must be considered as waste in order to assure proper regulatory oversight under the SWMA. DEP argues that a proper interpretation of applicable regulations supports its position. DEP further argues that the discarded used tires being handled by Tire Jockey at the Site are not "source-separated recyclable materials" and, therefore, Tire Jockey's operation does not fit within any exception to the definitions for residual waste processing and transfer facilities.

i. The Tires Accumulated at the Site Constitute Waste Subject to the SWMA and the Residual Waste Regulations

The SWMA defines the term "solid waste" as: "any waste . . . including solid, liquid, semisolid or contained gaseous materials." 35 P.S. § 6018.103. The statute divides "solid waste" into three sub-categories, municipal, residual or hazardous wastes, and provides definitions for each of those terms. *Id.*[5] However, the SWMA does not provide a definition for the basic term "waste." *Id.* The residual waste regulations, implementing the SWMA, define the term "waste" in relevant part as follows:

> (i) Discarded material which is recycled or abandoned. A [discarded material] is abandoned by being disposed [or] incinerated, or accumulated, stored or processed before or in lieu of being disposed of, burned or incinerated. . . .
>
> (ii) Materials that are not waste when recycled include materials when they can be shown to be recycled by being:
>
> (A) Used or reused as ingredients in an industrial process to make a product or employed in a particular function or application as an effective substitute for a commercial product, provided the materials are not being reclaimed. . . . Sizing, shaping or sorting of the material will not be considered processing for the purpose of this subclause of the definition.
>
> (B) Coproducts.
>
> (C) Returned to the original process from which they are generated, without first being reclaimed or land disposed. . . .

25 Pa. Code § 287.1.

Appellant argues that the whole used tires being handled at the Site fit within the exception to waste set forth in subparagraph (ii)(A). That is, the serviceable whole used tires are: "materials that can be shown to be recycled by being employed as an effective substitute for a

[5] The two categories of potential application to waste tires are municipal and residual waste. "Municipal waste" is defined by the SWMA in relevant part as: "Any garbage, refuse, industrial lunchroom or office waste and other material . . . resulting from operation of residential, municipal, commercial or institutional establishments and from community activities . . . ." 35 P.S. § 6018.103. The statute defines "residual waste" in pertinent part as: "Any garbage, refuse, other discarded material or other waste . . . resulting from industrial, mining and agricultural operations . . . ." *Id.* "Waste tires" are treated as residual waste, regardless of whether that material would fit within the definition for municipal or residual waste. 25 Pa. Code § 287.2(c)(3).

commercial product," *i.e.*, as an effective substitute for newly-manufactured automobile tires. The tire pieces cut from the non-serviceable tires are: "materials that can be shown to be recycled by being reused as ingredients in an industrial process to make a product," *i.e.*, as crumb rubber or raw material for rubber mats or other products. Thus, all materials at the Site at all times are within the (ii)(A) exclusion and nothing ever is considered waste.[6]

We are not persuaded that the interpretation advanced by Appellant is correct so as to cover everything at all times at the Site. First, its interpretation is contradicted by the plain language of the regulations. In this regard, what we will refer to as the "timing issue" is critical. Under Tire Jockey's view, a material is subject to the (ii)(A) exception from the definition of waste if it has the potential to be recycled or reused later. Under DEP's view, this exception only applies *when* the material is actually being recycled or reused. DEP's view on this is supported by the language of the regulation. The regulation provides that a material is not waste *when* recycled, *when they can be shown to be recycled by being used or reused.* 25 Pa. Code § 287.1. These are words of the present tense not future tense and, therefore, this language supports DEP's view of the timing question as it applies here. The materials are not excluded because they may have some potential for later being recycled or reused. According to the regulatory language, it is only when they *are* recycled by being used or reused.

As the Department's interpretation of the plain language of this regulation, *i.e.*, the (ii)(A) exception to the definition of "waste" in 25 Pa. Code § 287.1, as well as its application thereof in this context, is not unreasonable, we will credit it. *DEP v. North American Refractories*

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[6] Early in the case, Tire Jockey also argued that the (ii)(B) coproduct exception also covered some or all of its processes and materials. However, at closing argument, Tire Jockey stated that it was abandoning that contention based on the fact that the definition of coproduct which restricts that term to only materials that are applied to the land. Closing Argument Tr. 85; 25 Pa. Code § 287.1 (coproduct would only apply to materials that will be applied to the land). Under that definition, the major prospective materials of Tire Jockey, mats and crumb rubber would not qualify since they were never intended to be applied to the land.

Company, 791 A.2d 461, 426-67 (Pa. Cmwlth. 2002).[7]

Moreover, Tire Jockey's end-use, all inclusive, "potential to be reused or recycled" theory of the exclusion from the definition of waste as applied to tires was specifically rejected by the Commonwealth Court more than a decade ago in this language:

> [Appellant] argues that the tires are not waste because they are a marketable commodity capable of being profitably recycled for various further uses. As the Board observed, the fact that the discarded tires may have value to [appellant] does not mean that they are not "waste." [Appellant's] value-based analysis falters in at least two respects. First, it ignores the express legislative policy in the Act to correct "improper and inadequate solid waste practices [which] create public health hazards, environmental pollution . . . ." 35 P.S. § 6018.102. Testimony showed that the tires pose a fire danger and harbor mosquitoes and other insects, thus constituting a public health hazard. Second, the value-based analysis ignores the absurd result that a party could escape environmental regulations by simply declaring his waste has value. Accordingly, the Board properly found that the tires on [appellant's] property were municipal waste and subject to regulation.

Starr v. DER, 607 A.2d 321, 323-24 (Pa. Cmwlth. 1992) (footnotes omitted).

The Commonwealth Court's determination that accumulated discarded whole used tires and tire derived materials are waste within the meaning of the SWMA has been reaffirmed, *see Booher v. DER*, 612 A.2d 1098, 1101-02 (Pa. Cmwlth. 1992), most recently by the Pennsylvania

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[7] Tire Jockey's reference to supposedly contradictory narrative language from the Environmental Quality Board's Preamble to this set of regulations in no way undermines our conclusion that the Department's interpretation of the regulation, nor its application to this situation, is not unreasonable. Tire Jockey points to language which states that the final form of the regulations "expand the exemptions in the definition of 'waste' to exclude, *upfront*, material reused off-site as an ingredient in manufacturing". 31 Pa. Bull 238 (Jan. 13, 2001) (Exh. P-Y) (emphasis added). Also, the Preamble provides:

> Commentators suggested that language should be added to provide for more exclusions from waste for materials such as clean fill, scrap metal, steel slag, materials for reclamation, metals, clean glass, paper, cardboard and NPDES discharges...Some commentators indicated support for the definition [of waste] since it would exclude from regulation materials that are recycled by being used or reused as an ingredient in an industrial process... The Board decided not to adopt suggested revisions. Many of the materials recommended for exclusion already are excluded if used in an industrial process to make a product or used as an effective substitute for a commercial product.

Id. at 239. Even if this language were supportive of Tire Jockey on the timing question, which is questionable, the Preamble cannot overrule the actual language of the regulation. As noted, we have reviewed and find DEP's reading thereof not unreasonable in this context. Also, the comments Tire Jockey cites talk about a material being excluded from regulation "that *are recycled by being used or reused as an ingredient*". That is to be distinguished from and is not the same as saying materials that *could be recycled* or that have the *potential to be recycled.*

Supreme Court in *Commonwealth v. Packer*, 798 A.2d 192, 196-97 (Pa. 2002). There is no indication that the any of the amendments to the residual waste regulations were intended to overturn the settled interpretation that discarded automobile tires are "waste" subject to DEP enforcement action under the SWMA.[8] The Board itself has just recently reaffirmed that aspect of the *Starr* case. *See Starr v. DEP*, No. 2002-049-C, *slip op.* at 20-21 (EHB Docket No. 2002-049-C, Opinion and Order, Sept. 18, 2002).

The history, context and background of the residual waste regulations also contradict Tire Jockey's view of them. The residual waste regulations address the management of waste materials resulting from industrial, mining and agricultural operations. When the residual waste regulations were first promulgated, DEP made a conscious decision to tie the definition of waste to the process or manner in which the material is generated. *See* 22 Pa. Bull. 3391-92 (July 4, 1992). Thus, "waste" is partly defined by reference to the types of materials generated by an industrial, agricultural or mining operation—a "product" being the intended result, and "co-products" or "by-products" being materials generated in addition to the intended result.[9] Appellant's interpretation seeks to tie the regulatory definition of waste contained in the residual

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[8] This is yet another reason to reject Tire Jockey's argument that the WTRA jumps in to short circuit the SWMA's province over discarded tires. The WTRA was passed in 1996, four years after *Starr* was decided. There is not a hint in the WTRA that the Legislature meant to overturn *Starr* by the WTRA. Indeed, the lack of an *in pari materia* provision in the WTRA as to the SWMA leads to the conclusion that the Legislature affirmatively meant that the WTRA have no retrenching affect at all on the holding in *Starr*.

[9] A "product" was defined as "a commodity that is the sole or primary intended result of a manufacturing or production process," excluding off-specification materials. 25 Pa. Code § 287.1 (1992); *see also* 22 Pa. Bull. 3422-25 (July 4, 1992). "Co-product" was defined generally as a "material generated by a manufacturing or production process, or an expended material, of a physical character and chemical composition that is consistently equivalent to, or exceeds, the physical character and chemical composition of an intentionally manufactured product or produced raw material." *Id.* "By-product" was a "material generated by a manufacturing or production process that is not a product or coproduct, regardless of whether it has value to the generator or another person." *Id.* And an "expended material" was a "material, including a product or co-product, that has been used for a specific purpose and which can no longer be used for that specific purpose, without processing or treatment." *Id.*

The term "waste" was defined in part by reference to these process-oriented definitions: "(i) One or more of the following: (A) A by-product. (B) An expended material that is not a co-product. (C) A material that is abandoned or disposed, including abandoned or disposed products or coproducts. . . ." *Id.*

waste regulations exclusively to the ultimate end use of the material. However, DEP explicitly rejected that approach from the outset because waste material often presents the same dangers to public health and safety and the environment regardless of whether the material is disposed or reused. *Id.*

Though the residual waste regulations were amended in 2001, the process-oriented approach to the definition of "waste" was not changed. The amended regulations essentially subdivided the original "co-product" category into two parts and reduced the threshold requirements for attaining the exclusion formerly granted to co-products. *Cf.* 25 Pa. Code §§ 287.1 (1992) (definitions for "co-product" and "waste") *with* 25 Pa. Code §§ 287.1 (2001) (same). However, the current exclusion in subparagraph (ii)(A) continues to refer only to materials generated by an industrial, agricultural or mining process *in addition to* the "product."

In contrast, the whole used tires acquired and accumulated by Tire Jockey for its processing/recycling operation are not such a material. The materials handled by Tire Jockey are a used, and discarded, consumer product, not unlike discarded windshield wipers, air filters, batteries or other automobile parts that are periodically replaced due to wear. A "discarded material which is recycled," or "accumulated, stored or processed" in lieu of being disposed, constitutes waste. Appellant acquires discarded consumer products, and processes them—*i.e.*, employs a method to convert part or all of the waste materials for offsite reuse. 25 Pa. Code § 287.1 (definition for "processing"). Appellant does not engage in a manufacturing process which generates a product and, in addition to the intended commodity, generates whole used tires.[10]

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[10] Tire Tire Jockey's argument based on subsection (v) of the waste definition is specious as well. That subsection provides as follows:

> In enforcement actions implementing the act, a person who claims that the material is not a waste in accordance with subparagraph (ii) shall demonstrate that there is a known market or disposition for the material, and that the terms of the exclusion have been met. In so doing, appropriate documentation shall be provided (such as contracts showing that a second person uses

For all these reasons, we do not accept Tire Jockey's assertion that the tires which arrive at its facility are not waste and cannot be regulated under the SWMA. On the other hand, we accept DEP's argument that they are and they can. [11]

ii. The Discarded Whole Used Tires Accumulated by Tire Jockey Do Not Fit Within the Definition for Source-Separated Recyclable Materials

The residual waste regulations except from the definitions of a "processing" and "transfer facility" a facility which serves as a "collection or processing center that is only for *source separated recyclable materials*, including clear glass, colored glass, aluminum, steel and bimetallic cans, high-grade office paper, newsprint, corrugated paper and plastics." 25 Pa. Code § 287.1 (emphasis added).[12] Appellant argues that its operation should be deemed a "collection or processing center that is only for source separated recyclable materials." Tire Jockey asserts that the tires it collects are "source-separated" because they are intentionally separated by auto dealers and tire retailers from other waste materials, and that waste tires are unquestionably recyclable.

> the material as an ingredient in a production process) to demonstrate that the material is not a waste. In addition, owners or operators of facilities claiming that they actually are recycling materials shall show that they have the necessary equipment to do so.

25 Pa. Code § 287.1. This subsection does not alter the principles we have outlined above with respect to the proper interpretation of the definition of waste. Tire Jockey seemed to be operating under the false premise that if it could show that there could potentially be a market for crumb rubber or mats that, based on that showing alone, the materials in its operation were waste. This subsection states plainly, however, that the proponent must demonstrate that there is known market or disposition of the material *and that the terms of the exclusion have been met.* As such, this subsection does not expand or restrict the definition of waste or non-waste. Here, the bottom line is that Tire Jockey failed to show that the terms of the exclusion had been met.

[11] DEP's post-hearing brief included a Motion to Strike a document admitted into evidence over DEP's objection at the supersedeas and merits hearings. The document is a draft internal legal memorandum, dated April 28, 1992, in which a DEP counsel rendered an opinion for DEP staff members concerning application of the new residual waste regulations to a waste tire shredding facility near Perkasie, Pennsylvania. We need not reach the issue raised by DEP's Motion to Strike. On account of the nature of the document—an opinion from one DEP counsel rendered over ten years ago concerning a potential application of subsequently-amended regulations to a completely different operation—we assigned no weight to this evidence and disregarded it when reaching our decision.

[12] We have not misstated the regulations, it is true that the regulations except from the definition of "processing", which is a *verb*, "a collection center…", which is a noun.

DEP counters that it has consistently interpreted "source separated recyclable materials" as including only those materials which are specifically listed in the pertinent regulation. DEP also argues that the nature of waste tires, particularly the environmental and safety hazards presented by the accumulation of waste tires, supports its position that the whole used tires collected by Tire Jockey should not be considered "source-separated recyclable materials."

We find DEP's interpretation to be reasonable and therefore credit it. *North American Refractories Company*, 791 A.2d at 426-67.

Tire Jockey makes much of the use of word "including" in the residual waste regulation and insists that the list of source separated recyclable materials is therefore not exclusive. Indeed, the analog municipal waste regulations provide that the list is "*limited to* clear glass, colored glass, aluminum, steel and bimetallic cans, high-grade office paper, newsprint, corrugated paper, plastics and other marketable grades of paper." 25 Pa. Code § 271.1 (emphasis added).

This point is interesting but, even if Tire Jockey were correct, not dispositive. Even assuming the list in the residual waste regulations is not exclusive, DEP is not compelled to interpret the regulations as including a specific additional material such as waste tires. Quite simply, the regulation does not name waste tires when enumerating "source separated recyclable materials" and there is no mandate that the Department have interpreted it in connection with the Tire Jockey case, or that we do so now, to transplant the term "waste tires" into the definitional list of source separated recyclable materials.

There are a number of good reasons to not compel an interpretation of these lists in the residual waste regulations to include waste tires. It is Act 101 from which the concept of "source-separated recyclable materials" and the list of such materials as set forth in the residual and municipal waste regulation was taken. Act 101's definition of "source-separated recyclable

materials" is "[m]aterials that are separated from municipal waste at the point of origin for the purpose of recycling". 53 P.S. § 4000.103. Section 1501 mandates that municipalities implement a source separation and curbside collection program to recover recyclable materials. 53 P.S. § 1501. The Act provides that municipalities are to select three recyclable materials for their source-separation curbside collection recycling program and that the three materials shall be chosen from the following: clear glass, colored glass, aluminum, steel and bimetallic cans, high-grade office paper, newsprint, corrugated paper and plastics. 53 P.S. § 1501(c).

As is apparent, this list from Act 101 is the same list which appears in both the municipal waste regulations and the residual waste regulations. The list from Act 101 is exclusive. In the Final Rulemaking on the Act 101 regulations, the Department commented as follows on a suggestion that the list be amended to be more inclusive, "[t]he language limits the definition to the nine materials specified in Section 1501 of Act 101, plus other marketable grades of paper to reflect recent Environmental Hearing Board decisions." Exh. C-116. DEP next had this to say about the relationship of tires to the list of source-separated recyclable materials, "[t]hese decisions prevent oil and tire 'recycling' facilities from claiming that they were not regulated under [the SWMA]. The Department believes the materials identified in the definition can by recycled without significant risk to human health and the environment". *Id.* Clearly, waste tires were not deemed appropriate to be considered "source-separated recyclable materials".

Also, waste tires are obviously different in nature and quality from clear glass, colored glass, aluminum, steel and bimetallic cans, high-grade office paper, newsprint, corrugated paper and plastics. None of those kinds of waste materials pose the same kind of dangers and threats to the environment as do waste tires. It is waste tires, not any of the aforementioned materials, which have been recognized to present the dangers of tire fires and mosquito infestations. 35

P.S. § 6029.102(4). Moreover, it is stretching the imagination to conceive that the tires that found their way or would find their way to Tire Jockey have been "source separated" in the same way that recyclable materials in the list are source separated. It is plain from Act 101 that the idea of the recycling mandate and the list of recyclable materials that these materials are to be source-separated by the homeowner or business at the point of generation and placed at the curbside for pickup in the normal course. It is now rather commonplace within the Commonwealth for individual homeowners to have a separate refuse container for cans and bottles and have those containers set out at the curb for collection. It is ridiculous to think of waste tires being handled in that manner and there was no evidence in the record that they are.

Unlike the WTRA, Act 101 does have a provision which provides that it, Act 101, is to be construed *in pari materia* with the SWMA. 53 P.S. § 4000.104. Thus, the history of the "source-separated recyclable materials" provisions, as well as the rejection of the proposed inclusion of waste tires to that list, supports the conclusion here, that Tire Jockey's tires should not be required to be considered as "source-separated recyclable materials" under the SWMA's residual waste regulations.

C. Conclusion Regarding the Order

The charge by Tire Jockey that the Department's interpretation of the residual waste regulations that this operation needs a permit, which we have now upheld, is hostile to and discourages tire recycling is false. DEP is not saying that facilities like the one contemplated here cannot or should not exist. It is saying, correctly, that they are required to have a permit which governs their operations. Tire Jockey has failed to demonstrate that DEP was without the legal authority to issue the January Order under the SWMA and the residual waste regulations, and DEP has proven the violations underlying the January Order. We also find that the measures

imposed by the January Order are a reasonable means of curing the violations, and consequently, DEP has carried its burden of proving that the January Order was properly issued.

III. The Civil Penalty Assessment

Pursuant to section 605 of the SWMA, DEP may assess a civil penalty for every violation of the SWMA, whether or not the violation was willful or negligent. 35 P.S. § 6018.605. To sustain the civil penalty assessed against Tire Jockey, DEP had to prove that the underlying violations of law giving rise to the assessment in fact occurred, that the penalty imposed is lawful and that the amount of the penalty is reasonable and appropriate. *See, e.g., Stine Farms and Recycling, Inc.,* 2001 EHB at 811-13. DEP has carried its burden of proof on these elements.

As discussed above, DEP has proven that Tire Jockey was operating a residual waste processing and transfer facility without a permit, in violation of the SWMA and the residual waste regulations. 35 P.S. §§ 6018.301, 6018.302(a), 6018.610(2); 25 Pa. Code §§ 297.201(a) and 293.201(a). According to the SWMA, the maximum civil penalty which may be assessed is $25,000 per offense, 35 P.S. § 6018.605, and DEP assessed a civil penalty of $13,500 for each of four violations. Thus, the penalty imposed is lawfully within the statutory allowance. In its post-hearing brief, Tire Jockey has not contested the reasonableness of the penalty amount. Arguments not raised in post-hearing memoranda may be waived. 25 Pa. Code § 1021.131(c). In any event, we believe that the penalty amount is not only reasonable and appropriate, it could be viewed as lenient.

DEP's selection of a "low" degree of severity for the offense was reasonable given that Tire Jockey's operation, while it could pose a hazard to public safety and the environment, had not actually caused environmental damage at the time of January Order. Appellant could also reasonably be deemed by DEP to have committed a willful violation of the SWMA. Mr. Pignataro was informed on numerous occasions prior to opening that the type of operation Tire

Jockey contemplated conducting and, after opening, that the type of operation it was conducting, required a permit under Pennsylvania environmental law.

Before he ever opened the doors of the Fairless Hills facility Mr. Pignataro had met with DEP officials in September, 1999, including the Secretary of the Department, and he was advised then that a permit would be required to operate the facility as he contemplated. Moreover, DEP personnel visited the Elizabeth Facility in November, 1999 and advised Mr. Pignataro that a permit would be necessary to conduct a similar operation in Pennsylvania. The grant application submitted by Mr. Pignataro and his associates in 1999 acknowledged the general permit requirement.

Even after all of this, Mr. Pignataro commenced Tire Jockey's operations in June, 2000 without a permit and without even having filed a permit application. There is no evidence whatsoever that Mr. Pignataro had concluded before Tire Jockey started operations that, despite the numerous admonishments, Tire Jockey did not need a permit. That contention was clearly adopted later as part of Tire Jockey's litigation posture.

Not surprisingly, shortly after Tire Jockey opened, it received the August 16, 2000 NOV, which cites Tire Jockey for operating a residual waste processing facility without a permit. Mr. Pignataro's August 28, 2000 response thereto confirms that he knew all along that a permit was necessary. He states, perhaps erroneously, but that does not matter for these purposes, that Tire Jockey "could not proceed with the State application process until we are certain that we would receive Municipal Approval". He asks, "how do we stay in business during the permit process?". He further asks whether there are "any temporary or limited permit provisions or exemptions that could bridge this gap while application for [a] formal permit is pending?" He also states that, "[a]ny assistance you might provide both in the area of permit application

preparation assistance and/or defining other interim possibilities would be greatly appreciated". After that, he met with DEP personnel in September 2000, received another NOV in October 2000, and, did not get around to filing a permit application until mid-December, 2000.[13]

It is certainly reasonable to conclude from these facts that Tire Jockey's violation of the law was knowing and deliberate.[14] DEP's selection of $12,500 for the willfulness factor is the lowest amount in the discretionary range for a "willful" violation. The penalty could very well have been appropriately substantially higher.

Under the factual circumstances presented here, the penalty amount is clearly reasonable and appropriate in light of the violation committed. If anything, the penalty is too small. DEP has met its burden of proof and we will uphold the civil penalty assessment of $54,000 against Tire Jockey.

IV. The Permit Denial

The denial of the permit application boils down to two issues: (1) the Department's insistence that and Tire Jockey's refusal to bond for the entire amount of tires present at the facility; and (2) whether the Department was correct that Mr. Pignataro has demonstrated a lack of ability or intention to comply with environmental laws.

A. Bonding

An applicant for General Permit WMGR038 must also provide an estimate of the number of whole waste tires that are stored, or will be stored or processed, on site at any time prior to closure, for purposes of determining the amount of the bond required for the facility. DEP must

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[13] That permit application which was eventually filed was not only extremely late but it was also seriously deficient in two very fundamental ways that we will talk about in the next section.

[14] At best, Tire Jockey manifested a reckless disregard for the law. *See Delaware Valley Scrap Company, Inc. v. DER*, 645 A.2d 947, 949-50 (Pa. Cmwlth. 1994). DEP's selection of $12,500 for the willfulness factor was both the lowest amount in the discretionary range for a "willful" violation and the highest amount for a "reckless" violation. Either way, the penalty amount is appropriate.

approve a bond before activities on the site may be initiated. *See* Exh. P-45 (condition 20n). Pursuant to Condition 29 of the general permit the "permittee shall maintain a bond in an amount, and with sufficient guarantees, acceptable" to DEP. Importantly, the "amount of the bond required for the facility will be based upon the *maximum number of waste tires* or equivalent in [tire-derived materials] which will be brought onto the site and accumulated by the permittee at any one time." Exh. P-45 (condition 29b); *see also id.* (condition 21). Further, the SWMA states: "No permit shall be issued unless and until all applicable bonds have been posted with the department." 35 P.S. § 6018.503(b).

The bond is designed to assure the complete cleanup of all materials at the Site in the event of operator goes bankruptcy or abandons the operation. Abandonment of the facility is, of course, exactly what happened with respect to the Tire Derived Products facility in Elizabeth, New Jersey, Mr. Pignataro's immediately prior tire managing facility before opening Tire Jockey in Pennsylvania. The clean-up of that abandoned tire facility cost the State of New Jersey $364,000.

The crux of matter between the parties with respect to bonding is easy to see. Tire Jockey's argument on the bonding issue is a function of its consistent litigation position that the whole tires that find their way to the Site are not waste. Tire Jockey argues that since not all the tires at the Site would be waste, the bond required in connection with the permit should be calculated using only the "waste tires" and not the supposed non-waste tires. DEP, of course, argues that all the tires are waste and, therefore, the bond must be calculated based on all the tires that would be present at the Site.

Our previous discussion renders the Department's position on this the correct one. Tire Jockey's proposal to bond for only 10,000 passenger tire equivalents was woefully deficient.

During its inspection of the Site in December 2000, DEP personnel counted approximately 50,000 whole tires or passenger tire equivalents at the Site. At the time of the hearing, Tire Jockey still had approximately 47,000 whole used tires at the Site. Tire Jockey clearly failed to satisfy the general permit's conditions relevant to bonding, and the SWMA provides that no permit shall be issued unless and until all applicable bonds have been posted with the department. 35 P.S. § 6018.503(b). DEP's decision to deny coverage under General Permit WMR038 for Tire Jockey's operation on the basis of the inadequate bonding calculation is completely correct both legally and factually.

B. Compliance History

The bonding deficiency matter could be easily corrected by Tire Jockey so we will discuss the compliance history basis for denial as well.[15] Section 503 of the SWMA provides as

[15] There were actually five other very minor deficiencies in the Tire Jockey permit application which were left unresolved when the Department issued its denial letter. Mr. Wentzel admitted at trial that these deficiencies were minor and we think they could easily be corrected. (Tr. 1090-1096). He noted that if it were not for the bonding and compliance history matters that the Department would have provided an opportunity for Tire Jockey to correct these minor deficiencies but that course did not seem worthwhile here since the bonding and compliance history matters were fundamental and fatal to the permit application. (Tr. 1096). Tire Jockey has requested that, in the event that we find that Tire Jockey does need a permit, which we have now done, we remand the permit denial matter to the Department with "strict instructions" to: (a) only require bonding for "waste tires"; (b) provide Mr. Pignataro with an opportunity to submit an amended compliance history form which includes the information about Tire Derived Products; (c) promptly and in good faith address the few minor remaining technical issues; and (d) retain jurisdiction to monitor the Department's good faith compliance with such an Order. A remand here is not appropriate. It is true, as we mentioned, that Tire Jockey could easily correct the bonding problem on remand. It may be able to correct the other five deficiencies as well. However, Tire Jockey's proposal assumes that the denial on the Section 503(c) basis would be satisfactorily corrected by the submission of the amended compliance history information. That could hardly be the rule for Section 503(c) review. Otherwise, in the instances that DEP catches an applicant submitting false or incomplete information, the offender could then merely submit the information and have everyone pretend that the original false submission never took place. That is as silly as contending that perjury did not happen when, after being confronted with the perjury, the perjurer then tells the truth. Tire Jockey's remand format also ignores that, even if the later admission somehow wiped the slate clean so to speak, the permit denial on compliance history basis was based, not only the allegation that the false submission was made, but that the substance of the Tire Derived Products episode supports a conclusion that Mr. Pignataro, through that experience itself, has demonstrated a lack of ability or intention to comply with environmental laws. Thus a remand upon Tire Jockey's protocol is not advisable. Likewise, although we could do so, it would make no sense to stop our discussion of the permit denial upon the disposition we have made of the bonding question and remand from there. The bonding component of the permit denial is really just a carryover of the salient issue in the Order case. The compliance history matter was fully tried before us and it is ripe for adjudication now. It is really the lynchpin issue in the permit denial appeal because a determination of deniability under Section 503(c) means there is no permit for Tire Jockey as presently constituted regardless of even minor and easily solvable other technical issues or resolvable

follows:

> [DEP] may deny . . . any permit or license if it finds that the applicant . . . has failed or continues to fail to comply with any provision of [the SWMA] . . . or any other state or Federal statute relating to environmental protection or to the protection of the public health, safety and welfare; or any rule or regulation of the department; or any order of the department; . . . or if the department finds that the applicant . . . has shown a lack of ability or intention to comply with any provision of [the SWMA] or any of the acts referred to in this subsection or any rule or regulation of the department or order of the department . . . .

35 P.S. § 6018.503(c).

Based on our review of the record and our evaluation of Mr. Pignataro as a witness in front of the Board, we believe that the Department was also completely correct when it reached its conclusion that Mr. Pignataro has shown a lack of ability or intention to comply with environmental laws.

Mr. Pignataro has a demonstrated history of repeatedly failing to respect and comply environmental laws. Mr. Pignataro commenced operations in New Jersey without the appropriate occupancy permits or environmental permits. As we have discussed already, that paradigm was repeated here in Pennsylvania as well. Here, as we have discussed in connection with the penalty calculation, Mr. Pignataro was advised before coming to Pennsylvania that he would need a permit for his operations by no less a figure than the Secretary of the Department.

Mr. Pignataro offered numerous excuses why he was completely blameless for the Elizabeth, New Jersey situation. However, the New Jersey trial court found him jointly and severally liable for the Tire Derived Products disaster.

Mr. Pignataro failed to disclose at any stage of his Pennsylvania permit application his involvement with and enforcement difficulties regarding a virtually carbon copy facility in

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bonding issues. On the other hand, if we decide that denial on Section 503(c) grounds was wrong, then we could and probably would remand so the remaining bonding and technical issues could be corrected. The bottom line is that it makes utmost sense and it is the most respectful of everyone's efforts and time, both already spent and to be spent, to address the Section 503(c) issue now.

Elizabeth, New Jersey. Even counsel for Tire Jockey admits that Mr. Pignataro should have disclosed the enforcement history of Tire Derived Products as it is a a "related party" to Tire Jockey under the permit application Form HW-C. (Tire Jockey Post Hearing Brief, p. 67). We totally reject counsel's excuse for Mr. Pignataro that Mr. Pignataro completed the permit application without counsel and, therefore, the omission was an unintentional innocent oversight attributable to Mr. Pignataro's ignorance and/or lack of sophistication. We conclude, based on our evaluation of Mr. Pignataro after several days of his testimony as a witness before us, that the omission was deliberate. Mr. Pignataro is not as unsophisticated and/or unintelligent as his counsel is asking that we find him. On the contrary, our evaluation of him leads us to conclude that he is very intelligent, sophisticated, deliberate, and calculating.

We also find perverse, Mr. Pignataro's defense that the Department already knew about the Elizabeth facility since Department personnel had visited the Elizabeth site with Mr. Pignataro. That is tantamount to saying that one need not file federal income tax returns declaring one's income because the IRS already knows the level of your income.

Knowingly commencing operations in both New Jersey and again in Pennsylvania without the needed permits, the intentional failure to disclose on the HW-C, and the Tire Derived Products debacle itself, although each amply sufficient by themselves or in combination to justify denial of the permit on Section 503(c) grounds, are not the only bases on which we come to the inescapable and obvious conclusion that Mr. Pignataro lacks the ability or intention to comply with environmental laws. His ruse on DEP officials in his campaign of telephone calls to them in early April, 2001 is reflective of this point as well. FOFs 62, 63. Mr. Pignataro has demonstrated a lack of respect for and belligerency toward environmental authorities. FOFs 36, 37, 73. Also, we found Mr. Pignataro to be evasive and not always completely truthful as a

witness. FOF 74.

Based on all these facts and our observation and evaluation of Mr. Pignataro as a witness, we have no hesitation coming to the conclusion that the Department was absolutely correct when it concluded that Mr. Pignataro's company should be denied a permit to operate in Pennsylvania on the basis of the compliance provisions of Section 503(c) of the SWMA.

CONCLUSIONS OF LAW

1. DEP bears the burden of proving by a preponderance that the administrative order conforms with applicable law, is supported by a preponderance of the evidence, and is a reasonable exercise of the agency's discretion.

2. DEP must prove by a preponderance that the underlying violations of law giving rise to the civil penalty assessment in fact occurred, the penalty imposed is lawful and, the amount of the penalty is reasonable and appropriate.

3. Tire Jockey must prove by a preponderance of the evidence that DEP's denial of the general permit application was an error of law or otherwise unreasonable and inappropriate.

4. DEP met its burden of proving that the factual premises underlying the January Order are supported by a preponderance of the evidence, and that the remedial measures imposed by the order are a reasonable exercise of DEP's discretion.

5. Tire Jockey's operation at the Fairless Hills Facility constituted a residual waste processing or transfer facility within the meaning of those terms as defined by the SWMA and the residual waste regulations. Appellant failed to demonstrate that its operation qualified for any exception to the definition for a residual waste processing or transfer facility or to demonstrate that DEP did not have jurisdiction over its facility under the SWMA.

6. DEP had the authority pursuant to the SWMA to issue the January Order to

Appellant for operating a residual waste processing facility, and/or a transfer facility, without a permit in violation of 25 Pa. Code §§ 297.201(a) and 293.201(a).

7. DEP met its burden of proving the occurrence of the violations of law underlying the civil penalty assessment, that the penalty imposed is lawful, and that the amount of the penalty is reasonable and appropriate.

8. Tire Jockey failed to demonstrate that it satisfied the criteria for a determination of applicability of General Permit WMGR038 to its operation at the Site. Appellant failed to demonstrate that it met the terms and conditions set forth in General Permit WMGR038, and failed to demonstrate that it met applicable criteria for permitting required by the SWMA.

9. Mr. Pignataro has shown a lack of ability or intention to comply with relevant environmental statutes, regulations and agency orders as set forth under Section 503(c) of the Solid Waste Management Act.

10. Tire Jockey failed to satisfy Condition 29 of General Permit WMGR038 pertaining to the calculation of an appropriate bond amount for Tire Jockey's operation at the Site.

11. DEP's denial of the determination of applicability of General Permit WMGR038 conformed with applicable law, and was reasonable and appropriate under the circumstances presented here.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TIRE JOCKEY SERVICES, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-155-K**
	:	**(Consolidated with 2001-041-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 23, 2002**

O R D E R

AND NOW, this 23rd day of December, 2002, it is hereby ORDERED as follows:

1. The appeals of Tire Jockey Services, Inc., docketed at EHB Dkt. No. 2001-041-K and EHB Dkt. No. 2001-155-K are hereby dismissed, and the docket shall be marked closed and discontinued.

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Administrative Law Judge
Member

Dated: December 23, 2002

cc: **DEP Bureau of Litigation**
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	:	
v.	:	
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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**
	:	**Issued: December 31, 2002**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

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

Synopsis:

The Board modifies a condition in an underground mining permit revision that authorized development mining but required that an additional permit revision be issued before full-extraction mining could proceed. The Board retains the part of the condition that makes the issuance of that additional permit revision contingent upon compliance with regulations related to mining and water pollution and hydrologic balance requirements. The Board strikes the part of the condition that is based upon the application of the Dam Safety and Encroachments Act and certain water discharge requirements in the regulations.

The Dam Safety and Encroachments Act and the permitting regulations promulgated thereunder and codified at 25 Pa. Code Chapter 105 do not apply to the subsidence impacts of underground mining beneath watercourses. 25 Pa. Code Chapter 93, which applies to "discharges," also does not apply to the subsidence impacts of underground mining. The Clean

Streams Law and the water-protection provisions of 25 Pa. Code Chapters 86 and 89, however, do apply to the subsidence impacts of underground mining. In permitting and regulating the subsidence impacts of underground mining, the Department is not limited to the Bituminous Mine Subsidence and Land Conservation Act and Subchapter F of 25 Pa. Code Chapter 89.

OPINION

Consol Pennsylvania Coal Company ("Consol") filed an application with the Department of Environmental Protection (the "Department") to revise Consol's Coal Mining Activities ("CMA") Permit No. 30841316 for its Bailey Mine, an underground longwall coal mine in Richhill Township, Greene County. Consol sought to add 384 acres to its permit area and 643 acres to its subsidence control plan.

It is undisputed that Consol's proposed expansion area contains waters of the Commonwealth, such as perennial and intermittent streams. Full-extraction underground mining beneath those waters may cause subsidence, which in turn can change the characteristics of the waters. For example, subsidence can alter the beds of streams or decrease stream flow.

Consol was anxious to begin development mining. Development mining involves activities precedent to full-extraction mining. The parties have assumed that development mining will not cause subsidence. The Department was not ready to approve full-extraction mining, but it conditionally granted Consol's permit revision application on April 17, 2002 to allow development mining. Condition 5 of the permit revision provides that Consol is limited to development mining for the time being.

Condition 26 of the permit revision reads as follows:

> If 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 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.

Consol filed this appeal from Conditions 5 and 26. Although Consol objects to the conditions in their entirety, Consol's primary complaint is that it should not be required to obtain an encroachments permit under the Dam Safety and Encroachments Act ("DSEA"), 32 P.S. §§ 693.1-693.27, or 25 Pa. Code Chapter 105 authorizing the subsidence impacts that underground mining may have on overlying waters of the Commonwealth as part of its CMA permit. Consol contends that the subsidence impacts of underground mining may only be regulated pursuant to the Bituminous Mine Subsidence and Land Conservation Act (the "Subsidence Act"), 52 P.S. §§ 1406.1-1410d, and Subchapter F of 25 Pa. Code Chapter 89.[1]

Consol now moves for summary judgment asking us to void Conditions 5 and 26 in their entirety. Consol argues that the Department lacks the statutory authority to impose the requirements set forth in Conditions 5 and 26, that the conditions are invalid because they impose new substantive regulatory requirements that should have been subjected to regulatory review, and that the conditions are unlawful because they are inconsistent with existing regulations. Columbia Gas Transmission Corporation has filed a response asking the Board to refrain from issuing any ruling in the current context relating to Condition 5 as it pertains to subsidence impacts upon gas transmission lines (see footnote 1, *supra*). Columbia takes no position with respect to Condition 26. The Department and the Intervenors have filed responses disputing all three of Consol's arguments in support of its summary judgment motion. We grant Consol's motion in part.[2]

The Department does not have the authority under either the DSEA or the Clean Streams Law, 35 P.S. §§ 691.1-691.1001, to require Consol to obtain an encroachment permit covering

[1] To a degree not entirely clear at this point, this appeal also involves issues related to the impact of subsidence on overlying gas transmission lines. To the extent that those issues remain, they are not the subject of Consol's summary judgment motion and are outside the scope of this opinion and order.

[2] The pertinent standard for granting summary judgment is set forth at Pa. R.C.P. 1035.1 (party entitled to judgment as a matter of law based upon undisputed facts). 25 Pa. Code § 1021.94(b).

the subsidence impacts of Consol's underground mining beneath waters of the Commonwealth. The DSEA prohibits any person from constructing, operating, maintaining, modifying, enlarging, or abandoning any encroachment without a permit. 32 P.S. § 693.6(a). An "encroachment" is "[a]ny structure or activity which in any manner changes, expands or diminishes the course, current or cross-section of any watercourse, floodway or body of water." 32 P.S. § 693.3. The Act only applies, however, to encroachments "located in, along, across or projecting into any watercourse, floodway or body of water." 32 P.S. § 693.4(4). *Accord*, 25 Pa. Code § 105.3(a)(4).

Thus, underground mining, which causes surface subsidence, may be an encroachment because it is an "activity" which "changes" the "course, current, and/or cross-section" of "watercourses." It is not, however, covered by the DSEA because it occurs *beneath* the watercourses, not "in, along, across, or projecting into" them.[3]

The Department and the Intervenors insist that the Legislature must not have meant what it said, and they attribute the express limitation on the scope of the statute in Section 4(4) to "imprecise drafting" (DEP Memorandum p. 15 n. 6) and an "inartful" use of language (Intervenors Brief p. 14). Even if the Department and the Intervenors were correct, which is far from obvious to us,[4] we would not be in a position in this appeal to rewrite the unambiguous statute to say what the Department and the Intervenors believe the Legislature meant to say. 1 Pa.C.S. § 1921(b) (where words of statute are clear, they may not be ignored in pursuit of the supposed spirit of the statute or legislative intent); *Nationwide Mutual Insurance Co. v. Wickoff*, 763 A.2d 813, 818 (Pa. 2000). Furthermore, the Department and the Intervenors' proposed interpretation would essentially write the scope limitation in Section 4 out of the statute, which is

[3] At the risk of stating the obvious, the surface activities associated with deep mining may create encroachments that require permits. Here we are focused on the underground mining in and of itself.

[4] *Cf. Kentuckians for the Commonwealth, Inc. v. Rivenburgh, ("Kentuckians")*, 204 F.Supp.2d 927 (S.D.W.V. 2002) (placement of overburden from mountain top removal regulated by Section 402 (prohibition of pollution), not Section 404 (dredge and fill program) of Clean Water Act).

impermissible. There is no reason why the definition and scope sections cannot be read to both have meaning, as we do today. *See* 1 Pa.C.S. §§ 1921(a) (statute must be construed as a whole, giving effect, if possible, to all of its provisions) and 1922(2) (presumption that legislature intends entire statute to be effective and certain).

We also reject the Department and the Intervenor's argument that subsidence is actually a component of the mining and, therefore, because the subsidence occurs in the streams, the operator may be said to be mining in the streams. Subsidence is an effect of mining; it is not a component of the mining itself. 25 Pa. Code § 86.1 (definition of underground mining activities). Just as a mine may cause subsidence, it may also cause a change in water quality downstream. Even if that change can be detected miles away, it does not follow that the operator is *mining* miles away. The activity is the mining; the change in water quality is an effect or consequence of the mining. So it goes with the subsidence impacts.

Our decision that the DSEA is inapplicable to the subsidence impacts of underground mining is based upon the plain, unambiguous language of the statute, which limits the application of the DSEA to encroachments "located in, along, across or projecting into any watercourse, floodway or body of water." In addition, we note that many of the provisions of the DSEA are clearly designed to apply to surface structures or facilities (*see, e.g.*, 32 P.S. §§ 693.13 and 693.14), and that the Department has never before in the long history of underground mining in Pennsylvania attempted to apply this Act to the effects of underground mining.

The Intervenors (but not the Department) contend that the Clean Streams Law provides the Department with independent authority to require Consol to obtain an encroachment permit. As discussed below, subsidence can certainly result in pollution, and it is also true that the Clean Streams Law authorizes the Department by rule or regulation to require permits for activities that have the potential to cause pollution, 35 P.S. § 691.402, but permitting pursuant to the Clean Streams Law is already incorporated into the Department's integrated CMA permit. (Consol

Exhibit 2(4)).[5] The Clean Streams Law provided authority in addition to the DSEA for the promulgation of encroachment regulations, 35 P.S. § 691.5, but it does not follow from that authority that the Department can require a separate *encroachment* permit pursuant to the Clean Streams Law even in cases where the DSEA does not apply. Finally, Section 315(f) of the Clean Streams Law, 35 P.S. § 691.315(f), authorizes the Department to condition a permit issued under the Clean Streams Law on compliance with the DSEA, but it does not itself authorize the Department to require a DSEA permit where the DSEA does not otherwise apply as a condition of obtaining a Clean Streams Law permit. In any event, requiring Consol to obtain two separate Clean Streams Law permits for subsidence impacts would be superfluous.

In sum, the DSEA does not apply to the subsidence impacts of underground mining. In that a permit is not required under the DSEA, it follows that the regulations set forth in Chapter 105 relating to permits issued pursuant to DSEA also do not apply. The Clean Streams Law does not provide the Department with independent authority to require Consol to obtain an encroachment permit as a separate component of the CMA permit. The Department erred by requiring Consol to obtain an encroachment permit before being allowed to conduct full-extraction mining. Therefore, we grant Consol's motion for summary judgment in part, and strike the second sentence of Condition 26. With respect to the first sentence of Condition 26, we strike the reference to 25 Pa. Code Chapter 105.

Chapter 93 of Title 25 of the Pennsylvania Code also does not apply to the subsidence impacts of underground mining. The scope of that Chapter is defined at 25 Pa. Code § 93.2(a), 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*

[5] Consol's averment (Motion §§ 9, 15) that the CMA permit is only issued pursuant to the Subsidence Act is simply wrong.

discharges (emphasis added).

Thus, Chapter 93 relates to the "regulation of discharges." A "discharge" is an addition of any pollutant to surface waters from a "point source." 25 Pa. Code § 92.1. A "point source" is any discernable, confined, and discrete conveyance. 25 Pa. Code § 92.1. The subsidence impacts of underground mining cannot be said to be an addition of pollutants to surface waters from a discernable, confined, and discrete conveyance. Therefore, the impacts are outside of the expressly defined scope of Chapter 93, including the antidegradation requirements set forth at Sections 93.4a-4d.

The Intervenors argue that Chapter 93 applies because Chapter 93 implements the Clean Streams Law, and 25 Pa. Code § 86.37(a)(1) provides that a mining permit applicant must show that it has complied with all applicable laws, including the Clean Streams Law. The argument is circular and begs, but does not answer, the question of what laws are applicable. It simply does not necessarily follow that Chapter 93 applies to subsidence because the Clean Streams Law applies to mining activities. There are regulations that address the treatment of sewage that implement the Clean Streams Law, but it does not follow that Section 86.37(a)(1) somehow makes those sewage regulations applicable to deep mining. In other words, Section 86.37(a)(1) does not define the reach of any regulations; it merely provides that it is necessary to comply with any regulations that otherwise do apply. The scope of Chapter 93 is expressly defined in Section 93.2, and we must abide by that regulatorily specified limitation.

The Intervenors accurately point out that the scope of the antidegradation regulations is defined simply as follows: "This section applies to surface waters of this Commonwealth.". 25 Pa. Code § 93.4a(a). The fact remains, however, that the antidegradation regulations are contained within Chapter 93, and the scope of the entire chapter, without limitation or exception, is limited to the regulation of "discharges." 25 Pa. Code § 93.2(a).

Thus, the Department erred in referencing Chapter 93 in the first sentence of Condition 26 to the extent that the Department relies upon that chapter to support its regulation of the subsidence impacts of Consol's mining. (The Department, of course, may rely upon Chapter 93 to regulate any discharges from the mine.) That leaves the Department's reference to Chapters 86 and 89 in the first sentence of Condition 26 for our consideration.

We conclude that the water-protection regulations promulgated pursuant to the Clean Streams Law and codified in 25 Pa. Code Chapters 86 and 89 apply to the subsidence impacts of underground mining on waters of the Commonwealth. The Department, therefore, acted properly in referencing those chapters in Condition 26.

We start with the undisputed proposition that subsidence can change the course, current or cross-section of streams. (Consol Brief p. 8 n. 7; Reply Brief p. 8 n. 7.) Indeed, it can make portions of a stream disappear altogether. Consol admits that its proposed mining at the Bailey Mine will cause some increased pooling in overlying streams. (Consol's Supplemental Pachter Affidavit – Encroachment Application.) Such impacts fit within the Clean Streams Law's definition of "pollution," which includes physical alteration of surface waters such as a diminution or deviation in flow. 35 P.S. § 691.1. *See Oley Township v. DEP*, 1996 EHB 1098, 1117-18 (change in water level in wetlands that could compromise their ecological functions would constitute a violation of the Clean Streams Law). *Accord, PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 114 S.Ct. 1900 (1994) (diminution in water quantity constitutes pollution). Such impacts can also disrupt the "hydrologic balance," which refers to "[t]he relationship between the quality and quantity of water inflow to, water outflow from and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake or reservoir. It encompasses the dynamic relationships among precipitation, runoff, evaporation and changes in groundwater and surface water storage." 25 Pa. Code § 89.5. *See generally Tinicum Township v. DEP*, EHB Docket No. 2002-101-L, slip op. at 13, 15 (September 18, 2002)

(Department's duty to evaluate effects of mining on waters of the Commonwealth extends beyond water-quality impacts).

While the definitions of "pollution" and "hydrologic balance" are very broad, in some cases, only pollution that interferes with a water's uses has been made the subject of regulation. *See, e.g., PUSH v. DEP*, 1999 EHB 457, 562, *aff'd*, 789 A.2d 319 (Pa. Cmwlth. 2001); *Oley Township,* 1996 EHB at 1118 (change in water level a concern if it interfered with wetlands' ecological functions). *Accord* 25 Pa. Code Chapter 93.4a (protection of uses).[6] But even if regulated pollution is limited to an interference with uses--a question we need not resolve here--there is no dispute that subsidence, by changing or eliminating flow, can potentially result in such interference. In other words, subsidence has the potential to cause pollution or an unacceptable alteration of the hydrologic balance regardless of whether those terms are defined broadly or narrowly.

There are several regulations in Chapter 86 and 89 that require the Department to regulate pollution and the alteration of hydrologic balance, and, therefore, the subsidence impacts of deep mining. *See* 25 Pa. Code §§ 89.35 (prediction of hydrologic consequences), 89.36 (protection of hydrologic balance) and 89.52(a) (protection of hydrologic balance). Section 86.37(a)(3) requires Consol to demonstrate that there is no presumptive evidence of potential pollution (which includes the adverse impacts of subsidence) of the waters of the Commonwealth (not just perennial streams) before it is entitled to a permit. 25 Pa. Code § 86.37(a)(3). *See also* 25 Pa. Code § 86.37(a)(4) (protection of hydrologic balance). Protecting the waters of the

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[6] On this point, however, the Pennsylvania Supreme Court recently had this to say:

> The nature of the public use of the water should not be the focus of our inquiry. To the contrary, we have explained that "we believe that the public has a sufficient interest in clean streams alone *regardless of any specific use thereof*...."

Machipongo Land and Coal Company v. Commonwealth, Department of Environmental Protection, 799 A.2d 751, 774 (Pa.), *cert. denied*, 123 S.Ct. 486 (2002), *quoting Commonwealth v. Barnes & Tucker Co.*, 319 A.2d 871, 882 (Pa. 1974) (emphasis added).

Commonwealth is a primary concern of these mining regulations. *Empire Coal Mining and Development v. DEP*, 1995 EHB 944, 987. Consol's mining activities may only be permitted in accordance with these regulations. Consol is incorrect to the extent that it suggests that none of Chapter 86 applies to underground mining. *See* 25 Pa. Code §§ 86.2 and 89.2; *PUSH*, 1999 EHB at 559 (applying § 86.37 to analysis of deep mining discharges). *See also* 25 Pa. Code § 86.1 (defining "coal mining activities" (regulated under Chapter 86) to include "underground mining activities," which is also defined).

Consol attempts to avoid the rather obvious application of the water-protection regulations in Chapter 86 and 89 by arguing that the subsidence impacts of mining are addressed in a more focused manner in the Subsidence Act and Subchapter F of Chapter 89. 25 Pa. Code §§ 89.141-155. It therefore follows, Consol contends, that the Department may only regulate subsidence impacts on waters of the Commonwealth pursuant to that Act and that limited set of regulations.

Consol's argument flies in the face of Section 9.1(d) of the Subsidence Act, 52 P.S. § 1406.9a(d), which expressly provides that nothing in the Subsidence Act is to be construed to amend, modify, or otherwise supersede any standard contained in the Clean Streams Law or any regulation promulgated under the Clean Streams Law. *See also* 52 P.S. §§ 1406.2 (purposes of Subsidence Act include aiding in the preservation of surface water drainage) and 1406.5(a) (application to mine must include map showing location of all bodies of water, rivers, and streams). Such regulations as Sections 86.37 and 89.36 were promulgated under the Clean Streams Law. (*See* "Authority" notations at beginning of Chapters 86 and 89.)

Similarly, there is nothing in Subchapter F of Chapter 89 that states that it is to serve as the exclusive source of regulatory authority regarding subsidence. Indeed, in light of Section 9.1(d) of the Subsidence Act, any attempt in Subchapter F to limit the scope of the Clean Streams Law or the regulations promulgated thereunder would have been ineffective and

unlawful. *See Lancaster Laboratories, Inc. v. Commonwealth*, 578 A.2d 988, 992 (Pa. Cmwlth. 1990), *aff'd*, 633 A.2d 588 (Pa. 1993); *Harmar Coal Co. v. DER*, 306 A.2d 308, 319 (Pa. 1973) (a regulatory program that is inconsistent with an implementing statute is invalid).

Even in the absence of Section 9.1(d) of the Subsidence Act, we would require rather unequivocal and convincing evidence that the Legislature exempted subsidence impacts from the operation of the Clean Streams Law and otherwise applicable regulations promulgated thereunder before we would conclude that those water-protection laws do not apply. *See Carroll v. Ringgold Education Ass'n*, 680 A.2d 1137, 1141-42 (Pa. 1996) (two statutes apply where it is possible to comply with both); *Parisi v. Philadelphia Zoning Board of Adjustment*, 143 A.2d 360, 363 (Pa. 1958) (no repeal by implication absent irreconcilable repugnancy between two statutes); *Patton v. Republic Steel Corp.*, 492 A.2d 411, 417 (Pa. Super. 1985) (same); *Duda v. State Board of Pharmacy*, 393 A.2d 57, 59 (Pa. Cmwlth. 1978) (same). *Cf. Kentuckians*, *supra* (no inconsistency between federal mining laws and Clean Water Act). No convincing evidence exists here. Although Subchapter F focuses on the impacts of subsidence, the subchapter is perfectly compatible with the more general but equally applicable requirements of the Clean Streams Law and the water-protection provisions of Chapters 86 and 89 of 25 Pa. Code. Consol has not shown how or why it would be impossible to comply with both Subchapter F and other water-protection provisions. We see nothing in the various provisions that make them mutually exclusive or repugnant to each other. For example, although certain sections of Subchapter F relate to perennial streams (*e.g.* 25 Pa. Code § 89.142a(h)(1) and (2)), there is nothing in Subchapter F that literally or practically prevents, precludes, or excuses Consol from complying with the other water-protection provisions set forth in other subchapters of Chapters 86 or 89, which apply to *all* waters of the Commonwealth. On the flip side, there is nothing in those other water-protection provisions in Chapters 86 and 89 that expressly or by implication in any way suggests that they do not apply to subsidence.

Consol also directs our attention to the rather tortuous regulatory history of Subchapter F, including the involvement of federal authorities in that process, and suggests that the drafters *must* have intended to limit or preempt the other provisions of Chapters 86 and 89. Our review of the history has revealed no such intent, express or implied. There is no statement, for example, that underground mines need not be concerned about subsidence impacts when it comes to intermittent streams or wetlands. As we previously stated, any such attempt would not have been lawful in light of the Clean Streams Law's protection of all waters of the Commonwealth.[7]

Consol also directs our attention to *Bethenergy Mines v. DER*, 1994 EHB 925. That case involved an appeal from a compliance order. The Department found that Bethenergy's underground mining had converted portions of Roaring Run from a perennial to an intermittent stream and significantly diminished the amount of flow in Howell's Run. Pursuant to regulations then codified at 25 Pa. Code §§ 89.52(a) (protection of hydrologic balance), 89.143(d) (protection of perennial streams), and 89.145(a) (restoration of perennial streams), the Department's order limited Bethenergy's mining activities in the vicinity of Roaring Run, Unnamed Tributary No. 3 to Roaring Run, Howell's Run, and the North Branch of the Little Conemaugh River, and ordered Bethenergy to restore perennial flow to Roaring Run.

The Board made the rather unremarkable observation that Bethenergy could not be required to "restore" perennial flow to Roaring Run unless Roaring Run had been a perennial stream in the first place. We sustained Bethenergy's appeal because the Department failed to carry its burden of proving that Roaring Run had ever been a perennial stream. We also found that the Department failed to prove that flow in Howell's Run had been diminished, largely due

[7] Our discussion in *PUSH v. DEP, supra,* focused largely on perennial streams, but we also concluded that the mining company's subsidence control plan protected "all streams...whether perennial or otherwise." 1999 EHB at 559. We do not read *PUSH* to be in any way inconsistent with the notion that a proposed deep mine must demonstrate compliance with Chapters 86 and 89, which apply to all waters of the Commonwealth.

to the absence of premining flow data. Finally, we found that there was no factual basis for prohibiting Bethenergy from mining beneath the North Branch and Tributary No. 3.

Bethenergy has limited application here, not only because it was an enforcement case, but more significantly, because the Board did not get into a detailed analysis of the law as a result of the Department's failure of proof. For example, although our focus here is upon the Clean Streams Law and the mining regulations promulgated thereunder, in *Bethenergy* we stated that, given the Department's failure of proof, there was no need to address the Department's authority to issue the order under the Clean Streams Law. In other words, because Bethenergy was not shown to have adversely affected the streams, the question of whether the adverse effect--if it had been shown--would have constituted pollution never arose.

Nevertheless, it is worth mentioning that the Board applied Section 89.52 (protection of hydrologic balance), which is not contained in Subchapter F of Chapter 89. This is inconsistent with Consol's theory that subsidence is regulated exclusively under Subchapter F. Furthermore, even though Roaring Run was found to be an intermittent stream, the Board presumed that Section 89.52 applied to the stream when it found that the order could not be sustained because the Department failed to prove as a factual matter that the hydrologic balance of Roaring Run had been altered. The Board also applied Section 89.52 to Howell's Run, another intermittent stream, concluding that the facts did not support a finding that Section 89.52 had been violated. While it is debatable whether too much can be read into these findings given the Department's failure of proof, *Bethenergy* is certainly not inconsistent with our holding today that the Clean Streams Law and all of Chapters 86 and 89, not just Subchapter F of Chapter 89, apply to the subsidence impacts of underground mining on all waters of the Commonwealth.

Our holding today on this point is limited to rejecting Consol's challenge to Condition 26 to the extent that the challenge included 25 Pa. Code Chapter 86 and other subchapters of Chapter 89. We are not called upon to address such questions as whether Consol's mining will,

in fact, pose an unacceptable risk of pollution or an unacceptable risk of altering the hydrologic balance, or what information and data the Department may or should require, how the Department is to evaluate that data, or what standards the Department should apply. We are far removed from any consideration of what remedial measures would be appropriate in the event mining is permitted and damage occurs. We simply conclude that the Department is entitled to require Consol to demonstrate compliance with 25 Pa. Code Chapters 86 and 89 before engaging in full-extraction mining.

We acknowledge that the practical effect of our ruling is to give the Department adequate authority to protect water resources from the adverse effects of the subsidence impacts of Consol's underground mining under the regulations at 25 Pa. Code Chapters 86 and 89 as it reviews the application for a permit revision for full-extraction mining. While it may relieve Consol from the requirement of submitting an alternatives analysis required of other activities under the regulations under the DSEA in Chapter 105, that is the necessary effect of the General Assembly's limiting that Act's application to activities "located in, along, across or projecting into any watercourse, floodway or body of water."

To the extent that Consol argues that the Department cannot apply the Clean Streams Law and the regulations promulgated thereunder because the Department has never done so in the past, the argument is without merit. Initially, the existing record does not support Consol's claim that the Department has failed to enforce the Clean Streams Law to its fullest extent. *See, e.g., Bethenergy, supra* (DEP effort to correct damage allegedly caused to intermittent streams by subsidence). But even if the Department had fallen short in its duty to apply that law in the past, nonexistent or lax implementation in the past is no ban to applying the law properly on a going-forward basis. 1 Pa. C.S.A. § 1973 ("A statute shall not be deemed repealed by failure to use such statute."); *Commonwealth v. Barnes & Tucker Co.*, 319 A.2d 871, 884 n. 13 (Pa. 1974); *Licensed Beverage Ass'n v. Board of Education*, 669 A.2d 447, 450 (Pa. Cmwlth. 1995); *Ingram*

v DER, 595 A.2d 733, 736 (Pa. Cmwlth. 1991); *Lackawanna Refuse Removal, Inc. v. DER*, 442 A.2d 423, 426 (Pa. Cmwlth. 1982). The law requires what the law requires. The pertinent Clean Streams Law provisions and the regulations promulgated thereunder are not ambiguous. Therefore, the extent to which the Department has historically enforced those laws is largely irrelevant for our immediate purposes.

Our conclusion that the DSEA does not apply to the subsidence impacts of underground mining means that we need not decide whether imposing that permitting requirement was a new binding norm that should have been subjected to the regulatory drafting, review, and promulgation process. To the extent that Consol claims that applying the Clean Streams Law and the mining regulations promulgated thereunder by way of a permit condition to the subsidence impacts on all waters of the Commonwealth constitutes the application of a new binding norm, we reject it. The Department's obligation to apply the Clean Streams Law and the mining regulations that implement that statute exists independently of the permit conditions at issue. In fact, the duty preexisted the permit conditions. The first sentence of Condition 26 merely serves to provide notice, not a new substantive requirement, that further review pursuant to those preexisting requirements will be needed prior to full-extraction mining. The valid part of the permit condition is the sort of "pronouncement that tracks a statute or regulation and explains how that requirement is to be implemented," which is not required to undergo regulatory review, as opposed to a "pronouncement [that] actually imposes an entirely new substantive requirement," which must undergo regulatory review. *Dauphin Meadows v. DEP*, 2000 EHB 521, 525-26. *See also*, *Rushton Mining Co. v. DEP*, 591 A.2d 1168, 1173 (Pa. Cmwlth. 1991) (statement that is merely an announcement of course agency intends to follow without creating a new substantive standard of conduct is not a *de facto* regulation).

For the above reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 2002-112-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 31st day of December, 2002, Consol's motion for summary judgment is granted in part and denied in part. Condition 5 remains the same. Condition 26 of CMA Permit No. 30841316 is revised to read as follows:

> If 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 and 89.

In accordance with Pa.R.C.P. 1035.5, this appeal shall proceed to a hearing to address any remaining issues. The parties shall advise the Board on or before **January 22, 2003** how they would suggest that we proceed to address any outstanding issues that remain in this appeal.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

Dated: December 31, 2002

c: **DEP Bureau of Litigation:**
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